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September 17, 2007

**VIA e-FILING and
FEDERAL EXPRESS**

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

Re: IC 13

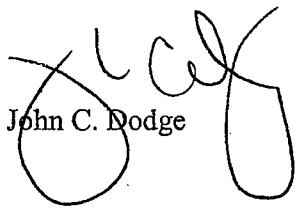
Dear Ms. Nichols Anglin:

Enclosed for filing in the above-referenced docket please find an original and five copies of "Brief in Support of Order" of Universal Telecom, Inc. ("Universal"). Attached to that filing is a copy of a proposed order as requested by Administrative Law Judge Allan J. Arlow.

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 PUBLIC UTILITY COMMISSION
OF OREGON**

IC 13

<p>In the Matter of</p> <p>UNIVERSAL TELECOMMUNICATIONS, INC. vs. QWEST CORPORATION</p> <p>Complaint for Enforcement of Interconnection Agreement.</p>	
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BRIEF IN SUPPORT OF PROPOSED ORDER

Universal Telecom, Inc. ("Universal") hereby provides its "Brief in Support of Proposed Order" in the above-captioned matter, as required by Judge Arlow's bench ruling of September 11, 2007. Universal believes that the Commission should extend the current stay through November 15, 2007 for the reasons set forth below.

Universal appreciates that the Commission faces a difficult decision in this matter. Two companies under the Commission's jurisdiction have a heartfelt disagreement regarding the propriety of certain costs, and the responsibility for those costs. The Commission so far has ruled in Qwest Corporation's ("Qwest") favor, and Universal has appealed the Commission's essential ruling to federal court. If, however, a significant portion of the disputed costs are immediately demanded from Universal, such action will force Universal out of business overnight, leaving tens of thousands of Oregonians without access to local dial-up Internet access service.

These are the real world consequence facing the stakeholders here. Nonetheless, Universal believes that the Commission has the discretion under Oregon law to allow

Universal to exit the business which underlies the disputed costs in an orderly fashion, which also guarantees Qwest at least partial immediate payment of the disputed costs. The price of Universal exiting the managed modem business is high no matter which path the Commission chooses. Universal's recommended course of action represents the least costly option available, and the option that best protects the public interest.

A. Universal Satisfies the Standards for A Stay.

Oregon courts generally employ a "competing interests" test to determine whether to exercise their discretion to institute a stay:

The possible damage which may result from the granting of a stay, the hardship or inequity which a party may suffer in being required to go forward [sic], and the orderly course of justice measured in terms of simplifying or complicating issues, proof, and questions of law which would be expected from a stay.

Wachner v. Aramark Educational Svcs., Inc., CV 02-528, 2004 U.S. Dist. LEXIS 13603 (D. Or June 15, 2004) (citations omitted). Universal believes the Commission can and should employ the same balancing test here. Given the strong public interest in completing the orderly transition of customers from Universal to GlobalPOPs, and the limited interest Qwest has in an immediate disconnection, the Commission should exercise its discretion to continue the stay through November 15, 2007.

Universal anticipates that Qwest will argue that the Commission's past decisions in ARB 671 and IC 13 regarding application of a Relative Use Factor to ISP-bound traffic, and Universal's purported actions in response, militate against continuing the stay. Oregon law suggests otherwise. A party entitled to a stay if it is able to make a "very strong showing" that the balance of hardships is in favor of its need for equitable relief,

notwithstanding its legal claims.¹ In the instant matter, the balance of hardships is entirely in the public's favor (*i.e.*, in allowing the transition of Internet access service from Universal to GlobalPOPS) and therefore, since continuation of the stay would most benefit the public, Universal's position meets the "very strong showing" test.

1. Lifting the Stay Would Cause Immediate and Irreparable Harm to the Public.

Lifting the stay would result in the disconnection by Qwest of all circuits, resulting in a sudden and serious disruption of services to the end user customers of Universal's 27 Internet Service Provider customers. Disconnection would immediately deprive more than 24,000 Oregonians of their local dial-up Internet access. The vast majority of these end users are Qwest basic service customers in rural areas, customers who have no alternative for Internet access other than dial-up.² These end users rely on Internet service for small business operations, educational research, access to government services, on-line shopping and other transactions, and include residents, businesses, schools, and churches.

