Qwest
421 Southwest Oak Street
Suite 810
Portland, Oregon 97204
Telephone: 503-242-5420
Facsimile: 503-242-8589
e-mail: carla.butler@qwest.com

Carla M. Butler
Sr. Paralegal

March 18, 2005

Annette Taylor
Oregon Public Utility Commission
550 Capitol St., NE
Suite 215
Salem, OR 97301

Re: ARB 589

Dear Ms. Taylor:

Enclosed for filing are an original and (5) copies of Qwest Corporation's Response to Application for Reconsideration and Clarification of Universal Telecom, Inc., along with a certificate of service.

If you have any questions or concerns, please feel free to give me a call.

Sincerely,

Carla M. Butler
Sr. Paralegal

CMB:
Enclosure
cc: Service List
L:\Oregon\Executive\Duarte\ARB 589 (Universal)\PUC Transmittal Ltr 3-18-05.doc

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

ARB 589

In the Matter of the Petition of QWEST CORPORATION for Arbitration of Interconnection Rates, Terms, Conditions, and Related Arrangements with UNIVERSAL TELECOMMUNICATIONS, INC.	**QWESTS RESPONSE TO UNIVERSAL'S APPLICATION FOR RECONSIDERATION AND CLARIFICATION**

Petitioner Qwest Corporation ("Qwest") hereby submits its Response to the Application for Reconsideration and Clarification that Universal Telecom, Inc. ("Universal") filed on March 3, 2005 ("Application"). For the reasons set forth below and in the briefs that it previously submitted in this docket, Qwest submits that the Commission should deny Universal's Application, and further submits that the Commission should affirm the conclusions reached in its February 9, 2005 Order granting Universal's Motion to Dismiss ("February 9th Order").

ARGUMENT

I. Universal has not met the requirements of OAR 860-14-0095

Preliminarily, the Commission should deny Universal's Application because Universal has not met the requirements of OAR 860-14-0095. Specifically, the Commission's procedural and substantive requirements for applications for rehearing or reconsideration of Commission orders are set forth in OAR 860-14-0095. All applications for rehearing must comply with that rule. Nevertheless, and in spite of the Commission's express reminder of these requirements in the February 9th Order (and that the Commission actually granted Universal's motion to dismiss), Universal's Application fails to identify with specificity both the information required by OAR 860-14-0095(2) and the grounds for reconsideration required by OAR 860-14-0095(3). Qwest submits that the Application is procedurally deficient, and for the reasons set forth more

fully herein, substantively deficient. Accordingly, there are no grounds for reconsideration, and thus the Commission should deny the Application.

II. Reconsideration is not warranted because of the manner in which the Qwest/Universal ICA was submitted to the Commission for approval

As a substantive matter, reconsideration is not warranted here because of the manner in which the Qwest/Universal ICA was submitted to the Commission for approval. First, as a preliminarily matter, Qwest denies that it engaged in any intentional misrepresentation or "subterfuge" in 1999 in submitting the Qwest/Universal interconnection agreement (the "Qwest/Universal ICA") for Commission approval as an opt-in agreement pursuant to section 252(i) of the 1996 Telecommunications Act (the "Act"). Having said that, and although Qwest respectfully disagrees with any conclusion or implication that the parties intentionally misled the Commission regarding the nature of their agreement at the time of its submission, the Commission need not further consider this issue in disposing of the Application.[1]

As related to the Application, Qwest categorically denies Universal's allegation that Qwest somehow "altered" the Qwest/Universal ICA's Term of Agreement provision without its knowledge. Qwest further denies Universal's allegation that "Universal had no reason to search for or believe that such change might have taken place within the document" (thereby suggesting that Universal did not know what was in the Qwest/Universal ICA at the time it was filed). Universal offers no evidence whatsoever in support of its inflammatory allegations.[2]

---

[1] Qwest has diligently researched the matter and cannot determine why the Qwest/Universal ICA was submitted as an opt-in to the Qwest/MFS ICA, even though the Term of Agreement provisions differed. In any event, Qwest does not contest the Commission's ruling that the Term of Agreement provision of the Qwest/MFS interconnection agreement actually governs the Qwest/Universal ICA.

