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Spirit of Service

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December 14, 2004

Via Hand Delivery

Annette Taylor
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Re: ARB 589

Dear Ms. Taylor:

Enclosed for filing are an original and (5) copies of Qwest Corporation's Second Additional Brief on Negotiation Issues, along with a certificate of service.

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

Sincerely,

Carla

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Sr. Paralegal

CMB:
Enclosure
cc: Service List
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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.	**QWEST CORPORATION'S SECOND ADDITIONAL BRIEF ON NEGOTIATION ISSUES**

Pursuant to Administrative Law Judge Christina M. Smith's ALJ Memorandum of November 15, 2004 ("ALJ Memorandum"), petitioner Qwest Corporation ("Qwest") hereby submits its second-round additional brief on the ICA negotiation issues and responds to the arguments raised in the Initial Brief that respondent Universal Telecom, Inc. ("Universal") filed on November 30, 2004 ("Universal Initial Brief"). For the reasons set forth below and in its Additional Brief filed November 30, 2004 ("Qwest First Additional Brief"), Qwest respectfully submits that Qwest as the Incumbent Local Exchange Carrier ("ILEC") has the right to seek renegotiation of a long-expired interconnection agreement ("ICA"), especially in light of Universal's utter refusal to negotiate, in contravention of the Telecommunications Act of 1996 ("the Act"). As such, the Commission should deny Universal's motion to dismiss and compel arbitration as Qwest has requested.

ARGUMENT

I. The ICA is Unambiguous

It appears that the only issues on which Qwest and Universal agree are that the ICA is unambiguous, and that the Commission should interpret it according to its plain language. However, even in the face of this acknowledged lack of ambiguity, Universal urges this

Commission to read provisions into the ICA that do not exist, and to follow a long and tortured road through statutory interpretation, inapplicable cases from other jurisdictions and strained logic to reach the ultimate result it seeks. For the reasons explained below, it is unnecessary for the Commission to take such a journey.

A. The Commission should not consider extrinsic evidence

As Universal acknowledges in its Initial Brief, the ICA's Term of Agreement provision is unambiguous. Accordingly, under Oregon law, extrinsic evidence is not considered in interpreting the ICA. *Westar Electric Co. v. Westar Acquisition Corp.*, 177 Or. App. 174, 186 (Or. App. 2001) (citing *Goodman v. Continental Casualty Co.*, 141 Or. App. 379, 389, *rev. den.* 324 Or. 305 (1996)). Nonetheless, relying on federal cases from other districts which hold that rules of *statutory construction* may apply to the interpretation of contracts, Universal urges this Commission to refer to Qwest's SGAT for the purpose of interpreting the admittedly unambiguous ICA.[1] The rationale for Universal's suggesting this exercise is unclear, but Oregon law regarding contract interpretation is not – extrinsic evidence, such as the SGAT, is completely irrelevant, and thus cannot be used to interpret this unambiguous ICA.[2]

Rather, the Commission should, in accordance with Oregon law, interpret the ICA as whole, relying on its plain language. As Qwest stated in its First Additional Brief, it does not consider either the Term of Agreement provision itself, or the ICA as a whole, to be ambiguous. Universal concurs with this position. The Term of Agreement provision unequivocally provides that the ICA's term expires on February 20, 2000 and contains no renewal provision. Further,

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[1] Likewise, Universal's reliance on a products liability case which provides that modification of a product is a defense to a products liability case (Universal Initial Brief, p. 4, fn. 10) is irrelevant.

[2] Moreover, even if the SGAT were relevant to the issues here, which it is not, the SGAT provision to which Universal cites (Universal Initial Brief, pp. 4-5) is *not* a "voluntary departure from Sections 251 and 252."

the ICA clearly contemplates that a new agreement will replace it, and simply provides that the ICA will continue in evergreen status in the interim. The fact that the provision itself does not specify the process by which the parties are to initiate negotiations of the replacement agreement does not render the provision ambiguous as to the ICA's term or its current expired status.

Universal apparently agrees that the ICA should be interpreted according to its plain language, and thus so admits in its Initial Brief. However, its argument that the Term of Agreement section requires the parties to "mutually agree" to negotiate a new ICA necessarily asks the Commission to read into the ICA a requirement that simply does not exist and that the parties never intended.[3] Further, as Qwest stated in its First Additional Brief, the concept of "mutual assent" as a requirement to the parties entering into a new ICA makes no sense in the context of a regulated environment where Qwest is legally obligated to enter into such agreements, and where state commissions arbitrate issues on which parties are not able to agree.

B. Oregon common law cases do not command a different result

The Oregon common law cases on contracts of an indefinite duration are not controlling. This is especially so given the regulatory framework within which the parties operate. However, even to the extent these cases are applicable, they actually support Qwest's position.

