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July 25, 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 (5) copies of Qwest Corporation's Response to Commission Questions Propounded by Administrative Law Judge Allan Arlow, and the Supplemental Non-Confidential Affidavit of Nancy Batz, along with a certificate of service.

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

Sincerely,

Carla M. Butler

CMB:
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 13

Universal Telecommunications, Inc., Plaintiff, v. Qwest Corporation, Defendant.	**QWEST CORPORATION'S RESPONSE TO COMMISSION QUESTIONS PROPOUNDED BY ADMINISTRATIVE LAW JUDGE ALLAN ARLOW**

Qwest Corporation ("Qwest"), pursuant to Administrative Law Judge Allan Arlow's request in a procedural conference on July 23, 2007, hereby responds to the questions that Judge Arlow articulated on behalf of the Oregon Public Utility Commission ("Commission") with regard to the Complaint for Enforcement of Interconnection Agreement ("Complaint") that Universal Telecommunication, Inc. ("Universal") filed on July 16, 2007.

INTRODUCTORY COMMENTS

Qwest makes every effort to directly address the questions that were propounded, and will attempt to quote sections from the interconnection agreement ("ICA") that are relevant to those questions. Qwest has attempted to avoid undue length, but notes that some of the issues raised in the questions (particularly Question No. 1) require a discussion of some of the underlying issues that Universal's Complaint and Mr. Martin's affidavit have raised. In other words, to put Qwest's answers to the two sub-questions in Question No. 1 into the context of the ICA and the pertinent facts (as disclosed by the two previously-filed affidavits of Ms. Batz), the response to Question No. 1 will also deal with some of Universal's underlying alleged "disputes" and discuss them in the context of what the ICA requires of Universal to preserve a dispute.

Qwest's approach to the questions will be to direct Judge Arlow and the Commission to the relevant portions of the ICA, and then provide sufficient commentary to place those provisions into context.

In the event the Commission does not have ready access to the effective interconnection agreement ("ICA"), a copy of the agreement is on the Commission's website E-dockets link, under docket ARB 671, at http://edocs.puc.state.or.us/efdocs/HAQ/arb671haq155552.pdf, where it is referred to as "Supplemental Application" and was filed on July 25, 2006 (exactly one year ago today).

Qwest addressed most, if not all, of the key facts in its Answer and Ms. Batz's two affidavits. Because Judge Arlow's questions have raised a handful of additional brief factual issues, Qwest is also filing a brief supplemental non-confidential affidavit of Ms. Batz.

However, before addressing the questions, a few basic (and Qwest believes undisputed) facts should be briefly summarized, as they bear directly on Qwest's responses to the issues.

STATEMENT OF PERTINENT FACTS

A. The Relative Use Factor ("RUF")

1. Using data from June 2006 through August 2006, Ms. Batz calculated a new relative use factor ("RUF") in compliance with the new ICA. On October 30, 2006, she sent a letter to Universal with the proposed RUF (99% Universal / 1% Qwest). Ms. Batz also provided a detailed worksheet that accompanied her letter. Ms. Batz made the calculation in compliance with ICA Sections 7.3.1.1.3.1 (which applies to Entrance Facilities—"EF") and 7.3.2.2.1 (which applies to direct trunked transport—"DTT"), and specifically, in compliance with the formula spelled out in Exhibit H to the ICA. (Batz Non-confidential Affidavit, ¶ 6; Attachment A to Batz Confidential Affidavit.)

2. Universal has never provided a substantive response to that letter and the underlying compliant calculation. Instead of reviewing the data and calculation, and challenging either or both if it believed them to be in error, Universal refused to address the proper calculation of the RUF, instead declining to adopt a position. (Batz Non-confidential Affidavit, ¶ 7; Attachment B.) Despite the fact that Qwest provided a compliant RUF calculation on October 30, 2006, Universal has never provided a proposed a RUF calculation based on Exhibit H, or any other relevant Sections of the ICA, in their entirety, to support its position.

3. Indeed, the first time that Universal had proposed a specific RUF under the new ICA (other than suggesting that the RUF under the old ICA should continue during the pendency of Universal's federal court appeal) was in paragraph 9 of its July 16, 2007 Complaint, in which Universal proposed a RUF that assigned 58% responsibility to Qwest and 42% to Universal. Universal, however, provided nothing to demonstrate its actual calculation of the RUF and it was not even addressed in Mr. Martin's affidavit. In other words, Universal has still not provided a substantive response to Qwest's October 30, 2006 letter calculating a compliant RUF. The only explicit (although unsupported) RUF "proposal" that Universal has ever so much as even mentioned was made in an allegation of an unverified Complaint filed 8½ months after Qwest's initial letter.

B. <u>The Alleged Basis for Universal's Disputes</u>

4. Universal refused to respond to Qwest's RUF calculation with a substantive response based on the formula in the ICA. Further, until a few weeks ago, Universal had never suggested that it had any ground for dispute under the ICA other than the fact that it had appealed the Commission's decision to federal court.

5. The critical letter on this issue is Mr. Martin's December 14, 2006 letter. (Batz Non-confidential Affidavit, ¶ 9, Attachment D.) The *sole basis* that Universal articulated for its dispute was "because the *legal justification* for these charges is in *dispute*. As you know, the question of the lawfulness of Qwest's proposed charges is one issue now *pending before the federal district court* in Oregon in Case No. 06-6222-HO. Therefore, there is no basis for Qwest to assess such charges at this time, and Universal requests that Qwest cease and desist from assessing additional charges in the future." (Emphasis added.)

6. For months, despite the voluminous correspondence, and in the face of monthly billings from Qwest for DTT, EF, and Multiplexing, Universal's appeal has been the sole basis that it has articulated for its dispute. Even as late as July 16, 2007, Mr. Martin stated that the basis of Universal's dispute was the rationale provided in its December 14, 2006 letter and no other rationale was provided. (Batz Non-confidential Affidavit ¶ 32 and Attachment W.)

