

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

ARB 671

In the Matter of QWEST CORPORATION'S )  
Petition for Arbitration of Interconnection )  
Rates, Terms, Conditions, and Related ) **RULING**  
Arrangements with UNIVERSAL TELE- )  
COMMUNICATIONS, INC. )

**DISPOSITION: MOTION TO COMPEL DENIED**

On November 9, 2005, Universal Telecom, Inc. (Universal), filed a Motion to Compel Qwest Corporation's (Qwest's) Responses to Certain Discovery Requests (Motion)<sup>1</sup> because on November 1, 2005, Qwest had failed to respond to Universal's data requests Nos. 20 and 21 in a manner satisfactory to Universal. The text of those data requests is affixed hereto as Attachment A. In essence, Request No. 20 asks that Qwest provide Universal with a list of all interconnection agreements or regulatory proceedings where Qwest, as the incumbent LEC either agreed or was ordered to pay reciprocal compensation on all ISP-bound traffic since 1996. Request No. 21 asks for Qwest to provide Universal with a list of all interconnection agreements or regulatory proceedings where Qwest, as the incumbent LEC either agreed or was ordered "to accept financial responsibility for all facilities on its network used to deliver originating traffic to a point I interconnection with an interconnected CLEC. In other words, it asks Qwest to 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").<sup>2</sup>

Universal asserts that the information requested is discoverable under ORCP Rule 36B(1) and is relevant to 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. Universal argues that if Qwest believes its legal positions in this proceeding are correct, it would never have agreed to accept financial responsibility for the facilities, but if it had done so, either voluntarily or under

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<sup>1</sup> Universal cites OARs 860-014-0070(3), 860-016-0000, *et seq.*, and the Oregon Rules of Civil Procedure as the procedural bases of its Motion. I have assumed that the citation to "O.A.R. 806-014-0700," regarding certification of inability to resolve the dispute, is a numeric transposition of "OAR 860-014-0070," and find that Universal has met the procedural requirements under our Rules.

<sup>2</sup> Motion, p. 3.

regulatory duress, then its legal position is undermined. As to Qwest's assertion that the request is burdensome, Universal cites *Seaward Yacht Sales, Ltd. v. Murray Chris-Craft Cruisers, Inc.*,<sup>3</sup> which states: "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." Universal also asserts that "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."<sup>4</sup>

In its Response (Response), Qwest states that the data requests would require a special study covering thousands of agreements with hundreds of CLECs in 14 states over a period of almost ten years and that the information, while voluminous is publicly available, a fact Universal acknowledges.<sup>5</sup> Furthermore, Qwest asserts that Universal is already in possession of all of the agreements at issue in docket UM 1168, including those that the Commission agreed were not interconnection agreements. Qwest further characterizes Universal's request for costs and attorneys' fees as "bizarre" and without precedent and the requests themselves as "grossly overbroad and unduly burdensome." Furthermore, Qwest asserts that it "has offered to provide the non-public information that Universal has claimed justifies these two requests, but Universal has rejected Qwest's offer."<sup>6</sup>

Qwest distinguishes *Seaward* by noting that it is limited to circumstances where discovery may be "somewhat" burdensome and expensive, and where it is "otherwise appropriate," neither of which is true in the instant case. Rather, Qwest cites two Ninth Circuit cases upholding the denial of motions to compel, where documents relating to far-ranging locations were denied "without a more specific showing that the burdens of production would be minimal."<sup>7</sup> Qwest further argues that the information Universal seeks is not discoverable because the issues that the Commission must decide in arbitrating a new interconnection agreement are between Qwest and Universal in Oregon under current law. How other commissions ruled on different language under different state interconnection policies over the course of many years is irrelevant to the task at hand.<sup>8</sup>

## DISCUSSION

To enunciate the standard for its entitlement to discovery of the information requested in data requests Nos. 20 and 21, Universal cites ORCP Rule 36B(1) and several Oregon Administrative Rules, including, but only in general, OAR 860-016-0000, *et. seq.*, and enlists the *Seaward* case. However, the instant discovery dispute turns upon the language in OAR 860-016-0030(5), which relates

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<sup>3</sup> 1988 U.S. Dist. LEXIS 5266 at \*6 (D. Or. 1988), citing 10A Fed. Proc. L. Ed. § 26:401(1988).

<sup>4</sup> Motion, p. 5.

<sup>5</sup> Response, pp. 1, 8-10.

<sup>6</sup> *Id.*, p. 2.

<sup>7</sup> *Id.*, pp. 3-5 and cases cited therein.

<sup>8</sup> *Id.*, pp. 6, 11.

specifically to discovery in Mediation and Arbitration Under the 1996 Telecommunications Act. It provides as follows:

Formal discovery procedures will be allowed only to the extent deemed necessary by the arbitrator. Parties will be required to cooperate in good faith in voluntary, prompt, and informal exchanges of information relevant to the matter. Unresolved discovery disputes will be resolved by the arbitrator upon request of a party. The arbitrator will order a party to provide information if he/she determines the requesting party has a reasonable need for the requested information and that the request is not overly burdensome.

The above-noted standard differs substantially from that set forth in OAR 860-014-0070 cited by Universal insofar as discovery is “*allowed* only to the extent deemed necessary,” while, in a hearing under OAR 860-014-0070, data requests are “*subject to limitations* imposed by the Commission or Administrative Law Judge.” The plain meaning of the difference in the language is reflected in its effect: in a hearing, data requests are encouraged, whereas in an arbitration, the opposite is true; data requests are permitted only where necessary to analyze and decide the issues presented.

The limitation on the use of data requests in arbitrations is further supported by the fact that OAR 860-016-0030(5) requires, in addition to being necessary to decide the issue, that the request not be overly burdensome. OAR 860-014-0070 contains no such limitation. Thus, the ALJ does not need to make findings as to the validity of Universal’s interpretation of the relevant sections of the Oregon Rules of Civil Procedure, the applicability of Oregon U.S. District Court opinions or the weight to be accorded to scholarly treatises on federal practice and procedure, in order to rule on the Motion to Compel. Rather, the ALJ needs only to determine whether the information sought is necessary to decide the issue and whether the request is overly burdensome.<sup>9</sup>

I have reviewed the scope of the issues presented in this proceeding and the scope of the data requested in Universal’s Request Nos. 20 and 21 and find that they are substantially mismatched. I concur with Qwest’s assertions (which Universal tacitly acknowledges) that the requests are overly burdensome. Furthermore, Universal’s assertion that such information might show that Qwest has acted differently in negotiations with other CLECs in other agreements in other states at other times and thus undermine a legal position taken by Qwest, is of such tenuous relevancy to the issues before us that it fails to meet the standard that “the requesting party has a reasonable need for the requested information” as the rule provides.

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<sup>9</sup> *In the Matter of Covad Communications Company, Petition for Arbitration of an Interconnection Agreement with Qwest Corporation*, ARB 584 Ruling 4-15-05.

**RULING**

Universal Telecom, Inc.'s Motion to Compel Qwest Corporation's Responses to Certain Discovery Requests is DENIED.

Dated at Salem, Oregon, this 23rd day of December, 2005.

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Allan J. Arlow, Arbitrator

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