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March 3, 2005

VIA FEDERAL EXPRESS

Ms. Christina Smith
Administrative Law Judge
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

Re: In the Matter of Qwest Corporation Petition For Arbitration of an Interconnection Agreement with Universal Telecom, Inc., ARB 589

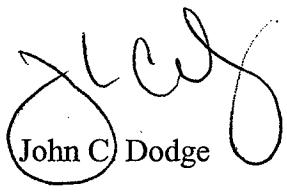
Dear Judge Smith:

Enclosed for filing in the above-captioned matter please find an original and five (5) copies of the Application for Reconsideration and Clarification of Universal Telecom, Inc.

Kindly date-stamp the additional copy enclosed and return it to the undersigned in the postage prepaid envelope also enclosed.

Please direct any questions regarding this matter to the undersigned.

Sincerely,



John C. Dodge

Enclosures

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.	)))))

APPLICATION FOR RECONSIDERATION AND CLARIFICATION OF UNIVERSAL TELECOM, INC.

Pursuant to OAR 860-014-0095 and the February 10, 2005 Final Order[1] in the above-captioned matter, Universal Telecom, Inc. ("Universal") respectfully submits this Application for Reconsideration and Clarification.

In the Order the Commission dismissed Qwest Corporation's ("Qwest") Petition for Arbitration.[2] However, the Commission also found that the interconnection agreement it approved as between Universal and Qwest differs in two respects from the interconnection agreement as between Qwest and MFS Intelenet, Inc.:

> First, rather than expiring on February 20, 2000, the MFS Intelenet Agreement states it is "effective for a period of 2 ½ years." Second, and more importantly, it included a critical sentence to the end of the provision that states: "The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."[3]

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1 *In the Matter of Qwest Corporation Petition for Arbitration of Interconnection Rates, Terms, Conditions and Related Arrangements with Universal Telecom, Inc.*, ARB 589, Order No. 05-088 (dated Feb. 10, 2005) ("Final Order").

2 Final Order at 8.

3 *Id.* at 7.

The Commission concluded that these differences came about as a result of the parties' "subterfuge" and "misrepresentations."[4] Consequently, the Commission nullified the parties' current interconnection agreement and substituted the original MFS-USWest [now, MCI-Qwest] contract in its place, pursuant to which "either party, including Qwest, may commence negotiations."[5]

First and foremost, Universal strongly disputes that it engaged in any "subterfuge" or "misrepresentation" in this matter and herein urges the Commission to expunge the specific language from the Order suggesting that Universal did. Second, Universal respectfully requests that the Commission clarify that Universal is entitled to the same contractual benefits afforded to MCI Communications (MFS's successor in interest) with respect to the Term of Agreement provision of the MCI-Qwest interconnection agreement, and reconsider its finding that either party may commence negotiations for a new agreement. Third, Universal respectfully requests that the Commission clarify the legal authority upon which it relies to "nullify" a prior approved interconnection agreement. This authority is not obvious from the federal Telecommunications Act of 1996 ("Act), other federal law, or the Commission's enabling statute or regulations.

I. ARGUMENT

A. There Was No "Subterfuge" or "Misrepresentation" on Universal's Part in the Adoption of the Interconnection Agreement

The Commission's suggestion that Qwest and Universal jointly and deliberately misled the Commission into approving an "open-ended Term of Agreement provision" is wrong and not supported by recitation to any facts. Here are the undisputed facts. By letter dated March 15, 1999 Universal alerted Qwest that Universal wished to adopt the MFS-USWest interconnection

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4 Final Order at 7.

5 *Id.*

agreement. Thereafter the parties exchanged several letters regarding each party's position on the compensability of ISP-bound traffic. Next Qwest prepared for Universal's signature a version of the MFS-USWest contract, which Universal signed on August 18, 1999 and returned to Qwest for its signature and filing with the Commission. Neither Universal nor its counsel knew that Qwest had altered the MFS-USWest agreement as sent to Universal for signature before filing with the Commission. Qwest filed the contract on September 3, 1999. The Commission approved the agreement on September 22, 1999.[6]

Universal, as a matter of federal law, was entitled to rely on Qwest to proffer an accurate copy of the MFS-USWest contract for execution by the parties and approval by the Commission. Indeed, the only "change" that Universal requested was the substitution of Universal's name for MFS's. Qwest did not notify Universal to any change to the Term of Agreement provision (or any other provision) and Universal had no reason to search for or believe that such change might have taken place within the document. Universal should not be demeaned or disadvantaged for following federal law.