7. Indeed, the very first time that Universal even so much as suggested that another dispute-related issue might exist beyond the appeal was in the parties' June 15, 2007 meeting when a Universal representative indicated that there might have some "excess capacity" issues. (Batz Supplemental Affidavit, ¶ 2.)[1]

8. However, it was only in its July 16, 2007 Complaint that Universal, *for the first time*, argued outside of the dispute resolution calls that a basis for its disputes of Qwest's charges was that Qwest had the sole responsibility to unilaterally disconnect under utilized trunk groups that Universal had originally ordered. Universal did so despite the fact that "excess capacity" was discussed with Universal on February 15, 2007 and that Universal representatives had stated

[1] It is not Qwest's intention to disclose confidential information from the dispute resolution meeting either here or in Ms. Batz's Supplemental Affidavit. However, Universal is the party that has placed at issue the question of "excess capacity." Given that fact, the purpose for discussing that issue here is to identify when that issue was raised for the first time, but not get into any other substantive details of the meeting.

that Universal "was aware of under utilized trunk groups & indicated they would be disconnecting some of their trunk groups." (Batz Non-confidential Affidavit, ¶ 61 and Attachment MM; see also Martin Affidavit, ¶ 9.)

9. In its Complaint, and also for the first time, Universal made an additional claim that Qwest had billed it incorrectly for the small amount of traffic that Universal had generated and delivered to Qwest. Qwest acknowledges its error and is already in the process of determining the amount of overbilling (about $500) and thus will shortly issue a credit. (Batz Supplemental Affidavit, ¶ 4). Upon issuance of that credit, Qwest considers this issue closed.

10. On July 16, 2007, Universal claimed that Qwest owed it $88,200 for reciprocal compensation. The matter was mentioned in Mr. Martin's affidavit, which provides no specific information, other than the bare statement that Qwest owes Universal $88,200. (Martin Affidavit, ¶ 4.) As Ms. Batz pointed out, her analysis indicates that this is likely based on two recent bills, one for incremental 2006 usage, and the other for incremental January through April, 2007 usage, neither of which was even due at the time the Complaint was filed. (Batz Non-confidential Affidavit, ¶¶ 54-55.) As will be discussed hereafter, Qwest has analyzed those two bills and is in the process of preparing a total credit to Qwest's charges of about $23,800.

QWEST RESPONSES TO QUESTIONS

I. Commission Question No. 1: Do the provisions of the ICA restrict Qwest from disconnecting service for non-payment of amounts due under the ICA? Does it matter whether or not the amounts are being actively disputed by the parties in the context of a pending Complaint?

A. Do the provisions of the ICA restrict Qwest from disconnecting service for non-payment of amounts due under the ICA?

The answer to the first of the two related questions is "No." The provisions of the ICA do allow Qwest to disconnection services for non-payment:

> 5.4.3 The Billing Party may *disconnect any and all relevant services* for failure by the billed Party to make full payment, *less any disputed amount as provided for in Section 5.4.4 of this Agreement*, for the relevant services provided under this Agreement within sixty (60) calendar Days following the payment due date. The billed Party will pay the applicable reconnect charge set forth in Exhibit A required to reconnect each resold End User Customer line disconnected pursuant to this paragraph. The Billing Party will notify the billed Party at least ten (10) business days prior to disconnection of the unpaid service(s). In case of such disconnection, all applicable undisputed charges, including termination charges, shall become due. If the Billing Party does not disconnect the billed Party's service(s) on the date specified in the ten (10) business days notice, and the billed Party's noncompliance continues, nothing contained herein shall preclude the Billing Party's right to disconnect any or all relevant services of the non-complying Party without further notice. For reconnection of the non-paid service to occur, the billed Party will be required to make full payment of all past and current undisputed charges under this Agreement for the relevant services. Additionally, the Billing Party will request a deposit (or recalculate the deposit) as specified in Section 5.4.5 and 5.4.7 from the billed Party, pursuant to this Section. Both Parties agree, however, that the application of this provision will be suspended for the initial three (3) Billing cycles of this Agreement and will not apply to amounts billed during those three (3) cycles. In addition to other remedies that may be available at law or equity, each Party reserves the right to seek equitable relief, including injunctive relief and specific performance. (Emphasis added.)

Thus, it is clear that, contrary to Universal's counsel's statements to the contrary, the ICA clearly contemplates the disconnection of services under certain circumstances.

B. Does it matter whether or not the amounts are being actively disputed by the parties in the context of a pending Complaint?

The answer to the second question is "Yes." ICAs represent the contractual agreements that define an important ongoing business relationship between two companies. Given that, and the fact that the obligation to make payments for services and reciprocal compensation flow back and forth between the parties, it is critical that one party not be allowed to retain the benefits of the interconnection and exchange of traffic, continue to collect revenue from the other party, and all the while fail to fulfill its payment obligations under the ICA. And it is particularly egregious if one party is able to do so under the pretext of an undefined "legal disagreement" or through vague claims, some completely unquantified (e.g., Universal's "capacity" claim), or simply by throwing numbers out without providing a single bit of information to support the claim (e.g.,

Universal's claim for $88,200). Because of this concern (i.e., one party performing and the other not), the ICA is clear on what a true "disputed" claim is and is not.

