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July 25, 2007

Frances Nichols
Public Utility Commission of Oregon
550 Capitol Street NE
Suite 215
Salem, OR 97301-2551

Re: Docket IC 13

Dear Ms. Nichols:

Enclosed for filing in the above referenced docket is Universal Telecommunications Inc.'s Memorandum in Support of the Motion for Temporary Emergency Relief. The original plus two copies will be sent via UPS overnight mail.

Very truly yours,

Davis Wright Tremaine LLP

A handwritten signature in black ink, appearing to read 'Mark P. Trincherero', with a long, sweeping horizontal line extending to the right.

Mark P. Trincherero

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 13

Universal Telecommunications, Inc.,
Plaintiff,
v.
Qwest Corporation,
Defendant.

**UNIVERSAL
TELECOMMUNICATIONS, INC.’S
MEMORANDUM IN SUPPORT OF
THE MOTION FOR TEMPORARY
EMERGENCY RELIEF**

INTRODUCTION

Universal Telecommunications, Inc. (“Universal”) and Qwest Corporation (“Qwest”) entered into an Interconnection Agreement (“ICA” or “Agreement”) approved by the Public Utility Commission (“PUC” or “Commission”) in an order entered on August 22, 2006. This dispute arises under the terms of that interconnection agreement and is properly before the Commission.

On or about December 14, 2006, Universal formally disputed charges assessed by Qwest under the ICA. (Batz Aff. ¶ 9.) Universal does not deny that, initially, it asserted the pending appeal of an arbitration order by this Commission as the basis for the dispute. However, as the discussions between the parties continued, Universal notified Qwest in telephone conferences held in June and July 2007 that it had other grounds for disputing the charges, and those disputes

1 arise solely under the terms of the ICA and are based upon Universal's interpretation of that
2 Agreement. See Batz Aff. ¶ 59.

3 Pending resolution of the dispute, Universal has withheld payment of the disputed
4 charges, as it is expressly entitled to do under the Agreement. The parties engaged in informal
5 dispute resolution in the months immediately prior to the filing of Universal's Complaint, but the
6 parties could not resolve their differences. (Batz Aff. ¶¶ 25, 29.)

7 The ICA provides that, if a dispute cannot be resolved informally, the parties must
8 comply with the dispute resolution procedures set forth in the Agreement or seek relief in a court
9 or before this Commission. Qwest admits that, in a letter dated July 3, 2007, Qwest informed
10 Universal that, if Universal did not immediately pay the disputed charges, Qwest intended to
11 disconnect services effective July 23, 2007. (Answer ¶ 14.) The threatened disconnection for
12 nonpayment of disputed charges expressly violates the terms of the ICA. Universal thereafter
13 filed its Complaint, setting forth the grounds for this dispute *arising solely under the terms of the*
14 *ICA*, and a Motion seeking temporary emergency relief to prevent Qwest from disconnecting
15 services or refusing disconnection orders in further violation of the Agreement.

16 ARGUMENT

17 The plain language of the ICA prohibits the billing party from disconnecting services or
18 refusing orders when payment is withheld based on a good faith dispute between the parties. If a
19 dispute cannot be resolved informally, the billing party may not engage in self-help but instead
20 must rely on the formal dispute resolution provisions in the Agreement.

21 Universal has a good faith basis for disputing charges under the ICA, and has asserted
22 those grounds in prior negotiations with Qwest and in its Complaint. Pending resolution of the
23 claims and counterclaims of the parties, and pursuant to the terms of the ICA, the Oregon
24 Revised Statutes and applicable administrative and procedural rules, the Commission should, as
25 a matter of law and public policy, enjoin Qwest from unlawfully disconnecting services or
26 refusing orders to the detriment of Universal, its customers and the thousands of end users who

1 will suffer immediate and irreparable harm. Because the relief requested seeks only to limit
2 Qwest to its available remedies and to enjoin conduct in violation of the Agreement, the order
3 does not require escrow of the disputed charges or any other form of security.