Indeed, Universal lodged a complaint with the Commission about Qwest's insertion into the MFS-USWest interconnection contract—after Universal had signed and sent back the document to Qwest—an unlawful hand-written addendum, which addendum Qwest ultimately withdrew.[7] To suggest that Universal was complicitous with Qwest in altering the MFS-USWest contract in the first instance but brought to the Commission's attention a later alteration makes no sense. First, neither Universal nor its counsel knew that Qwest had altered the Term of

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[6] *In the Matter of the Interconnection Agreement Between Universal Telecommunications, Inc., and U S WEST Communications, Inc., adopting the terms of the ARB 1 Agreement, Submitted for Commission Approval Pursuant to Section 252(i) of the 1996 Telecommunications Act*, ARB 157, Order No. 99-00547 (Sept. 22, 1999).

[7] *In the Matter of the Interconnection Agreement between Universal Telecommunications, Inc. and US West Communications, Inc.*, ARB 128, Order No. 99-515 (Aug. 24, 1999).

Agreement provision. Second, Universal's complaint about Qwest's hand-written addendum invited the Commission's scrutiny to the entire contract and adoption process. Had Universal intended to deceive the Commission it certainly would not have called attention to the contract at all. Third, as is obvious from Qwest's passionate advocacy in this docket, had the company known about the ramifications of its edit it never would have agreed with Universal to alter the contract in a manner that could even remotely benefit Universal. After all, Qwest appended the hand-written addendum to the contract sparking the original official dispute between the carriers, an action specifically aimed at limiting Universal's contract rights. Universal did nothing wrong and did not even know about Qwest's alteration of the Term of Agreement provision.

It is also the case that Qwest has not been disadvantaged by the existence of the altered Term of Agreement provision by the simple fact that it did not seek renegotiations with Universal until five years into the parties' interconnection relationship. That is, *both* parties acted for five years as though no new contract was needed, which is exactly the import of the altered Term of Agreement provision.

The Commission, moreover, is simply incorrect when it states that "the submitted agreement was negotiated, in that the terms were altered."[8] For "negotiation" to have occurred, Universal would have had to know about the alteration. "Negotiate" commonly is defined as the conduct of communications with a view to reaching an agreement.[9] "Negotiation" is the process of submission and consideration of offers until an acceptable offer is made and accepted.[10] The parties did not "negotiate" and no "negotiation" otherwise occurred here, as Qwest did not communicate the fact of its edit, or otherwise submit any offer about the edit, to Universal.

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8 Final Order at 7.

9 *United States DOI v. Fed. Labor Rels. Auth.*, 279 F.3d 762 , 766 (2002).

10 *Gainey v. Brotherhood of Ry. And S. S. Clerks, Freight Handlers, Exp. & Station Emp.*, 275 F.Supp. 292, 300 (1967).

In light of these considerations, Universal respectfully asks that the Commission expunge the pejorative and exaggerated language used in the Final Order, as there is no evidence to suggest that Universal engaged in subterfuge or misrepresentation and in fact Universal did not.

B. Universal is Entitled to the Benefit of the MFS-USWest Contract

The Commission points out that the original MFS-USWest contract contained a "critical sentence" at the end of the Term of Agreement provision: "The Parties agree to commence negotiations on a new agreement no later than two years after this Agreement becomes effective."[11] Consequently, the Commission states, "Under the proper 'Term of Agreement' provision, either party, including Qwest, may commence negotiations."[12] Universal respectfully seeks reconsideration of the Commission's finding in this regard, for three separate reasons. First, Qwest and MFS long ago waived the enforceability of the "critical sentence." Second, the Commission ratified the MFS-USWest Agreement as between Qwest and MCI without that "critical sentence." Third, even had the "critical sentence" been included in the contract as between Universal and Qwest, the parties would have waived its enforceability.

There is no indication—from public records at least[13]—that MFS and Qwest commenced negotiations toward a new agreement by September 17, 1999—the date by which MFS and Qwest agreed to do so.[14] Indeed, MCI (MFS's successor) and Qwest continue under the original contract through today.[15] The MFS Agreement does not contain a typical "nonwaiver" clause,

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11 Final Order at 7.