As Qwest explains in its First Additional Brief, the ICA is not a contract of indefinite duration. Rather, it is an expired one that, out of necessity, remains in effect (although the "term" is no longer in effect) until it is replaced by a new one. However, if the Commission

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[3] In essence, Universal argues that the ICA terminates upon "a specific triggering event"- that is, an "agreement to a new ICA" (in other words, *an agreement to a new agreement*). (See Universal Initial Brief, pp. 5-6.) However, all that the Term of Agreement here provides is that the ICA remains in effect until a new agreement "becomes effective," and not that the parties must "agree to a new agreement." Under section 252, the way to have an agreement (ICA) "become effective" is either to (1) "agree" (i.e., voluntarily and mutually agree to a new agreement (ICA)) or (2) petition the state commission to *arbitrate* a new "agreement" (ICA). See 47 U.S.C. §§ 252(a), 252(b). Because Congress recognized that the parties might not always "agree to an agreement" (as here), it established a mechanism where either party could file a petition to arbitrate the terms and conditions of an ICA. See 47 U.S.C. § 252(b).

takes the view that the ICA is not an expired agreement, then the only other possibility is that the ICA is an indefinite agreement, and thus Qwest, under Oregon law, is able to terminate it upon reasonable notice. *Lund v. Arbonne Int'l., Inc.*, 132 Or. App. 87 (1994); *Fleming v. Kids and Kin Head Start*, 71 Or. App. 718 (1984).

Universal acknowledges that it also does not believe the ICA is a contract of indefinite duration. However, carrying out Universal's argument to its logical conclusion results in the ICA being a contract of perpetual duration, in contravention of the parties' original intent and Oregon law requiring clear and unambiguous language to make an agreement's term perpetual. Universal's view is that the ICA is still under "term" because it continues in effect until replaced by a new ICA. Universal argues that the ICA's duration is not indefinite because the evergreen language constitutes a "termination" provision sufficient to render the ICA's term definite. This view is simply wrong and contradicts the ICA's plain language.[4]

The ICA clearly and plainly states that it "*shall expire February 20, 2000.*" (Emphasis added.) Despite its repeated statements that the Commission should look at the ICA's plain language, Universal again urges the Commission to ignore the ICA's language and read provisions into the ICA that do not exist and were not contemplated. Not only does the Term of Agreement section fail to include a "termination" provision, the ICA contains no specific termination provision at all, not even as a remedy for default. Thus, if the Commission rejects the argument

[4] The fact that an agreement may grant the parties limited termination rights does not necessarily render the agreement's duration definite. In *Paul Gabrilis, Inc. v. Dahl*, 154 Or. App. 388 (1997), the Oregon Court of Appeals found the country club membership agreements at issue to be perpetual, notwithstanding that the club retained the right to terminate club membership in the event members failed to abide by club rules. See also, *Delta Services and Equipment, Inc. v. Ryko Mfg. Co.*, 908 F.2d 17 (5th Cir. 1990). *Besco, Inc. v. Alpha Portland Cement Co.*, 619 F.2d 447 (5th Cir. 1980), which Universal cited in support of its contention that the ICA's evergreen provision constitutes a termination provision, is inapplicable, as the agreement at issue in *Besco* contained express language making it clear that the parties intended the plaintiff's exclusive option to purchase the defendant's output to "*continue indefinitely,*" subject only to certain limited and clearly defined withdrawal rights of the defendant. As

that the ICA is expired and is not currently operating under a "term," then it can only conclude that the ICA is, on its face, a contract of indefinite duration, and thus terminable by Qwest.

Following Universal's argument to its conclusion leads to an absurd and inequitable result. Essentially, Universal argues: (1) the ICA's term is not indefinite because it will terminate upon replacement with a new ICA; (2) *but*, in order for a new ICA to take effect, both parties must "mutually agree" to negotiate one (which Universal would never do as long as it viewed the outdated ICA as being favorable); *unless* (3) Universal unilaterally decides, in its *sole discretion*, as is its alleged right as a CLEC, to initiate interconnection negotiations, and (4) if the fact that Universal alone can determine if and when the parties enter a new ICA results in the current ICA being a perpetual agreement, so be it (because, although such contracts are disfavored, "the ICA clearly and unambiguously expresses the parties' intent that the contract will remain in force and effect until a new agreement is reached"). (See Universal's Initial Brief, p. 7.)