4 **I. Qwest is restricted, under the express terms of the ICA, from disconnecting services
5 for nonpayment of disputed charges.**

6 There is no basis under the ICA for disconnecting services due to nonpayment of
7 disputed charges. Section 5.4.3 of the ICA provides that the billing party may disconnect
8 relevant services only if the billed party fails to make full payment “*less any disputed amount as*
9 *provided for in Section 5.4.4.*” If disconnection occurs, “all applicable *undisputed* charges” shall
10 become due. To reconnect, the billed party must pay in full all “past and current *undisputed*
11 *charges.*” In other words, the billing party’s right to disconnect is expressly conditioned on
12 nonpayment of *undisputed* charges.

13 For disputed charges, the parties’ rights and obligations are governed by Section 5.4.4,
14 which authorizes a party to withhold payment of disputed charges pending resolution of the
15 dispute. Section 5.4.4.1 sets forth the rights of the billing party if the disputing party withholds
16 payment:

17 *If a Party disputes charges and does not pay such charges by the payment due*
18 *date, such charges may be subject to late payment charges. If the disputed charges*
19 *have been withheld and the dispute is resolved in favor of the Billing Party, the*
withholding Party shall pay the disputed amount and applicable late payment
charges....(emphasis added)

20 Section 5.4.4.2 describes the rights of the disputing party if that party elects instead to pay:

21 *If a Party pays the charges disputed...and the dispute is resolved in favor of the*
22 *disputing Party, the Billing Party shall...credit the disputing Party’s bill for the*
23 *disputed amount and any associated interest....The interest calculated on the*
24 *disputed amounts will be the same rate as the late payment charges. (emphasis*
added)

25 The plain language of the ICA makes clear that the disputing party may either withhold payment
26

1 and risk late fees or make payment and collect interest, depending on the outcome of the dispute.

2 If the dispute over charges cannot be resolved informally, then the billing party is
3 obligated to seek relief in court, before this Commission, or through the dispute resolution
4 procedures set forth in Section 5.18:

5 If any claim, controversy or dispute between the Parties...should arise, and the
6 Parties do not resolve it in the ordinary course of their dealings (the "Dispute"),
then it *shall* be resolved in accordance with this Section. (emphasis added)

7 Nothing in Sections 5.4 or 5.18 authorizes Qwest to resort to self-help remedies for nonpayment
8 of disputed charges, and the ICA does not contemplate or permit such remedies.

9 In its Answer, Qwest implies that the requirements of Section 5.4.4 do not apply because
10 the dispute does not arise under the terms of the ICA. The only basis for Qwest's allegation is
11 that Universal initially disputed the charges based upon the pending appeal of the arbitration
12 order. Qwest admits (Batz Aff. ¶ 59), but otherwise ignores, the fact that, as the parties entered
13 into informal dispute resolution discussions in June and July, Universal asserted other grounds
14 for its dispute under the terms of the ICA. Specifically, Universal has challenged (i) Qwest's
15 charges for unused circuits, (ii) the method by which Qwest has calculated the Relative Use
16 Factor, and (iii) the rate at which reciprocal compensation is assessed by Qwest. Each of these
17 disputes arises solely under the terms of the ICA and is wholly independent of the pending
18 appeal.

19 Furthermore, these disputes are the only basis for Universal's Complaint before this
20 Commission, and Universal does not seek relief on any grounds other than its interpretation of
21 the ICA. In fact, in its Answer, Qwest now admits that it has been assessing reciprocal
22 compensation at the wrong rate under the ICA, one of the grounds for the dispute. (Answer ¶12.)
23 Qwest also implicitly acknowledges a genuine dispute regarding what rate should be charged for
24 unused circuits and which party is obligated under the ICA to disconnect those circuits. (Answer
25 ¶¶ 10, 16-17.)
26

1 Because Universal has disputed whether the assessed charges are in violation of the ICA,
2 Universal is entitled to withhold payment pending a resolution. Qwest is entitled to impose late
3 fees or to seek relief as provided in Section 5.18, but disconnection is not an available remedy
4 for nonpayment of disputed charges.

5 **II. Qwest is restricted, under the express terms of the ICA, from discontinuing order**
6 **processing for nonpayment of disputed charges.**

7 The ICA also restricts Qwest's right to refuse new orders from a disputing party. Section
8 5.4.2 of the ICA provides that the Billing Party may discontinue order processing only if a party
9 fails to make full payment "*less any disputed amount* as provided in Section 5.4.4." Order
10 processing will resume if the billed party pays all charges "*not disputed* in good faith under this
11 agreement." Based upon the plain language of the ICA, Qwest has no right to discontinue order
12 processing for nonpayment of disputed charges. Disputed charges must be resolved informally
13 pursuant to Section 5.4.4 or formally pursuant to Section 5.18 if informal dispute resolution fails.