Sections 5.4.4 (and its subparts 5.4.4.1, 5.4.4.2, and 5.4.4.3) are clear that a party to an ICA has an obligation to not just claim there is a dispute, but to document that dispute:

> 5.4.4 ***Should CLEC or Qwest dispute, in good faith, any portion of the nonrecurring charges or monthly Billing under this Agreement, the Parties will notify each other in writing within fifteen (15) calendar Days following the payment due date identifying the amount, reason and rationale of such dispute. At a minimum, CLEC and Qwest shall pay all undisputed amounts due.*** Both CLEC and Qwest agree to expedite the investigation of any disputed amounts, promptly provide all documentation regarding the amount disputed that is reasonably requested by the other Party, and work in good faith in an effort to resolve and settle the dispute through informal means prior to initiating any other rights or remedies. (Emphasis added.)
>
> > 5.4.4.1 If a Party disputes charges and does not pay such charges by the payment due date, such charges may be subject to late payment charges. If the disputed charges 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 no later than the second Bill Date following the resolution. If the disputed charges have been withheld and the dispute is resolved in favor of the disputing Party, the Billing Party shall credit the bill of the disputing Party for the amount of the disputed charges and any late payment charges that have been assessed no later than the second Bill Date after the resolution of the dispute. If a Party pays the disputed charges and the dispute is resolved in favor of the Billing Party, no further action is required.
> >
> > 5.4.4.2 If a Party pays the charges disputed at the time of payment or at any time thereafter pursuant to Section 5.4.4.3, and the dispute is resolved in favor of the disputing Party, the Billing Party shall, no later than the second Bill Date after the resolution of the dispute: (1) credit the disputing Party's bill for the disputed amount and any associated interest or (2) pay the remaining amount to CLEC, if the disputed amount is greater than the bill to be credited. The interest calculated on the disputed amounts will be the same rate as late payment charges. In no event, however, shall any late payment charges be assessed on any previously assessed late payment charges.
> >
> > 5.4.4.3 If a Party fails to dispute a charge and discovers an error on a bill it has paid after the period set forth in Section 5.4.4, the Party may dispute the bill at a later time through an informal process, through an Audit pursuant to the Audit provision of this Agreement, through the Dispute Resolution provision of this Agreement, or applicable state statutes or Commission rules.

Setting aside the Universal claim that it may dispute all transport charges because it has appealed this matter to federal court, it is instructive to look at the other "disputes" in the context of these provisions, in particular, the provision that states that "the Parties will notify each other in writing within fifteen (15) calendar Days following the payment due date identifying the amount, reason and rationale of such dispute. At a minimum, CLEC and Qwest shall pay all undisputed amounts due." This clause spells out the procedure a party *must* follow to properly dispute a claim.

Excess Capacity Claim- Universal has utterly failed to document any portion of this claim, or to cite any specific language in the ICA, as Section 5.4.4 requires it to do. First, despite the fact that even Universal admits to having discussed the issue of excess capacity in a February 2007 facilities planning conference (and even alleges to have done so in August 2006), until the Complaint was filed on July 16, 2007 Universal had never notified Qwest in writing with 15 days after any payment due date. Even now (other than the most general of allegations), it has never provided any "reason" or "rationale" for this alleged dispute, let alone a calculation of its value (other than to suggest that it was Qwest's sole responsibility to disconnect circuits that Universal had ordered, and that Qwest's charges should reflect only those charges associated with utilized facilities) Universal has thus failed to preserve this dispute as required by Section 5.4.4 and has failed to cite any reference in the ICA to support an adjustment to the RUF for this capacity issue.

The $88,200 Claim- Literally, the only references to this claim is Mr. Martin's statement in paragraph 4 of his affidavit (and a similar statement in the motion for temporary emergency relief) that "[t]o date Qwest has withheld reciprocal compensation

payments owed to Universal in the amount of $88,200 . . . ." Not until Universal made this ambiguous reference in an affidavit (and not in a written communication to Qwest notifying it of the claim or dispute) has Universal ever even mentioned this issue.[2] Aside from the lack of a written communication, there is also no mention of time frames or billing dates, nor has Universal has provided any reason, rationale, or calculation for the dispute. Indeed, as Ms. Batz's Non-confidential Affidavit shows, she was left to attempt to speculate, based on two recent billings that were not even due, what the $88,200 claim might refer to. Nonetheless, as noted below and in a show of good faith, Qwest has analyzed this claim, has found about one-fourth of it to be valid, and is in the process of preparing a credit to Qwest's charges. Yet Universal did not take the proper steps to preserve this dispute.

Billing the Wrong Reciprocal Compensation Rate- Until the filing of the Complaint, Universal had never mentioned this issue. Nonetheless, the Complaint at least provided enough information so that Qwest could identify the alleged problem. Qwest has done so, has determined that the wrong rate was in fact billed, and thus Qwest will shortly issue a credit of about $500. Nonetheless, even as to this claim, Universal did not follow the procedures called for in the ICA.

C. The Relative Use Factor Claim

As noted, Qwest provided a detailed RUF proposal to Universal on October 30, 2006. Other than a request that the RUF under the old agreement remain in effect (a proposal obviously at odds with the fact that the current ICA supersedes the old agreement), Universal has utterly

[2] Qwest acknowledges receipt of Universal's invoices for incremental 2007 usage on or about June 29, 2007 and for incremental 2006 usage on or about July 13, 2007. At the time that Universal filed its Complaint on July 16, 2007, Qwest's payments for neither of these invoices were due pursuant to Section 5.4.1 of the ICA.

failed to comply with the ICA's RUF provisions. The RUF provisions for EF and DTT are essentially identical, so Qwest will only quote Section 7.3.1.1.3.1, the section relating to EF:

> 7.3.1.1.3.1 The provider of the LIS two-way Entrance Facility (EF) will initially share the cost of the LIS two-way EF by assuming an initial relative use factor (RUF) of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party for the use of the EF, as described in Exhibit A, shall be reduced by this initial relative use factor. Payments by the other Party will be according to this initial relative use factor for a minimum of one (1) quarter. The initial relative use factor will continue for both bill reduction and payments until the Parties agree to a new factor, based upon actual minutes of use data for non-ISP-bound traffic to substantiate a change in that factor. If CLEC's End User Customers are assigned NPA-NXXs associated with a rate center different from the rate center where the End User Customers are physically located, traffic that does not originate and terminate within the same Qwest local calling area (as approved by the Commission), regardless of the called and calling NPA-NXXs involving those End User Customers, is referred to as "VNXX traffic." ***For purposes of determining the relative use factor, the terminating carrier is responsible for ISP-bound traffic and for VNXX traffic. If either Party demonstrates with traffic data that actual minutes of use during the previous quarter justifies a new relative use factor, that Party will send a notice to the other Party. The new factor will be calculated based upon Exhibit H.*** Once the Parties finalize a new factor, bill reductions and payments will apply going forward from the date the original notice was sent. ISP-bound traffic or traffic delivered to Enhanced Service providers is interstate in nature. Qwest and CLEC shall not exchange VNXX traffic. (Emphasis added).

Ms. Batz's October 30, 2006 letter was based on actual data in compliance with the ICA, and it reflected the application of the foregoing section, the identical section on DTT, and the formula set forth in Exhibit H. Universal attempted to avoid a substantive response on this issue, but never challenged the validity of Mr. Batz's calculation. Further, when Qwest began billing DTT and EF under this RUF, Universal had an obligation under Section 5.4.4 to challenge the billing within 15 days of the payment due date in a writing that identified "the amount, reason and rationale of such dispute," and "[a]t a minimum," to "pay all undisputed amounts due." Universal did none of those things (other than to cite its appeal as a basis for its dispute of Qwest's charges) until just recently. Its month-after-month failure to comply with the requirements of Section 5.4.4 is an obvious waiver of its right to dispute Ms. Batz's RUF

calculation for any of those bills. Universal's effort in its July 16 Complaint to throw on the table its own vague non-compliant RUF proposal, with no supporting calculation, cannot under any reasonable standard constitute a substantive response to Qwest's RUF calculation made 8½ months previously.

D. Calculating the RUF Based on Capacity

Universal makes the novel claim in its Complaint that the "RUF must be calculated to reflect the actual percentage of the DTT facilities that are being utilized." (Complaint, ¶ 10.) Universal cites no authority in the ICA for this theory, however. First, there is nothing whatsoever in the RUF sections themselves to suggest that the RUF is created based on a "capacity" measure, or that it is applied to only the capacity of a service actually being used. As Ms. Batz stated, based on her experience having calculated RUFs across the CLEC industry, and having applied those RUFs for billing purposes, capacity has never been an element in either. (Supplemental Affidavit of Nancy Batz, ¶ 3.)

The language of the RUF provisions themselves demonstrate the absurdity of Universal's argument: "The provider of the LIS two-way Entrance Facility (EF) will initially *share the cost of the LIS two-way EF* by assuming an initial relative use factor (RUF) of fifty percent (50%) for a minimum of one (1) quarter if the Parties have not exchanged LIS traffic previously. The nominal charge to the other Party *for the use of the EF, as described in Exhibit A*, shall be reduced by this initial relative use factor." (Emphasis added.) Had the intent been to apply the RUF to only utilized trunks, then the language would have certainly said that not only would the amount owed be reduced by the RUF, but by the RUF applied only to the capacity of the service actually used. It does not say that, however; instead, it refers to the RUF being applied to the

cost of the LIS, and then later refers to Exhibit A of the ICA. Exhibit A, of course, sets forth the Commission-determined rates for EF and DTT (and not some allocated rate based on capacity).

Moreover, in support and direct correlation to the language, Exhibit H, which provides the detailed means of calculating the RUF, *contains not a single word* to suggest that a RUF is either calculated on the basis of capacity, or that it is applied on the basis of capacity. Thus, the RUF provisions themselves, and the approved methods of calculating a compliant RUF, as clearly laid out in Exhibit H, demonstrate conclusively that Universal's theory is completely inconsistent and non-compliant with the ICA. Universal's proposal is inconsistent with the ICA's provisions that the parties shall share the EF and DTT costs. Under its proposal, Qwest would be 100% responsible for the costs of the under-utilized facilities that *Universal* ordered.

Universal's theory is also non-compliant with other provisions of the ICA. For example, Section 7.3.1.1.1 states: "Recurring and nonrecurring rates for Entrance Facilities are specified in Exhibit A and *will apply for those DS1 or DS3 facilities dedicated to use by LIS*." (Emphasis added.) There is no dispute that when a dedicated circuit is provided to a CLEC, the entire circuit "is dedicated" to that CLEC, and not just the amount of the capacity that the CLEC uses. Moreover, the reference to Exhibit A is to the rate for the entire LIS service, not to some allocated portion thereof. There is a similar provision is in Section 7.3.2.1.1.[3]

E. CLEC or Qwest Duty to Disconnect Trunks

Universal makes a second fantastic claim, which is that it is all Qwest's fault that Universal has trunks where little or no capacity is being used, and that Qwest should have

[3] Section 7.3.2.1.1 provides: "Direct trunked transport (DTT) is available between the Serving Wire Center of the POI and the terminating Party's Tandem Switch or End Office Switches. *The applicable rates are described in Exhibit A. DTT facilities are provided as dedicated DS3, DS1 or DS0 facilities.*" (Emphasis added.)

disconnected them - even those that Universal had originally ordered. (Complaint, ¶ 16.) There are two issues on this point.