12 *Id.*

13 For example, neither MFS nor MCI is involved in any open dockets before the Commission; none of the 42 open dockets in which Qwest is participating is an arbitration with MCI. *See* http://www.puc.state.or.us/ (Mar. 3, 2005).

14 The MFS-Qwest contract was approved by the Commission on September 17, 1997 in Arbitration 1. *In the Matter of the Petition of MFS Communications Company, Inc., for the Arbitration of Interconnection Rates, Terms, and Conditions Pursuant to 47 U.S.C. Sec. 252(b) of the Telecommunications Act of 1996,* Final Order No. 97-367 (Sept. 17, 1997).

15 The last amendment to the MFS Agreement was approved by the Commission on July 18, 2004. *In the Matter of MCI WorldCom Communications, Inc. and Qwest Corporation, Seventeenth Amendment to*

disclaiming failure of enforcement as waiver of such provision unenforced. Consequently, the "critical sentence" of the MFS-USWest Agreement is no longer enforceable because it was not acted on by MFS and Qwest by September 17, 1999. With respect to MCI and Qwest, therefore, their current, existing contract requires *both* parties to agree to move to a new interconnection agreement. The Commission thus should reconsider its finding in this docket that "either party, including Qwest, may commence negotiations" under the agreement as between Universal and Qwest, because that is not the state of the contract as between MCI and Qwest.

Next, the Commission's own actions ratified MCI and Qwest's intent that both parties must agree to move to a new interconnection agreement. On August 30, 2002 the Commission approved Amendment No. 5 as between Qwest and MCI. This amendment essentially transferred the interconnection agreement from MFS (which MCI had acquired) to MCI. One of the recitals to that amendment provides as follows:

> WHEREAS, the initial term of the MFS Agreement expired, but remains in full force and effect until a new agreement becomes effective between the parties;[16]

This recital does not include a reference to each party's ability to initiate interconnection negotiations and instead explicitly provides that MCI and Qwest understood in 2002 (and understand today) that the "critical sentence" permitting either party to commence negotiations toward a new agreement was (and is) no longer operative in their contract. The Commission approved Amendment No. 5 and thus ratified MCI and Qwest's intent in this regard.

Pursuant to 47 U.S.C. § 252(i), Universal is entitled to the same terms and conditions of interconnection with Qwest as MCI. MCI and Qwest have not enforced and cannot enforce the

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Interconnection Agreement. Submitted for Commission Approval Pursuant to Section 252(e) of the Telecommunications Act of 1996, ARB 1 (17), Order No. 04-403 (July 18, 2004).

[16] Exh. A.

MFS-USWest Agreement's right that either party may commence negotiations, which right expired on September 17, 1999. The Commission ratified expiration of that right. Universal is entitled to that same contract treatment.[17] Consequently, the Commission must reconsider its finding that, with respect to the interconnection relationship between Universal and Qwest, either party can commence negotiations for a new agreement.[18] Instead, *both* parties must agree to commence such negotiations.

Finally, had the Term of Agreement provision in the Universal-Qwest agreement been *identical* to the MFS-USWest Agreement, the "critical sentence" has long since been waived as between Universal and Qwest. The Universal-Qwest agreement became effective on September 22, 1999. This contract (like the MFS-USWest Agreement) contains no nonwaiver clause. Thus, under the express language of the unaltered Term of Agreement provision, Qwest had until September 22, 2001 to request renegotiations with Universal before the contract reverted (as has the MFS-USWest [now, MCI-Qwest] Agreement) to requiring *both* parties' agreement to move to a new interconnection contract.[19] The Commission found that Qwest did not request renegotiations until February 6, 2004.[20] The opportunity for Qwest to request negotiations individually has lapsed. Thus, the Commission should reconsider its finding that either party can commence negotiations for a new agreement, and rule instead that both parties here must agree to move to a new interconnection agreement.

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[17] The Commission approved the Universal-Qwest contract five days *after* the MFS-USWest "critical sentence" expired. Universal is entitled under 47 U.S.C. § 252(i) to the ***identical*** terms and conditions of the MFS-USWest contract as it existed at the time the Universal-Qwest contract was approved.