14 Despite these restrictions, Qwest has wrongfully resorted to self-help by refusing
15 Universal's disconnection orders in violation of the ICA. (Answer ¶¶ 14, 17.) As already
16 discussed, Universal is disputing the charges based upon its interpretation of the ICA, and
17 pursuant to Section 5.4.4.1, Universal is permissibly withholding payments pending resolution of
18 the dispute. Qwest's refusal to comply with the terms of the ICA is a continuing violation of the
19 Agreement.

20 **III. Qwest is obligated to mitigate its damages by immediately disconnecting unused**
21 **circuits as requested by Universal.**

22 Parties claiming injury from breach of contract are "required to do what reasonable care
23 and business prudence would dictate" to minimize the loss. *Schafer v. Sunset Packing*, 256 Or
24 539, 542 (1970). Qwest contends that Universal is in breach of the ICA by failing to pay
25 amounts owing under the Agreement. There is no question that disconnecting unused circuits
26 will decrease the charges accruing during the pendency of this action, thereby minimizing
Qwest's potential damages. Universal has issued disconnection orders, but Qwest has refused

1 these orders despite the fact that Qwest's refusal violates the ICA. As a matter both of law and
2 equity, Qwest should not be permitted to artificially inflate the outstanding balance by refusing
3 to do what it is obligated to do under the Agreement.

4 At the very least, Qwest's refusal has rendered impossible Universal's attempt to mitigate
5 damages by disconnecting circuits. To the extent that Qwest has counterclaimed for damages,
6 Qwest's damages must be reduced by the amount attributable to Qwest's failure to disconnect
7 unused circuits. *Enco, Inc. v. F.C. Russell Co.*, 210 Or 324, 340 (1957).

8 **IV. The Commission may order that Qwest refrain from disconnecting services and
9 reinitiate order processing pending resolution of this dispute. The Commission may
10 not require escrow or another form of security from Universal as a precondition of
11 issuing the order.**

12 The legislature has vested broad authority in the Commission "to do all things necessary
13 and convenient" in the exercise of its power and jurisdiction. ORS 756.040(2). The remedies
14 against regulated entities are the same as those available at common law, except as otherwise
15 provided by statute or agency rules. ORS 756.200(3).

16 In this case, the applicable administrative rules relating to enforcement of interconnection
17 agreements, set forth at OAR 860-016-0050, plainly contemplate orders for injunctive or
18 temporary relief in this context. Section (2)(f) requires the complainant to clearly mark motions
19 for injunctive or temporary relief. Section (3)(a) requires the notice to state whether the
20 complainant anticipates requesting temporary or injunctive relief. Furthermore, if a party to an
21 interconnection agreement is in violation of the agreement, ORS 759.455(3) provides that the
22 Commission shall order the telecommunications utility to remedy the violation and may
23 prescribe specific action to be taken by the utility.

24 The Commission is bound, however, by the Oregon Rules of Civil Procedure to the
25 extent that no specific rule or statute applies. OAR 860-011-0000(3). Because there are no
26 specific rules or statutes governing the award of injunctive relief in a PUC proceeding, the
relevant portions of ORCP 79 and 82 control whether the Commission may impose, in the

1 interim, an escrow or security requirement.

2 **A. Temporary emergency relief is appropriate because disconnection will**
3 **produce irreparable injury to Universal, its customers and thousands of end**
4 **users, and because Qwest's actions violate Universal's rights under the ICA.**

5 Pursuant to ORCP 79A(1), injunctive relief is appropriate when it appears that a
6 party is entitled to relief and "such relief consists of restraining the commission or continuance
7 of some act...which during the litigation would produce injury to the party seeking relief."
8 Qwest has threatened immediately to disconnect all services if Universal's motion for emergency
9 relief is denied. Qwest is also refusing to process orders to disconnect unused circuits. Qwest's
10 continuing and threatened violations of the ICA will irreparably harm Universal, its customers
11 and thousands of end users.