First, from a purely factual perspective, the only evidence in the record on this issue is an email from Renae Samuels of Qwest reporting that Universal had failed to call into the August 2006 forecasting call and that in the February 2007 call, Universal was "aware of under utilized trunk groups & indicated that they would be disconnecting some of their trunk groups." (Exhibit MM to Batz Non-confidential Affidavit.) Thus, based on Ms. Samuels' notes, Universal acknowledged its obligation to examine the services that Qwest was providing to it and then take the initiative to eliminate those services it no longer needed.

Second, the Universal theory is perplexing in that it suggests that Qwest somehow has some sort of "big brother" duty to protect Universal against its own failure to monitor its own business plans and to manage the services that Universal ordered. Universal is fully capable of knowing how much usage is being placed over the trunks that Qwest has provided. But in the past that never mattered to Universal because, until August 2006, when the new ICA became effective, DTT and EF were services that Universal ordered, but had no obligation to pay for. Thus, Universal had no incentive to use the Qwest-provided trunks in an efficient manner.

Further, Universal cites nothing in the ICA to suggest that Qwest has such an obligation (or, conversely, that Universal has no obligation to manage its own business). Indeed, the ordering provisions of the ICA are clear. First, Section 4 of the ICA defines an "Access Service Request" ("ASR") as "the industry guideline forms and supporting documentation used for ordering Access Services. *The ASR will be used to order trunking and facilities between CLEC and Qwest for Local Interconnection Service*." (Emphasis added.) Likewise, a "Local Service Request" ("LSR") is "the industry standard forms and supporting documentation used for

ordering local services." As Ms. Samuels of Qwest stated in her email to Ms. Batz (Attachment MM), "Qwest does not issue the disconnect[ion] or augment[ation] orders for customer's trunk groups. They would need to issue ASRs to the SDC [Service Delivery Coordinator] for this type of activity." And while the Ordering provisions of the ICA (Section 7.4) speak in terms of either party ordering services, the fact is that it is Qwest's services that are being used in almost every case, and it is the CLEC who knows what it needs and where it needs it.

Here, Universal placed the ASRs (or LSRs) to establish the service, and thus it is wholly appropriate that it (Universal) issue the ASRs (or LSRs) for those services no longer needed. However, most importantly, nothing in the Ordering sections suggests that a CLEC is relieved of its obligation to initiate the disconnection of services that it no longer needs on the premise that Qwest can do it better than the CLEC can. It would be naïve to suggest that CLECs (including Universal) would react positively to Qwest unilaterally connecting and disconnecting services for them. Indeed, if Qwest had made a standard practice of doing so, it would immediately be subject to complaints filed by CLECs with the Commission.

F. <u>The Appeal Is Not a Valid Dispute</u>

It is not clear from the recent procedural conferences whether Universal continues to claim that its appeal is a valid "dispute" under the ICA. Counsel for Universal stated that the appeal was completely separate from this docket and that the bases for Universal's Complaint are the specific items discussed above that were, for the most part, unveiled in the Complaint.

Nevertheless, to the extent that Universal claims that the appeal itself relieves it of any obligation to pay for transport during the pendency of the appeal, the ICA does not support it. The most relevant section is 5.18.1, the first section of the dispute resolution provision:

> 5.18.1 *If any claim*, controversy or dispute between the Parties, their agents, employees, officers, directors or affiliated agents should arise, and the Parties do not resolve it in the

> ordinary course of their dealings (the "Dispute"), then it shall be resolved in accordance with this Section. *Each notice of default, unless cured within the applicable cure period, shall be resolved in accordance herewith.* Dispute resolution under the procedures provided in this Section 5.18 shall be the preferred, but not the exclusive remedy for all *disputes between Qwest and CLEC arising out of this Agreement or its breach.* Each Party reserves its rights to resort to the Commission or to a court, agency, or regulatory authority of competent jurisdiction. Nothing in this Section 5.18 shall limit the right of either Qwest or CLEC, upon meeting the requisite showing, *to obtain provisional remedies (including injunctive relief) from a court before, during or after the pendency of any arbitration proceeding brought pursuant to this Section 5.18.* However, once a decision is reached by the arbitrator, such decision shall supersede any provisional remedy.

Universal, in its January 9, 2007 letter (Batz Non-confidential Affidavit, Attachment I) suggests that the initial reference to "any claim" means that an appeal of the validity of the ICA alone somehow relieves Universal of any obligation to pay. In other words, Universal claimed that, because it had appealed the validity of the RUF provisions (although, ironically, Exhibit H was not at issue in the arbitration, and is therefore not part of its appeal), it has no duty whatever to pay for DTT or EF for the duration of the appeal. Assuming it loses that appeal, Universal would then presumably argue that its non-duty continues through all potential additional appeals. This, of course, could take years. Aside from the egregiously unfair result, this argument simply makes no sense and it ignores other provisions of Section 5.18.1.

First, the language of Section 5.18.1 states that it is a "notice of default" that triggers the opportunity for a party to invoke the dispute resolution process. A "notice of default" is a term that makes sense only on the assumption that the underlying agreement is valid and that one party claims another party has breached the terms of the existing ICA. In contrast, a "notice of default" makes no sense if the "dispute" is an appeal challenging the validity of the ICA.

Second, the next sentence, which refers to "disputes between Qwest and CLEC arising out of this Agreement or its breach," has obvious reference, not to the underlying validity of the

ICA, but to the manner in which the parties comply, or fail to comply, with the approved terms of the ICA.

Further still, the Universal position that an appeal automatically suspends its duty to comply with the terms of the ICA is inconsistent with the next sentence of Section 5.18.1, which allows a party to seek provisional remedies, such as an injunction or a stay pending resolution of a dispute. In essence, Universal's appeal argument is that the ICA is not legally effective because of the appeal. There is nothing in the ICA, however, that suggests, let alone states, that the filing of an appeal suspends the effectiveness of the ICA. If, as Universal apparently claims, it were true that merely filing an appeal has the effect of a stay, then the language allowing parties to seek such provisional relief would be completely superfluous, and would effectively read that sentence out of the ICA. That result would, in turn, violate the well-established rule of construction that an agreement must be read to give meaning to all of its terms.

