

**BEFORE THE
OREGON PUBLIC UTILITIES COMMISSION**

In the Matter of the Petition of

Qwest Corporation

for Arbitration of Interconnection Rates,
Terms, Conditions, and Related Arrangements
with Universal Telecom, Inc.

ARB 671

**UNIVERSAL TELECOM, INC.'S MOTION TO COMPEL QWEST CORPORATION'S
RESPONSES TO CERTAIN DISCOVERY REQUESTS**

UNIVERSAL TELECOM, INC.

John C. Dodge
K.C. Halm
Gerie A. Voss
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750 (phone)
(202) 452-0067 (fax)

Its Attorneys

November 9, 2005

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Qwest Corporation

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Universal Telecom, Inc. ("Universal"), by its attorneys and pursuant to the Oregon Public Utility Commission's ("OPUC") Prehearing Order in ARB 671, OPUC Rules of Procedure 860-014-0070 (3), and 860-016-0000, *et. seq.* and applicable Oregon Rules of Civil Procedure, respectfully submits its Motion to Compel Qwest Corporation's Responses to Universal's Discovery Requests No. 20 and 21. Universal respectfully requests that the Commission enter an Order compelling Qwest to respond to these Requests and to require Qwest to pay for attorney's fees associated with this Motion.

Pursuant to O.A.R. 806-014-0700 Universal hereby certifies that representatives of both Parties have been unable to resolve this dispute without the Commission's intervention.

BACKGROUND FACTS

1. On October 25, 2005, Universal served discovery requests upon Qwest Corporation ("Qwest") entitled "Universal Telecom, Inc.'s First Set of Interrogatories, Requests for the Production of Documents, and Requests for Admission to Qwest Corporation."

2. On November 1 2005, Qwest served, by electronic mail, its responses, general objections, and specific objections to Universal's Requests. Qwest did not provide any responses to Requests No. 20 and 21 (attached hereto as Exhibit 1 and 2) aside from specific objections. Qwest's responses to Requests No. 20 and 21 were evasive and incomplete, and should be treated under Oregon law as a failure to answer such Requests in violation of the OPUC's Prehearing Order and Oregon Rules of Civil Procedure (ORCP) 46A(3).

3. In Request No. 20, Universal requested the following information:

Identify any state where Qwest is the incumbent LEC and Qwest has agreed or been ordered to pay reciprocal compensation on all ISP-bound traffic since 1996. In any state in which Qwest has agreed or been ordered to pay reciprocal compensation on all ISP-bound traffic also identify:

a) the docket numbers of any proceedings in which Qwest was so ordered;
and

b) the interconnecting CLEC to whom Qwest did, or does, pay reciprocal compensation on all ISP-bound traffic; and

c) the interconnection agreement, or amendment, (identified by docket number, date of filing and interconnected CLEC which reflects such obligation)

d) the date on which Qwest's liability for such obligations began.

4. In Request No. 21, Universal requested the following information:

Identify any state where Qwest is the incumbent LEC and Qwest has agreed or been ordered to accept financial responsibility for all facilities on its network used to deliver originating traffic to a point of interconnection with an interconnected CLEC. In other words, identify any state in which Qwest does not charge an interconnected CLEC, or is not compensated by the CLEC, for facilities that carry Qwest-originated traffic to the CLEC (what Qwest refers to as "LIS services").

5. Qwest objected to these Requests and failed to provide answers based on its claim that the Requests "would be unreasonably burdensome, ... would require Qwest to perform a special study, that the information (orders or interconnection agreements) is a matter of public

record, would require Qwest to perform legal research for Universal, and that the information is not calculated to lead to the discovery of relevant evidence.”