Lifting the stay would threaten the orderly transition of Universal's managed modem customer base to GlobalPOPs and protect the interests of Universal's ISP customers. As the Commission is now aware, Universal has been seeking to exit the managed modem business since the final decision in ARB 671 was released. Universal has dedicated significant resources to that effort over many months, including the

¹ See, e.g., *Studio Red, Inc. v. Rockwell Architecture Planning & Design, P.C.*, 2007 U.S. Dist. LEXIS 39562, *5 (D.N.Cal.) (citing *Rodeo Collection, Ltd. v. West Seventh*, 812 F.2d 1215, 1217 (1987)) (to overcome a weak showing of merit, a plaintiff seeking a preliminary injunction must make a very strong showing that the balance of hardships is in its favor).

² According to one recent report, the United States ranks 12th in the world in broadband penetration, with approximately 53% of Internet users still accessing the Internet via dial-up connections. See http://www.bizreport.com/2007/02/us_lags_in_broadband_penetration_rankings.html.

placement of modems in local calling areas (which recharacterized those markets as “non-VNXX” under ARB 671) and searching for a buyer of Universal’s customer base. However, it was not until June 27, 2007 that Universal was able to execute a nondisclosure agreement with GlobalPOPs that signaled meaningful negotiations toward the sale of the customer base.³ The transaction was not consummated until September 7, 2007, and was immediately disclosed to the Commission and Qwest (despite the fact that the nondisclosure agreement was and is still operative, and despite the fact that no state law obligates Universal to disclose the sale or its terms).

Universal and GlobalPOPs have established an aggressive schedule for the transition and are optimistic that Universal’s ISP customers, and their end user customers, will be fully transitioned to GlobalPOPs without service disruption by November 15, 2007. Although certain factors, like the availability of capacity from GlobalPOPs’ network suppliers, are outside the parties’ control, Universal believes that the November 15, 2007 date should accommodate any unforeseen delays in the transition.

Obviously, lifting the stay and allowing Qwest to disconnect all service would make the transition impossible. As noted above, ISPs and their customers, who are also Qwest end users, would lose service immediately if Qwest is allowed to disconnect. If the stay is continued for the brief period requested by Universal, the public should suffer no harm since the transition is designed to move customers from Universal to GlobalPOPs without causing a disruption to or noticeable change in the services the

³ Qwest’s assertion that Universal filed its notice in this docket on July 7, 2007 to permit Universal to sell its managed modem business to GlobalPops is false and unsupported. Universal’s notice was prompted by Qwest’s repeated disconnection threats, that last of which was dated July 3, 2007. *See* Exhibit 1 to Universal Telecom, Inc.’s Complaint for Enforcement of Interconnection Agreement, Docket No. IC 13 (filed July 16, 2007).

customers receive. Further, Universal believes it is highly likely that many of the ISPs that rely on Universal would not survive if their service was immediately terminated.

2. Universal will also suffer significant injury if the stay is lifted.

If the stay is lifted, and Qwest immediately disconnects all services as it intends to do, Universal will not be able to complete an orderly transition of its customers. As a result, Universal will be forced to shut its doors, lay off employees, breach contracts and liquidate its remaining assets.⁴ Universal will lose all goodwill with existing customers and may be plunged into sudden bankruptcy. Even Universal's rights to appeal the ARB 671 decision may be impacted.⁵

3. The potential harm to Qwest from continuing the stay is very limited.

In contrast to the significant harm to the public and to Universal if the stay is lifted, Qwest's potential harm from a continued stay is very limited. In fact, Qwest's damages may be greater if the stay is lifted than if it is continued. As counsel for Universal noted at the prehearing conference on September 11, 2007, to the best of Universal's information and belief the monthly RUF charges invoiced by Qwest total approximately \$33,000. Qwest withholds approximately \$18,000 per month from Universal for undisputed, "truly local" reciprocal compensation payments. Qwest's claimed revenue loss, then, is approximately \$15,000 per month.⁶ Ironically, if the stay is lifted and Qwest disconnects all services, Qwest's revenue loss will rise again to \$33,000 per month because it would be difficult, if not impossible, for Qwest to repurpose dark

⁴ Universal already has furloughed employees and reduced or eliminated salaries for others.