[18] At the very least Amendment No. 5 refutes the Commission's suggestion that Universal was involved in any effort to mislead the Commission. Further, to the extent it comes to light that MFS and Qwest *did* initiate negotiations prior to September 17, 1999 but have agreed to hold them in abeyance, Universal is entitled to that same treatment from Qwest, and should not be forced into renegotiations until such time as MCI and Qwest enter such renegotiations.

[19] Here Qwest would be estopped from arguing that it did not know about the September 22, 2001 deadline because, after all, it removed the "critical sentence" in the first place.

[20] Final Order at 2.

C. The Commission's Authority To Nullify a Prior Approved Agreement is Uncertain

The Commission took the extraordinary step of nullifying the agreement between Universal and Qwest and imposing in its place the underlying MFS-Qwest agreement.[21] Universal respectfully requests that the Commission clarify the authority it is granted under the Act or other law to act in this manner.

Neither the Act nor Federal Communications Commission ("FCC") rules on their face grant a state commission express authority to nullify a prior approved interconnection agreement. It is the FCC, "not the individual state commissions, [that] is the agency with the power granted by Congress to administer the [Act], through the formulation of policy, rulemaking, and regulation."[22] That is not to say state commissions do not play a vital role with respect to interconnection agreements.[23] But, a state commission's role appears limited to resolving arbitrated issues, approving or rejecting *pending* interconnection agreements, and interpreting and enforcing the terms of prior approved interconnection agreements.[24] Oregon law does not appear to differ from federal law on this point.

Although it is tempting to consider (and perhaps debate) what the Commission might have done or been able to do pursuant to 47 U.S.C. § 252(e)(2)(A) had it known of the change in the Term of Agreement provision,[25] that discussion is moot given that the Commission actually

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21 Final Order at 8.

22 *Global NAPS, Inc. v. Verizon New Eng., Inc.*, 2005 U.S. App. LEXIS 969, n. 7 (2005).

23 *See, e.g., BellSouth Telecomms. v. MCImetro Access Transmission Servs.*, 317 F.3d 1270, 1277-1278 (2003).

24 *Id.* ("It is reasonable to read the grant of authority in 252(e) as encompassing the interpretation of agreements, not just their approval or rejection."); *Pacific Bell v. Pac-West Telecomm., Inc.*,325 F.3d 1114, 1127 (9th Cir. 2003) ("State commissions have been given only the power to resolve issues in arbitration and to approve or reject interconnection agreements. . . .")

25 The Commission might have been guided by the FCC's then-current "pick and choose" rule (47 CFR §51.809 (1997)), and the doctrine of substantial compliance, which applies to a remedial statute such as the Act. *See generally* 47 U.S.C. § 252 *and in particular* § 252(e)(6); *see also Millay v. Cam*, 135 Wn.2d 193 , 204 (1998). ("Where a reasonable attempt has been made to comply with the statute in good faith, and there was no attempt to mislead or conceal, the doctrine of substantial compliance holds that the statute may be deemed satisfied.") *Davis v. Allstate Ins. Co.*, 217 Cal. App. 3d 1229, 1232 (1989). Further, an open-ended Term of Agreement provision does

approved the altered contract. The Commission's observation that had it known about the open-ended Term of Agreement provision it might not have approved the entire contract, must succumb to *stare decisis*, even if there are different commissioners today, and especially since the Commission "re-approved" an identical contract without the "critical sentence" by virtue of subsequent Amendment No. 5 (meaning the Commission did not enforce the original particular clause in the MCI-Qwest situation despite a specific opportunity to do so).

So the relevant question becomes, what authority does the Commission have to nullify a prior approved interconnection agreement? In light of the little guidance provided by the Act and other law on this important question, Universal respectfully requests that the Commission identify the authority with which it is so imbued.

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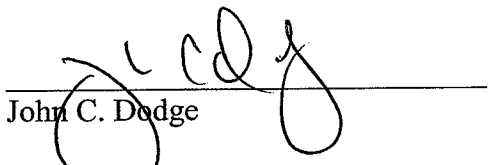
not appear to violate federal law requirements for interconnection agreements (especially when considering the level playing field arguments Universal raised previously; *see* Universal Telecom, Inc.'s Initial Brief at 9-10), meaning the term itself substantially complies with the Act. The FCC has utilized the doctrine of substantial compliance in interconnection matters dating back at least 20 years. *See, e.g., S. Pac. Communications Co. v. Am. Tel. & Tel. Co.*, 556 F. Supp. 825, 993 (1982).