ARGUMENT

I. The Commission Should Grant Universal’s Motion and Thereby Compel Qwest to Respond to Request Nos. 20 and 21

Rule 36B(1) of the Oregon Rules of Civil Procedure allows parties to seek discovery:

regarding any matter, not privileged, which is relevant to the claim or defense of the party seeking discovery or to the claim or defense of any other party It is not ground for objection that the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

The information sought under Requests No. 20 and 21 is discoverable under these parameters. These Requests are directly relevant to the only two disputed issues in this arbitration: (1) cost responsibility for facilities used to carry Qwest-originated traffic; and (2) payment of reciprocal compensation on *all* ISP-bound traffic. For both issues Qwest claims that its positions are supported by state and federal law; and Qwest cites to several state PUC decisions that it claims support its legal arguments. If Qwest believes its positions are supported by state and federal law, there is no reason that Qwest would agree to accept financial responsibility for facilities to carry Qwest-originated traffic from other competitive local exchange carriers (“CLECs”), or to pay reciprocal compensation on all ISP-bound traffic under interconnection agreements with other CLECs. Qwest already has acknowledged that doing so would have a substantial financial impact on its business.

If, however, Qwest responds that it has agreed, or been ordered, to pay for such facilities and reciprocal compensation for other CLECs, that response would substantially undermine its claim that it is not required to do so under state and federal law. Of course, if Qwest has not agreed or been ordered to do so a simple response of “None” would suffice. These facts would

also inform the ALJ in this case, as it would be useful to know whether other State PUCs have rejected Qwest's claims on these two issues. Accordingly, the information sought by Universal is directly relevant to its claims with respect to these two issues.

Qwest's objections to these Requests are not valid, legal bases for failing to provide the information sought in these discovery requests. Qwest, the party objecting to the discovery request, has the burden of showing why the request might not be relevant or reasonably calculated to lead to the discovery of relevant evidence. *See, e.g., Mockler v. Skipper*, 1994 U.S. Dist. LEXIS 3335 at *2 (D. Or. 1994) (citing 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2214, at 644 (1970)). Qwest's objections fail as if the Requests seek information that is relevant to Universal's claim or defense, as illustrated above. "The fact that [a discovery response] may be somewhat burdensome and expensive to the party responding to discovery is not ordinarily a reason to deny discovery which is otherwise appropriate." *Seaward Yacht Sales, Ltd. v. Murray Chris-Craft Cruiser's, Inc.*, 1988 U.S. Dist. LEXIS 5266 at *6 (D. Or. 1988) (citing 10A Fed. Proc. L. Ed. § 26:401 (1988)).

Further, Qwest's objection based on its statement that the Requests seek information included in the public record, is not a valid, legal basis for objection.

It is worth noting here that Universal is not asking Qwest to produce the actual agreement, or Order, memorializing an obligation to accept cost responsibility for facilities that carry Qwest-originated traffic, or for paying reciprocal compensation on all ISP-bound traffic. Instead, Universal *only seeks a list* of agreements or orders reflecting such obligations. Production of such a list in this case is appropriate because Qwest has recently stipulated with OPUC staff that it has failed to file certain interconnection agreements in Oregon.¹ *See, e.g.,*

¹ *See, e.g.,* OPUC Docket No. UM 1168.

OPUC Docket No. UM 1168. In addition, this problem has occurred in a number of other states in which Qwest operates.

Given this situation, it is possible that Universal's own research of public records in Oregon, and elsewhere, would not uncover all relevant agreements or orders. Instead, it is conceivable, based on Qwest's past violations of federal and state law with respect to the filing of interconnection agreements and associated documents, that such an agreement or order exists or could exist, but is not on file with the appropriate State PUC. For these reasons Qwest's "public records" defense should be rejected. Qwest should be ordered to produce such a list, which would in turn allow Universal to complete its research of public records to determine if or where such documents exist.

Moreover, if the information is contained in the public record, it would not be "difficult or time-consuming" for Qwest to obtain the required information. *State of Oregon v. Whitmire*, 151 Or. App. 192, 195 (1997). Accordingly, Qwest has not met this burden for objecting to either request. Qwest's blanket objections in their responses without specifically demonstrating how responding to the discovery requests would be unreasonable or unduly burdensome or why the discovery is not relevant or overbroad is unacceptable.

II. The Commission Should Award Universal Costs, Including Attorneys' Fees, Generated in Bringing this Motion.

Rule 46A(4) of the Oregon Rules of Civil Procedure provides that if a Motion to Compel is granted:

[T]he court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

Pursuant to this provision, the Commission should award Universal costs and attorneys' fees generated in bringing this Motion. Universal has made a good faith effort to obtain the information sought in this Motion without the Commission's involvement.