Finally, this Commission's own rules make clear that an appeal, or a motion for reconsideration of a Commission order, does not stay or postpone compliance with the Commission's original order. See e.g., OAR 860-014-0095(5) ("Unless ordered by the Commission under OAR 860-014-0093, an order granting an application for rehearing or reconsideration shall not stay or postpone compliance with the original order").

G. Summary of Qwest's Responses to Question No. 1

Universal is attempting to game the system by creating bizarre and unsustainable interpretations of the ICA that simply do not comport with its language. Further, to the extent the recent "disputes" that Universal has raised can even be construed as legitimate disputes under the ICA, Universal has utterly failed to comply with the provisions of the ICA to preserve them, describe them, and provide a rationale for them. Finally, Universal's appeal, by definition, is not

a valid "dispute" under the dispute resolution provisions of the ICA, and the appeal does not automatically suspend Universal's duty to meet its payment obligations under the ICA. Universal has never challenged Qwest's RUF calculation of October 2006, and is thus obligated to pay Qwest for DTT and EF based on the application of that RUF to the services in question.

II. Commission Question No. 2: Do the provisions of the ICA allow for the freezing of orders for facilities or services? Does it matter under the ICA whether the orders are for cancellation of services or facilities, rather than the addition of new circuits or changed circuit orders?

The answers to these two questions are clear. The provisions of the ICA allow for the freezing of orders for facilities or services, and the freeze contemplated by the ICA applies both to the circuit additions and to cancellation of services. Section 5.4.2 could not be more clear on this point:

> 5.4.2 One Party may *discontinue processing orders* for the failure of the other Party to make full payment for the relevant services, *less any disputed amount as provided for in Section 5.4.4 of this Agreement*, for the relevant services provided under this Agreement within thirty (30) calendar Days following the payment due date. The Billing Party will notify the other Party in writing at least ten (10) business days prior to discontinuing the processing of orders for the relevant services. If the Billing Party does not refuse to accept additional orders for the relevant services on the date specified in the ten (10) business days notice, and the other Party's non-compliance continues, nothing contained herein shall preclude the Billing Party's right to refuse to accept additional orders for the relevant services from the non-complying Party without further notice. For order processing to resume, the billed Party will be required to make full payment of all charges for the relevant services not disputed in good faith under this Agreement. Additionally, the Billing Party may require a deposit (or additional deposit) from the billed Party, pursuant to this section. In addition to other remedies that may be available at law or equity, the billed Party reserves the right to seek equitable relief, including injunctive relief and specific performance. (Emphasis added.)

No distinction is made between the types of orders contemplated.

III. Commission Question No. 3: Does the filing of a Complaint affect the right of the parties to act under Question 2, above?

The answer to this question is No. As noted above in the discussion of Section 5.18.1, injunctive relief is something that a party may seek, but it is not automatically granted, nor

should it be, for the reasons already discussed above. Such an extraordinary remedy should only be granted by the Commission or a Court on the basis of a party's meeting the requirements for such relief. Yet, until very recently, the only basis for a "dispute" was that an appeal had been filed. This is a claim that will be resolved in due course by the federal court, but which does not, under any terms of the ICA, suspend the effectiveness of the agreement in the interim.

IV. Commission Question No. 4: Does Qwest have an obligation to mitigate damages which it might be entitled in the future to receive from Universal, such as by disconnection of circuits pursuant to a Universal request, even though it might not be to its immediate benefit to do so?

While, in general terms, parties have a duty to mitigate damages, the provisions of the ICA override any such duty in this case. As noted in the response to Question No. 2, Section 5.4.2 clearly contemplates the suspension of all order activity. Further, while Universal would now like to disconnect some circuits, this is not a case where it was not given warning, after warning, after warning that Qwest would eventually exercise its rights under Section 5.4.2. In February 2007, Universal informed Ms. Samuels of Qwest that it would disconnect unneeded circuits. Universal did not do so, however. Then, on April 6, 2007, Universal was specifically warned that failure to comply with the ICA could result in the suspension of service order activity. (Batz Non-confidential Affidavit, Attachment M.) Other warnings by Qwest followed. Yet Universal continued to take the position that it had no duty to pay for any transport solely on the basis of its appeal.

Universal could have acted any time in the past 11 months to reduce the number of its circuits, but chose instead to play a brinksmanship game with Qwest. Now that it has reaped the whirlwind of its steadfast refusal to comply with the ICA or to state a legitimate dispute, however, it would be entirely inappropriate to deprive Qwest of the rights granted to it under Section 5.4.2, while Universal is given no corresponding duty to pay for the circuits for which it

is legally responsible under the ICA. That is precisely the point that Mr. Hult of Qwest has reiterated during the scheduling conferences. Universal wants rights, but it shuns duties. As noted in the next section, Qwest reiterates a proposal that would allow those circuits to be disconnected, but it involves benefits to *both parties*, and not just to Universal.

V. Commission Question No. 5: May the Commission impose interim requirements upon the parties pending resolution of disputed matters?