12 There is no question that sudden disconnection will result in immediate and
13 irreparable harm. As set forth in Universal's Motion and supporting affidavit, most of
14 Universal's customers are internet service providers. (Martin Aff. ¶ 7.) As a result, Qwest's
15 threatened disconnection would cause thousands of end users, including Qwest's own customers,
16 to experience sudden and serious disruptions to their internet access. (Martin Aff. ¶ 7.) If Qwest
17 disconnects services and Universal ultimately prevails, there will be no adequate remedy at law
18 or under the ICA for the resulting damage to Universal's business and reputation. There is
19 certainly no adequate recourse for the thousands of customers and end users who will be harmed
20 in the interim. As a matter of law, and as a matter of public policy, the Commission should not
21 permit Qwest to disconnect all services leaving thousands of innocent end users without service
22 when the dispute is pending before the Commission and has not yet been resolved.

23 Furthermore, neither the disconnection nor the refusal to process orders is lawful.
24 Preliminary relief is also appropriate when "the party against whom a judgment is sought is
25 doing or threatens...some act in violation of the rights of a party seeking judgment." ORCP
26 79A(1). Pursuant to ORS 799.455(1)(h), a telecommunications utility shall not "[f]ail to provide
a service, product or facility in accordance with *applicable contracts*" or rules. (emphasis added)

1 As discussed in Section I, *supra*, the ICA does not authorize Qwest to disconnect services or
2 suspend orders for nonpayment of disputed charges. Rather, Universal is entitled under Sections
3 5.4.4 and 5.18 to withhold payment pending informal resolution of the disputed charges, or,
4 should that fail, pending formal resolution of any Complaint filed before this Commission.
5 Because the threatened disconnection violates Universal's rights under the Agreement, the
6 Commission may and should require Qwest to refrain from disconnecting services while this
7 matter is pending.

8 **B. Because the order for emergency relief is sought to prevent conduct in**
9 **violation of the ICA and to restrict Qwest to its available remedies, the**
10 **Commission may not require Universal to escrow funds or pay another form**
11 **of security in order to obtain emergency relief.**

12 When the purpose of injunctive relief is to prevent unlawful conduct by a party
13 and to limit that party to its available judicial remedies, no security is required. ORCP 82A(a).
14 As argued, Qwest's threatened disconnection and its refusal to process orders violate the express
15 requirements of Sections 5.4 and 5.18 of the ICA. Because Qwest is prohibited under the ICA
16 from disconnecting for nonpayment of disputed charges, the disconnection is also a violation of
17 ORS 799.455(1)(h). Qwest's conduct, therefore, is "unlawful" conduct within the meaning of
18 ORCP 82A.

19 Furthermore, the proposed emergency order merely limits Qwest to its available
20 remedies under the Agreement. Pursuant to Section 5.4.4.1, Qwest's only available remedy when
21 disputed payments are withheld is to collect late payment charges if the dispute is resolved in its
22 favor. Qwest is not entitled to demand security deposits, escrow or any other form of security
23 under the ICA. In fact, Qwest has conceded as much in oral argument.

24 Because the sole purpose of the emergency relief is to prevent Qwest from
25 disconnecting services in violation of the ICA and to limit Qwest to its available remedies, the
26 Commission may not require security or impose any similar requirements on Universal as a
condition of obtaining emergency relief.

1 **CONCLUSION**

2 Based upon the Motion for Temporary Emergency Relief and the reasons set forth
3 herein, the Commission should find that Qwest's threatened disconnection and its refusal to
4 process orders is in violation of the ICA and would cause irreparable harm to Universal, its
5 customers and Qwest end users, and should therefore order Qwest to refrain from disconnecting
6 services and refusing orders pending final action on Universal's Complaint.

7 DATED this 25th day of July, 2007.

8 DAVIS WRIGHT TREMAINE LLP

9
10 By 

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19 Of Attorneys for Universal Telecommunications, Inc.
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CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of July, 2007, Universal Telecommunications, Inc.'s Memorandum in Support of the Motion for Temporary Emergency Relief 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.

Alex M. Duarte Qwest Corporation 421 SW Oak St., Suite 810 Portland, OR 97204 alex.duarte@qwest.com	Ted D. Smith Stoel Rives LLP 201 S. Main, Suite 1100 Salt Lake City, UT 84111 tsmith@stoel.com
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DAVIS WRIGHT TREMAINE LLP

By: Barbara Lasswell
Barbara Lasswell for Mark P. Trinchero