⁵ Oral argument in the appeal is set for September 18, 2007. If Universal is put out of business, a serious question arises as to whether its appeal becomes moot. *E.g. Russman v. Board of Education*, 360 F.3d 114 (2d Cir. 2001) (case becomes moot if dispute dissolves due to change in circumstances).

⁶ If the Commission, as Universal requests herein, requires Qwest to process Universal's current and future disconnection orders while the stay continues, then the monthly revenue loss will be further reduced.

circuits during the next 60 days, let alone realize comparable revenues from them during that period.

In large measure, the circuits on Qwest's side of the parties' points of interconnection that support Universal's managed modem service—interoffice transport trunks and entrance facilities—have been in place and operating for over 4 years, with some facilities older than 8 years.⁷ Qwest has borne responsibility for their costs during this 4-8 year period. The actual fiber optic and copper facilities will continue to exist if Qwest is allowed to disconnect them. Consequently, allowing Qwest to disconnect current circuits will result in *de minimis* cost savings to Qwest. The circuits will remain in place, just in an unlit status. The only cost savings to Qwest once the stay is lifted is the cost of electricity to power the circuits and the marginal back office costs associated with monitoring the circuits.

Although Qwest presumably will argue that it will suffer significant *revenue* loss if the stay continues, Qwest's revenues are sustainable only if the circuits are in operation. If Qwest disconnects, the circuits will not operate. If the stay is continued, circuits will operate and Qwest's revenue loss will be offset—by more than half—due to the reciprocal compensation payments Universal would otherwise receive from Qwest.

Albeit counterintuitive, Qwest's claimed revenue losses will be less if the stay is continued than if Qwest is allowed to immediately disconnect all circuits. Regardless, the actual harm to Qwest of continuing the stay through November 15, 2007 is significantly less than the harm to end user customers, Universal's ISP customers, and Universal itself

⁷ Indeed, the vast majority of the circuits were in place for three to five years before the ARB 671 decision which permitted Qwest to charge for them under the RUF calculation.

if Qwest is allowed to disconnect services before the transition of customers is completed.

Finally, although Qwest has financial interests at stake as a result of the stay, those interests will not be significantly affected, on at least an incremental basis, by a continued stay of disconnection. First, as noted above, continuing the stay would have negligible impact on Qwest's *costs*. Second, even considering Qwest's *revenues*, it is clear that the latest amount claimed owing by Qwest – \$320,000 – is insignificant when compared to Qwest's annual operating revenues. Qwest's 2006 revenues, company-wide, were \$13.9 billion. Qwest's Oregon operations accounted for \$745 million in revenues in 2006. The amount in dispute between Universal and Qwest is thus a fraction of a percent of the revenues Qwest realizes company-wide or on an annual basis in Oregon.⁸ Consequently, the impact of continuing the stay for two months will be minimal on Qwest, and the company will suffer relatively little harm in comparison to the public or Universal were the stay to be lifted.

B. To Mitigate Qwest's Damages, the Commission Should Amend the Stay to Require Qwest to Process Disconnect Orders from Universal.

If the Commission continues the stay through November 15, 2007, Universal further requests that the Commission require that Qwest resume processing of pending and future disconnect requests from Universal. Disconnection of unused circuits serves

⁸ Similarly, the incremental "net revenue" purportedly at risk to Qwest for another two months is negligible to Qwest's operations. The incremental net revenue Qwest will forego from continuation of the stay is, at most, \$30,000 (two months multiplied by \$15,000). As the revenues cited above confirm, this amount is *de minimis* to a company the size and scope of Qwest, and obviously only a fraction of the overall amount Qwest claims it is owed in any event.

only to mitigate the damages Qwest complains of and would further reduce the harm to Qwest during the pendency of the stay.⁹

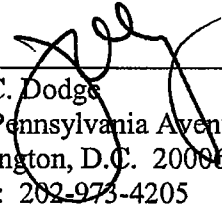
CONCLUSION

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.