[2] Additionally, Universal's references to the allegedly "unlawful hand-written addendum" is a red herring and thus is completely irrelevant to this matter, and therefore, the Commission should wholly disregard them. Qwest recently submitted a data request to Universal requesting copies of any documents or evidence in support of its "subterfuge" allegations, and Qwest reserves the right to seek permission to supplement this Response if necessary once it receives Universal's response to its data requests.

In addition, Universal's allegations are particularly disingenuous given that it filed its motion to dismiss Qwest's arbitration petition expressly based upon the Qwest/Universal ICA's Term of Agreement section that Universal has repeatedly alleged was specifically negotiated to represent the parties' intentions. The following is merely a sampling of Universal's prior statements, *in this docket,* concerning the Qwest/Universal ICA's Term of Agreement provision:

- "Universal is entitled to rely on the ***benefit of the bargain*** it struck with Qwest on this issue . . . Qwest's Petition, therefore, amounts to a request for extraordinary equitable relief – reformation of the Term provision of the ICA." (See Universal's Motion to Dismiss, at p. 5 (emphasis added).)

- "Reformation of this contract term by the Commission is an equitable remedy that should be reserved for extraordinary circumstances not alleged or present here. At stake is the fundamental principle of freedom of contract between the Parties to craft an agreement subject to specific limitations." (See Universal's Motion to Dismiss, at p. 6.)

- Here, the Parties have ***contractually agreed*** that their interconnection contract will continue in force until they reach mutual assent on termination and/or renegotiation." (See Universal's Motion to Dismiss, at p. 15 (emphasis added).)

- "In the instant case, to *ignore* the Term of Agreement and would contravene the parties' clearly expressed intent and nullify the Term of Agreement, an impermissible result under Oregon contract law." (See Universal's Initial Brief, at p. 6 (emphasis in original).)

Universal's arguments in support of its Application lack principle. Moreover, the completely contradictory positions it has taken at different times in the same docket graphically illustrate its willingness to advance whatever arguments may be convenient at the time in order to obtain what it wants -- a perpetual ICA. The Commission should not give any credibility to the notion that Qwest somehow duped Universal into signing the ICA with an "altered" Term of Agreement provision, or that any of Universal's revisionist history concerning the signing of the Qwest/Universal ICA somehow compels the Commission to reconsider its February 9th Order.

III. Universal is not entitled to the benefit of subsequent amendments to the MFS ICA

Universal next argues that, even if the Qwest/MFS ICA term provision does apply to the Qwest/Universal ICA, the February 9th Order somehow deprives Universal of the benefit of the MFS/Qwest ICA to which it alleges it is entitled. The "benefit" of which Universal believes it is being deprived is the supposed waiver of the sentence in the MFS/Qwest ICA Term section that states: "The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."

Although Universal's argument on this point is somewhat confusing, the gist of it appears to be that: (1) Qwest and MFS somehow waived the enforceability of the sentence quoted above by not commencing negotiations of a new ICA by September 17, 1999 (the two-year anniversary of the effective date of their ICA), and that such alleged "waiver" applies to the Qwest/Universal ICA; (2) the Commission approved the Qwest/Universal ICA without the above-quoted sentence (because it approved a *subsequent* amendment to the MFS/Qwest ICA that acknowledged the expiration of the negotiation deadline set forth in that sentence), and thus Universal is entitled to the benefit of that Qwest/MFS ICA amendment, and (3) even if that Qwest/MFS ICA sentence were part of the Qwest/Universal ICA, the parties somehow "waived" its enforceability by not requesting renegotiation within two years of execution (i.e., September 22, 2001). Universal's waiver argument is wholly without merit, and thus the Commission should disregard it.