It is not clear to Qwest precisely what is meant by "interim requirements." Qwest's position, as articulated herein, is that the Commission lacks the authority under the ICA to mandate that Qwest continue to provide services indefinitely, while Universal is allowed to receive those services without paying anything for them. At Judge Arlow's the request, and in order to see if the parties could reach some agreement, and as an interim solution pending the Judge's full review, Qwest made the following proposal to Universal (and reiterates it here):

> 1. Establish an escrow arrangement whereby Universal will pay to a third party amounts billed for transport (i.e. direct trunked transport, entrance facility and multiplexing charges) pursuant to the RUF calculations previously provided to Universal by Ms. Batz. This will include past amounts (the $278,387.12 through May 2007 usage as of Qwest's June 2007 invoices) plus all additional monthly amounts accrued during the pendency of the proceeding in Docket IC 13 before the Oregon Commission, such payments to made into the escrow account on a monthly basis within the timeframes specified in Section 5.4.1 of the interconnection agreement, i.e. "within thirty (30) calendar Days after the date of invoice, or within twenty (20) calendar Days after receipt of the invoice, whichever is later (payment due date)". The ultimate disposition of escrowed amounts will be distributed pursuant to the order of the Oregon commission in the current complaint docket (IC 13).
>
> 2. Qwest will pay Universal amounts properly owed for terminating compensation under the agreement on a monthly basis.
>
> 3. Assuming the escrow arrangement is and remains fully complied with, Qwest will lift the hold on order activity for Universal.
>
> 4. Qwest and Universal to agree to an expedited schedule to be worked out by the parties to assure that this complaint proceeding is quickly resolved. This will include shortened periods for filing of testimony and briefing.

However, on July 23, 2007, Universal rejected this proposal out of hand, with no counter-proposal. Instead, Universal claimed that the ICA does not mandate an escrow arrangement, ignoring the spirit of Judge Arlow's request and arguably the dispute protocol that is contained in the ICA, where both parties are held to a standard of attempting to resolve disputes in good faith.

In the meantime, Ms. Batz, in a good faith effort to move as quickly as possible, has analyzed the $88,200 claim and has determined that of the $15,000 billing that Universal sent to Qwest on June 29, 2007, about $10,300 of that amount represents minutes that are valid 2007 minutes subject to compensation at $.0007. Ms. Batz has also analyzed the $67,000 bill that Qwest received on July 13, 2007 (only 12 days ago), and has determined that approximately 80 percent of it is a re-billing of amounts Qwest has already paid, but that about $13,500 is valid. Qwest, therefore, is in the process of creating the appropriate documentation to credit Universal nearly $23,800.

The $500 credit for using the wrong ISP traffic billing rate is likewise in process. But the problem from Qwest's perspective is that Universal wants benefits (in the form of credits, free service, immediate responses to "disputes," and so on), but shuns its duties (such as providing a substantive response to Qwest's RUF proposal or properly documenting "disputes"). Universal views the ICA as a one-way street in which only Qwest has duties and only Universal has rights.

As a practical matter, the Commission does have one very effective interim requirement that it can impose, and that is to *require Universal to pay its bill to Qwest* (less, of course, the amounts being credited). Such payment, of course, would be subject to refund, if necessary, pending resolution of this matter.

As demonstrated in Ms. Batz's affidavits, and the provisions of the ICA, Universal has not even paid lip service to the ICA requirements to preserve a valid disputed claim. Instead, it

is scrambling to avoid paying by creating largely baseless claims to avoid the consequences of the Commission's correct decision to impose transport charges on Universal (a state of affairs that has applied for years to other CLECs in Oregon[4]) and its own failure to follow the ICA. Even if one were to assume the validity of the $88,200 claim, and add the $500 credit to it, the total of Universal's "disputes"[5] add up to about $88,700. Yet it is undisputed that the current net amount that Universal owes Qwest is nearly $280,000 (and growing). The ICA requires a party to pay "undisputed amounts," and in this case, at least the net of $190,000 is undisputed. Thus, Universal should be required to immediately pay the full amount owed, but, even giving it the benefit of the doubt on the $88,200 claim, Universal must pay Qwest at least $190,000 under the clear terms of the ICA.

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[4] The OPUC has ruled four times that CLECs are financially responsible the transport of ISP traffic on Qwest's network. In the first decision (the first of two Level 3 arbitration orders), the Commission noted that "Level 3 originates almost none of the traffic across the Qwest DTT and entrance facilities; Qwest customers originate virtually all of the traffic by calling Level 3's ISP customers." Order No. 01-809, *In Re Level 3 Communications, LLC*, 2001 WL 1335665 at *8, OPUC docket ARB 332 (OPUC, September 21, 2001.) Significantly, an Oregon federal district court affirmed this decision on judicial review. *Level 3 Communications v. Oregon Pub. Util. Comm'n*, No. CV01-1818-PA (D. Or., November 25, 2002). The second OPUC order came in the 2004 AT&T/Qwest arbitration, where the Commission rejected AT&T language that would have made Qwest financially responsible for transporting ISP traffic. The Arbitrator concluded that "this Commission has already determined that, in light of FCC rules, the term 'telecommunications traffic' does not include Internet traffic." Order No. 04-262, *In Re Qwest Corporation*, 2004 WL 1545412 at *13, OPUC docket ARB 537 (OPUC, May 17, 2004). The third decision was the Commission's decision in this matter. Finally, in March 2007, the Commission, in another Level 3/Qwest arbitration, again ruled that Level 3 is responsible to pay for the transport of ISP traffic. Order No. 07-098, *In the Matter of Level 3 Communications, LLC*, 2007 WL 978413, OPUC docket ARB 665 (OPUC, March 14, 2007) The Arbitrator's Decision, which was adopted by the Commission , neatly summed up the issues and the OPUC's legal conclusions on them: "Level 3's position does not find support in the FCC's rules or in the case law interpreting those rules. Fundamentally, Level 3 fails to recognize that the FCC's Part 51 reciprocal compensation rules apply only to the transport and termination of "telecommunications traffic." Both the FCC and the Courts have held that ISP-bound traffic is 'information access,' and is therefore excluded from the Part 51 rules, including Rules 703(b) and 709(b). Furthermore, the Ninth Circuit has specifically held that *VNXX-routed ISP-bound traffic* is excluded from Rule 703(b) because it is interexchange traffic." 2007 WL 978413 (WL star cites unavailable; see page 36 of 38. (Emphasis in original.)