DATED this 17th day of September, 2007.

DAVIS WRIGHT TREMAINE LLP

By _____


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Attorneys for Universal Telecommunications, Inc.

⁹ Qwest has the duty to mitigate its purported damages in any event, as under Oregon law, an injured party must "do what reasonable care and business prudence require to minimize his loss." *Enco, Inc. v. F.C. Russell Co.*, 210 Or. 324, 339, 311 P2d 737 (1957).

ORDER NO. 07-___

ENTERED 09/21/07

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
IC 13

<p>In the Matter of</p> <p>UNIVERSAL TELECOMMUNICATIONS, INC. vs. QWEST CORPORATION</p> <p>Complaint for Enforcement of Interconnection Agreement.</p>	<p>ORDER</p>
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Background

On August 22, 2007 the Commission issued Order No. 07-366 in the above-captioned matter. In its order the Commission ruled, *inter alia*, that Qwest Corporation (Qwest) was to “take no action to disconnect or otherwise impair service to the end-user customers of the ISPs that utilize Universal’s service.” On September 10, 2007 Allan J. Arlow, Administrative Law Judge (ALJ) convened a conference in this matter attended by counsel for the Commission and Qwest, various non-legal personnel from Qwest, and counsel for Universal Telecom, Inc. (Universal) in person and via telephone, and 10D Telecom, via telephone.¹

Judge Arlow also directed the parties to submit proposed orders and supporting briefs on the following question: Should the stay adopted in Order No. 07-366 be

¹ Responding to a request by Qwest, Judge Arlow considered whether to join CP 1378 – the pending application docket for 10D Telecom -- to the instant matter. After discussions on the record Judge Arlow denied Qwest’s request and excused counsel for 10D Telecom from the remainder of the conference.

extended until such time as Universal completes the transfer of its managed modem customers to GlobalPOPs? Qwest and Universal each filed briefs and reply briefs on this issue on September 17 and 19, 2007, respectively.

Based on argument and discussions heard on September 10, 2007, and considering the pleadings before the Commission, the Commission will maintain the current stay against disconnection through November 15, 2007, for the express purpose of permitting Universal to transfer its managed modem service customers to GlobalPOPs.

DISCUSSION

As briefed by Universal, the Commission possesses the discretion to impose or extend equitable relief upon a showing that the balance of hardships weigh in a particular party's favor. The Commission finds that, while Qwest has financial interests at risk in this matter, greater harm will result from lifting the stay than sustaining it for a few more weeks. The Commission is concerned that permitting immediate disconnection of service to Universal will seriously disrupt or deny dial-up Internet access for tens of thousands of Oregonians. The public interest thus favors continuation of the stay.

The Commission will extend the stay past November 15, 2007 only upon a showing of good cause by Universal.

The Commission also finds that it is in Qwest's financial interest to mitigate its revenue loss by processing pending and newly submitted disconnection orders from Universal.

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ORDER

IT IS ORDERED THAT:

1. Qwest Corporation shall take no action to disconnect or otherwise impair service to the end-user customers of internet service providers utilizing the services of Universal Telecom, Inc. prior to November 15, 2007.
2. Qwest Corporation shall process all pending and newly submitted disconnections orders from Universal on an expedited basis.

Made, entered and effective _____.

BY THE COMMISSION:

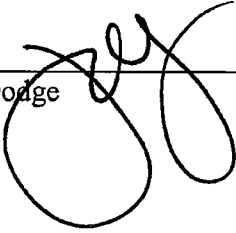
CERTIFICATE OF SERVICE

I hereby certify that on the 17th day of September, 2007, Universal Telecommunications, Inc.'s Brief in Support of Proposed Order and 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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By: 
John C. Dodge