First, the parties to the Qwest/MFS ICA did not waive the provision permitting either of them to commence negotiations merely because negotiations did not occur within two years of the ICA's effective date. In fact, the Qwest/MFS ICA expressly states, in section JJ (a provision Universal apparently overlooked in preparing its Application), that "[t]he failure of either Party to enforce any of the provisions of this Agreement or the waiver thereof in any instance ***shall not***

be construed as a general waiver or relinquishment on its part of any such provision, but the same shall, nevertheless, be and remain in full force and effect." (Emphasis added.)

More to the point, even if MFS and Qwest had arguably waived the provision (which Qwest denies), such waiver would have had nothing to do with Universal. To Qwest's knowledge, this Commission has never ruled that an amendment to an interconnection agreement applies automatically to any other interconnection agreement that had *previously* opted in to that agreement. Indeed, before now, no party has ever seriously advanced such a novel (and meritless) argument. The Qwest/MFS ICA is entirely separate from and independent of the Universal/Qwest ICA, and the two have nothing to do with each other. Once Universal opted into the Qwest/MFS ICA, the Qwest/Universal ICA became its own agreement, subject to amendment only by express agreement of Qwest and Universal, and approval by this Commission.

Similarly, Universal's contention that the Commission somehow retroactively "ratified" the "expiration" of the final sentence of the Term of Agreement provision when it approved an amendment to the MFS/Qwest ICA in August 2002 is both illogical and irrelevant. The same holds true with respect to Universal's argument that such "expiration" somehow applies to the Universal/Qwest ICA (even though the MFS/Qwest amendment occurred almost ***three years after*** the effective date of the Universal/Qwest ICA). Again, Qwest disputes Universal's contention that the August 2002 amendment to the MFS/Qwest ICA somehow serves as an acknowledgement that the last sentence of the provision had expired, or that the Commission somehow "ratified" the alleged expiration by approving the amendment. Nevertheless, even assuming that the August 2002 amendment of the MFS/Qwest ICA could be construed to be an acknowledgement that the sentence pertaining to renegotiation had expired, that amendment would be completely irrelevant to the Universal/Qwest ICA (precisely because Universal and

Qwest did not enter into a similar amendment). In short, any activity under the Qwest/MFS ICA is completely irrelevant to this docket, and thus need not be considered further.

Finally, Universal is incorrect in arguing that, to the extent the last sentence of the Qwest/MFS ICA Term of Agreement provision would be deemed part of Qwest/Universal ICA, the parties have somehow "waived" their rights to unilaterally request negotiation of a replacement ICA (by failing to commence negotiations by September 22, 2001, or two years from the effective date). Nowhere in the Qwest/Universal ICA does the agreement specifically state that the parties waive their rights to unilaterally seek negotiation of a replacement ICA if they fail to commence negotiations within two years. Again, Universal has apparently overlooked section JJ of the Qwest/Universal ICA, an express "no waiver" provision identical to that in the Qwest/MFS ICA, when it argued that the Qwest/Universal ICA "contains no non-waiver clause." (See Application at p. 7.)

Ultimately, all of Universal's arguments, untenable as they are, appear to be directed at one obvious goal: a Commission finding that the "critical" last sentence in the Qwest/MFS ICA Term of Agreement provision is not a part of the Qwest/Universal ICA, such that Universal could then make the argument that, absent "mutual agreement," Qwest cannot demand negotiations for a new ICA. In other words, Universal merely wants to reargue the very issue that commenced this case in the first place, and which the Commission has already resolved.

For all the reasons that Qwest has already briefed, the Qwest/Universal ICA does *not* require Universal and Qwest to "mutually agree" to negotiate a new ICA, with or without the Qwest/MFS ICA term provision. To read a "mutual agreement" requirement into the Qwest/Universal ICA, contrary to its express terms (regardless of which version of the Term of Agreement section applies), would make the Qwest/Universal ICA a *perpetual contract*. As Qwest explained more fully in its previous briefs, Oregon law is clear: courts will not impose a

perpetual term on an agreement unless it is clear that the parties so intended. There was obviously no such intention here. Further still, as the Commission itself acknowledged in the February 9th Order, it is "highly unlikely" that an interconnection agreement of perpetual duration would be in the public interest, or would ever be approved. Put simply, no matter how indirect or circuitous the argument, Universal cannot make a valid case for a Commission order declaring the Qwest/Universal ICA to be perpetual.