Additionally, Qwest is not justified in failing to produce the requested information. In fact, the information clearly is central to the proper adjudication of this matter, as it directly requests that Qwest admit or deny whether its positions on the arbitration issues are supported by federal and state law. Accordingly, under Rule 46A(4), Universal is entitled to attorneys' fees and costs associated with bringing this Motion

WHEREFORE, for all of the foregoing reasons, Universal respectfully requests that the Commission grant this Motion and enter an order consistent with the relief requested herein.

Respectfully submitted,


UNIVERSAL TELECOM, INC.

John C. Dodge
K.C. Halm
Gerie A. Voss
Cole, Raywid & Braverman, L.L.P.
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, D.C. 20006
(202) 659-9750 (phone)
(202) 452-0067 (fax)

Its Attorneys

November 9, 2005

EXHIBIT 1 Qwest Responses to
Universal Data Requests
Number 20

Oregon
ARB 671
UTI 01-020

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 020

Identify any state where Qwest is the incumbent LEC and Qwest has agreed or been ordered to pay reciprocal compensation on all ISP-bound traffic since 1996. In any state in which Qwest has agreed or been ordered to pay reciprocal compensation on all ISP-bound traffic also identify:

- a) the docket numbers of any proceedings in which Qwest was so ordered; and
- b) the interconnecting CLEC to whom Qwest did, or does, pay reciprocal compensation on all ISP-bound traffic; and
- c) the interconnection agreement, or amendment, (identified by docket number, date of filing and interconnected CLEC which reflects such obligation)
- d) the date on which Qwest's liability for such obligations began.

RESPONSE:

Qwest hereby objects to Request No. 20 on the ground that it would be unreasonably burdensome to require Qwest to provide the information (Qwest is an ILEC in the states of Oregon, Washington, Idaho, Montana, Utah, Arizona, Nebraska, New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Minnesota and Iowa), that it would require Qwest to perform a special study, that the information (orders or interconnection agreements) is a matter of public record, would require Qwest to perform legal research for Universal, and that the information is not calculated to lead to the discovery of relevant evidence.

EXHIBIT 2 Qwest Responses to
Universal Data Requests
Number 21

Oregon
ARB 671
UTI 01-021

INTERVENOR: Universal Telecom, Inc.

REQUEST NO: 021

Identify any state where Qwest is the incumbent LEC and Qwest has agreed or been ordered to accept financial responsibility for all facilities on its network used to deliver originating traffic to a point of interconnection with an interconnected CLEC. In other words, identify any state in which Qwest does not charge an interconnected CLEC, or is not compensated by the CLEC, for facilities that carry Qwest-originated traffic to the CLEC (what Qwest refers to as "LIS services").

RESPONSE:

Qwest hereby objects to Request No. 21 on the ground that it would be unreasonably burdensome to require Qwest to provide the information (Qwest is an ILEC in the states of Oregon, Washington, Idaho, Montana, Utah, Arizona, New Mexico, Colorado, Wyoming, North Dakota, South Dakota, Minnesota, and Iowa), that it would require Qwest to perform a special study, that the information (orders or interconnection agreements) is a matter of public record, would require Qwest to perform legal research for Universal, and that the information is not calculated to lead to the discovery of relevant evidence.

CERTIFICATE OF SERVICE

I, K.C. Halm, hereby certify that on 9th day of November, 2005, I caused copies of forgoing Universal Telecom, Inc.'s Motion to Compel Qwest Corporation's Responses to Certain Discovery Requests to be sent by electronically to the following parties:

Alex M. Duarte
Qwest Corporation
421 SW Oak Street
Suite 801
Portland, OR 97204
Alex.duarte@qwest.com

Ted D. Smith
Stoel Rives LLP
201 S. Main Street
Suite 1100
Salt Lake City, UT 84111
tsmith@stoel.com

Nancy Batz
Qwest Corporation
421 SW Oak Street
Suite 830
Portland, OR 97204
Nbatz@qwest.com



K.C. Halm