III. CONCLUSION

Wherefore, for the foregoing reasons, Universal respectfully requests that the Commission expunge that language in Order No. 05-088 that states or suggests that Universal engaged in "subterfuge" or misrepresentation" with respect to its interconnection agreement with Qwest; reconsider its finding that either Universal or Qwest "may commence negotiations" for a new interconnection agreement; and clarify what authority the Commission has to "nullify" a prior approved interconnection agreement.

Respectfully submitted,



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(202) 659-9750
(202) 452-0067

Counsel for Universal Telecom, Inc.

March 3, 2005

CERTIFICATE OF SERVICE

I, Connie Simmons, hereby certify that on this 3rd day of March, 2005, I caused copies of the foregoing *Application for Reconsideration and Clarification* to be sent by first-class mail, postage pre-paid to the following:

Alex M. Duarte
Corporate Counsel
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March 10, 2005

VIA FACSIMILE AND FIRST CLASS MAIL

Ms. Christina Smith
Administrative Law Judge
Public Utility Commission of Oregon
550 Capitol Street N.E. Suite 215
Salem, Oregon 97301-2551

Re: In the Matter of Qwest Corporation Petition For Arbitration of an Interconnection Agreement with Universal Telecommunications, Inc., ARB 589 -- ERRATUM

Dear Judge Smith:

By filing dated March 4, 2005, Universal Telecom, Inc. ("Universal") submitted its "Application for Reconsideration and Clarification" ("Application") in the above-referenced matter. The purpose of this letter is to correct one date referenced in that Application.

On page 3 of the Application, starting at line 2, there appears the following sentence:

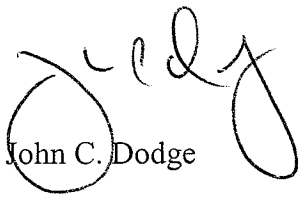
> Next Qwest prepared for Universal's signature a version of the MFS-USWest contract, which Universal signed on August 18, 1999 and returned to Qwest for its signature and filing with the Commission.

The referenced date is incorrect. Universal signed the MFS-USWest contract on April 7, 1999. The corrected date is not material to Universal's Application or the arguments therein.

A replacement page 3 and five (5) copies of same are enclosed herewith for substitution for the original page 3 of the Application. Also enclosed is a "stamp & return" replacement page 3 that should be returned to the undersigned in the prepaid envelope provided.

Universal apologizes for any inconvenience this may have caused. Kindly direct any questions regarding this matter to the undersigned.

Sincerely,



John C. Dodge

Cc: Jeff Martin, Universal Telecom, Inc.
Alex Duarte, Esq., Qwest Corporation
Rich Corbetta, Esq.

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agreement. Thereafter the parties exchanged several letters regarding each party's position on the compensability of ISP-bound traffic. Next Qwest prepared for Universal's signature a version of the MFS-USWest contract, which Universal signed on April 7, 1999 and returned to Qwest for its signature and filing with the Commission. Neither Universal nor its counsel knew that Qwest had altered the MFS-USWest agreement as sent to Universal for signature before filing with the Commission. Qwest filed the contract on September 3, 1999. The Commission approved the agreement on September 22, 1999.[6]

Universal, as a matter of federal law, was entitled to rely on Qwest to proffer an accurate copy of the MFS-USWest contract for execution by the parties and approval by the Commission. Indeed, the only "change" that Universal requested was the substitution of Universal's name for MFS's. Qwest did not notify Universal to any change to the Term of Agreement provision (or any other provision) and Universal had no reason to search for or believe that such change might have taken place within the document. Universal should not be demeaned or disadvantaged for following federal law.

Indeed, Universal lodged a complaint with the Commission about Qwest's insertion into the MFS-USWest interconnection contract—after Universal had signed and sent back the document to Qwest—an unlawful hand-written addendum, which addendum Qwest ultimately withdrew.[7] To suggest that Universal was complicitous with Qwest in altering the MFS-USWest contract in the first instance but brought to the Commission's attention a later alteration makes no sense. First, neither Universal nor its counsel knew that Qwest had altered the Term of

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