IV. The February 9th Order is within the Commission's authority

Finally, the February 9th Order is within the Commission's authority. Although it apparently disagrees, Universal does not cite to any authority in support of its contention that the scope of the February 9th Order exceeds the Commission's authority, and thus the Commission should reject any relief requested on those grounds.

In any event, Universal mischaracterizes and overly dramatizes the effect of the Commission's February 9th Order. First, the Commission did not "nullify" the agreement between the parties, or "impose" upon them a completely different ICA (indeed, the two agreements in question appear to be identical with the exception of the Term of Agreement provision). Thus, in spite of the Commission's statement that "[t]he underlying contract giving rise to this dispute has been nullified," the February 9th Order did not impose a new ICA upon the parties. Rather, the February 9th Order merely clarified that the Commission originally approved the Universal/Qwest ICA only to the extent that its terms were consistent with the MFS/Qwest ICA. In other words, the September 22, 1999 Order in docket ARB 157 specifically stated that the Qwest/Universal ICA "adopts the terms and conditions of the agreement previously approved in ARB 1," and it ordered that "the agreement between Universal Telecommunications Inc., and US WEST Communications, Inc., ***adopting the terms of the previously approved agreement in docket ARB 1***, is approved." (Emphasis added.) That is, the

Qwest/Universal ICA that the Commission actually approved on September 22, 1999 contained the identical Term of Agreement provision that was in the Qwest/MFS ICA. The February 9th Order simply clarifies that fact.

Finally, the clarification affects only the Term of Agreement provision, and nothing else. Thus, there is simply no need for further briefing, argument or clarification on this point. The Commission clearly acted within the scope of its authority in issuing the February 9th Order that clarified the meaning and effect of the Term of Agreement provision in the Qwest/Universal ICA. Accordingly, the Commission should deny the Application, and should close this docket.

CONCLUSION

Accordingly, based upon the arguments set forth herein, as well as in the other briefs that Qwest previously filed in this docket, Qwest respectfully submits that the Commission should deny Universal's Application, and thus that it should close this docket.

DATED: March 18, 2005.

Respectfully submitted,

Alex M. Duarte, OSB No. 02045
Corporate Counsel
QWEST
421 SW Oak Street, Room 810
Portland, Oregon 97204
503 242-5623 (phone)
503 242-8589 (fax)
Alex.Duarte@qwest.com

and

Richard L. Corbetta // Wendy Wagner
CORBETTA & O'LEARY, P.C.
1801 Broadway Street, Suite #500
Denver, CO 80202
720-264-4797 (phone)
303-296-3992 (fax)
Email: Rich@co-legal.com
Email: Wendy@co-legal.com
Attorneys for Qwest Corporation

CERTIFICATE OF SERVICE

ARB 589

I hereby certify that on the 18th day of March, 2005, I served the foregoing **QWEST'S RESPONSE TO UNIVERSAL'S APPLICATION FOR RECONSIDERATION AND CLARIFICATION** in the above entitled docket on the following persons via U.S. 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.

John C. Dodge
Cole Raywid & Braverman, LLP
1919 Pennsylvania Ave., N.W.
Suite 200
Washington, DC 20006
Email: jdodge@crblaw.com

Jeffrey R. Martin
Universal Telecommunications, Inc.
1600 SW Western Blvd.
Suite 290
Corvallis, OR 97333

Richard L. Corbetta
Wendy Wagner
Corbetta & O'Leary, P.C.
1801 Broadway Street
Suite 500
Denver, CO 80202
Email: Rich@co-legal.com
Email: Wendy@co-legal.com

DATED this18th day of March, 2005.

QWEST CORPORATION

By: _____
Alex M. Duarte, OSB No. 02045
421 SW Oak Street, Suite 810
Portland, OR 97204
Telephone: 503-242-5623
Facsimile: 503-242-8589
e-mail: Alex.Duarte@qwest.com

Attorney for Qwest Corporation