The Commission has thus established a consistent policy and history—based on a solid legal analysis—of requiring that CLECs bear the cost of transporting ISP traffic, and the only appellate case in Oregon on this issue upheld the Commission's decision.

[5] For the reasons set forth above, the "capacity" claim is so facially specious that it should be given no credence whatsoever.

Finally, ironically, although the ICA does not require it, Qwest is willing to accept an alternative escrow approach that does not allow it to get its hands on the money until resolution of the case. Universal raises the hue and cry that it has no legal obligation in the ICA to place money in escrow, yet it offers absolutely no alternative to resolve the short-term payment issues to avoid a lawful collection action by Qwest, as allowed under the ICA, and to avoid any undue impact to the end-user customers should Universal continue to refuse to pay for the services it has ordered and consumed. If that is the case, then the Commission should simply order Universal to pay the current balance (less about $24,300 in credits), under the terms the

Commission has previously approved between the parties. At the very least, the Commission should order Universal to pay $190,000. That is the only fair interim requirement under the facts of this case and under the terms of the ICA.

DATED: July 25, 2007

Respectfully submitted,

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

IC 13

Universal Telecommunications, Inc., Plaintiff, v. Qwest Corporation, Defendant.	**SUPPLEMENTAL NON-CONFIDENTIAL AFFIDAVIT OF NANCY J. BATZ**

STATE OF OREGON)
) ss:
COUNTY OF MULTNOMAH)

I, Nancy J. Batz, being first duly sworn, depose and state as follows:

1. I am a Senior Access Manager in the Wholesale Carrier Relations Department of Qwest Corporation ("Qwest"). My business address is 421 SW Oak Street, Room 8S16, Portland, Oregon 97204. My current job responsibilities include (a) providing account and access management services to independent telephone companies in Oregon, and (b) providing access management services to 24 competitive local exchange carriers ("CLECs"), including Universal Telecom, Inc. (Universal). I have personal knowledge of the facts set forth below. My background and qualifications are set forth in the non-confidential affidavit I filed in this matter on Monday, July 23, 2007.

2. Because part of my duties Access Manager include working directly with Universal, I was one of the two managers at Qwest who engaged in discussions with Mr. Roderick and Mr. Martin of Universal as part of the dispute resolution process. Those discussions took place on June 15, 2007 and July 2, 2007. I was either an author of written

communications between Qwest and Universal, the recipient of such communications from Universal, or reviewed such communications when others were the authors or recipients. Having reviewed those communications, and having been involved in oral communications on occasion with a Universal representative, the first time I became aware that Universal "might" be asserting other bases for its disputes, other than its appeal to federal court, was during the June 15, 2007 call attended by Mr. Roderick and Mr. Martin of Universal and Mr. Hult and me for Qwest. During the course of the conversation, Universal, for the first time, suggested that a dispute-related issue, other than the existence of the appeal, might exist. Neither Mr. Roderick nor Mr. Martin were specific on the subject, however, other than to advise Qwest that Universal might have some disputes related to Qwest's charges for "excess capacity."

3. As noted in my July 23, 2007 nonconfidential affidavit, one of my duties is to gather the usage data necessary to properly calculate a relative use factor ("RUF") under interconnection agreements with different CLECs and then to see that those RUFs are applied to the recurring billings for transport services such as direct trunked transport and entrance facilities. I have performed both functions for multiple CLECs. Never at any time, as part of all of those activities, have I calculated a RUF on the basis of the "capacity" of the circuits being used by a CLEC, nor have I ever been asked to do so by a CLEC. In fact, it would be impossible to do so using the calculation methodology set forth in Exhibit H of the agreement. Furthermore, never at any time during all of this activity have I ever applied the RUF for Qwest's billing purposes on the basis of the capacity of a particular service actually being used. RUFs have always been applied to the full price of such services as established in each CLEC's respective ICA.

4. Paragraph 12 of Universal's Complaint states that "Qwest had been assessing reciprocal compensation at the higher End Office Call termination rate of $0.0013301 per minute of use, contrary to the terms of the ICA". I have confirmed that Qwest has been billing Universal reciprocal compensation per-minute of use charges at the incorrect rate, as Qwest acknowledges that on Exhibit J to the ICA, Universal chose to exchange all compensable traffic at the per minute of use ("MOU") rate established in the *ISP Remand Order,* currently $0.0007. (See Qwest's Answer, ¶ 11.) Qwest is currently calculating a credit to its charges due to Universal for the over-billing, which Qwest estimates to be approximately $500. Qwest has corrected the rate in its billing system to reflect the correct rate of $0.0007 per minute of use on a going forward basis.

DATED this 25th day of July, 2007.

Nancy J Batz

Nancy J. Batz

Subscribed and sworn to before me this 25th day of July, 2007.

OFFICIAL SEAL
JANICE KAY KERR
NOTARY PUBLIC-OREGON
COMMISSION NO. 371462
MY COMMISSION EXPIRES SEPTEMBER 17, 2007

Janice Kay Kerr

NOTARY PUBLIC

Residing at Multnomah County

My Commission expires: 9/17/07

CERTIFICATE OF SERVICE

IC 13

I hereby certify that on the 25th day of July, 2007, I served the foregoing **QWEST CORPORATION'S RESPONSE TO COMMISSION QUESTIONS PROPOUNDED BY ADMINISTRATIVE LAW JUDGE ALLAN ARLOW** and the **SUPPLEMENTAL NON-CONFIDENTIAL AFFIDAVIT OF NANCY BATZ** 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 25th day of July, 2007.

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