Universal's argument is completely disingenuous and conflicts with Oregon law requiring clear intent of the parties before an indefinite agreement will be deemed perpetual. Although Universal begins by stating that the ICA is not indefinite, its logic actually results not only in the ICA becoming a contract of indefinite duration, but also a *de facto* perpetual contract (because Universal can hold Qwest to the ICA *forever*). This certainly was never Qwest's intent in entering the ICA, and Qwest respectfully submits that it was not the Commission's intent when it approved the ICA. Universal's desired outcome defies Oregon law.

Qwest explained in its First Additional Brief, the ICA contains no language whatsoever indicating that the parties intended its duration to be perpetual.

II. Qwest is Entitled to Initiate Negotiation and Seek Arbitration

Even if the Commission determines that the current ICA does not address the specific process by which the parties are to negotiate the terms of a replacement ICA, nowhere in the ICA has Qwest waived its rights under the Act. In fact, as Universal correctly notes, section XXXIV(W) makes it clear that the ICA is to be interpreted "solely in accordance with the terms of the Act and the applicable state law in the state where the service is provided." The law is clear that Qwest has the right to initiate negotiations under section 252 of the Act.

A. Numerous commission decisions support Qwest's position

With reference to but without repeating all of the arguments that Qwest made in its First Additional Brief, numerous state commission decisions have held that ILECs have the right to initiate interconnection negotiations under the Act. Most importantly, this Commission itself concluded that Qwest has such a right in Order No. 02-148 and the Arbitrator's Decision (February 11, 2002) in docket ARB 365 ("*ARB 365 Decisions*"), and those decisions are binding precedent here. As Qwest explained in its First Additional Brief, these commission decisions, which necessarily arose in their own unique factual contexts, all either base their holdings on, or find additional support for them in, the language of the Act itself, and not on "special circumstances," as Universal would have this Commission believe.

B. The cases that Universal cites are not instructive

Of all of the authority that Universal cites in its Initial Brief to support its argument that only CLECs are entitled to request interconnection negotiations, only one, *BellSouth Telecommunications, Inc. v. NOW Communications, Inc.*, 2000 La. PUC LEXIS 83 (May 17, 2000) ("*NOW Louisiana*"), is arguably on point. In *NOW Louisiana*, the Louisiana Public Service Commission ("Louisiana Commission") rejected the ALJ's recommendation to dismiss

an arbitration petition that BellSouth had filed. The ALJ based the recommendation upon a determination that the language of the Act contemplates that only CLECs may request negotiation under section 252(b). Finding that NOW (the CLEC) had in fact engaged in negotiations with BellSouth (the ILEC), amounting to a tacit negotiation request, the Louisiana Commission determined that the negotiation clock began ticking at the time that BellSouth requested negotiations, and thus ordered that arbitration proceed.

Although the Louisiana Commission stated that under section 252(b), only CLEC negotiation requests start the clock for purposes of commencing arbitration, it did not undertake an analysis of the provision. Rather, it merely based its decision on the fact that the CLEC (NOW) had tacitly requested negotiation by undertaking actual negotiations with the ILEC (BellSouth). Certainly, this single Louisiana decision is not enough to overcome the weight of authority, *including this Commission's binding ARB 365 Decisions*, that hold that ILECs are permitted to initiate interconnection negotiations *based upon the language of the Act.*

Universal goes on to cite two companion Sixth Circuit decisions, and one Seventh Circuit decision, in further support of its contention that only CLECs are permitted to commence interconnection negotiations. These cases, which struck down various state commission orders either requiring ILECs to file interconnection *tariffs* or *pay reciprocal compensation* to CLECs based solely on CLEC-filed *tariffs*, are not relevant to the issue here.[5] Further, as explained below, the policy considerations underlying these decisions actually favor Qwest.[6]

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[5] Specifically, in *Verizon North, Inc. v. Strand*, 367 F.3d 577 (6th Cir. 2004) (*Strand II*), the Sixth Circuit struck a state commission order requiring Verizon to pay reciprocal compensation to a CLEC (based on the CLEC's tariff) that was not a party to an interconnection agreement with Verizon. The court's opinion referred to its prior opinion in *Verizon North, Inc. v. Strand*, 309 F.3d 935 (6th Cir. 2002) (*Strand I*), in which the court struck a state commission order requiring ILECs to file interconnection tariffs. In so doing, the court in *Strand I* held that the commission order would sidestep the negotiation and arbitration provisions of the Act, allowing CLECs to access network elements without the necessity of negotiating an interconnection agreement, to the detriment of the ILEC.

III. Public policy supports Qwest's position

Universal's argument that allowing Qwest to initiate negotiations of a new ICA is contrary to the intent of the Act is transparent and disingenuous. Qwest does not deny that the Act imposes special duties on ILECs in order to "level the playing field" and force open the market to competition. However, Qwest is in no way attempting to shirk these duties, deny access to its network or services to Universal, or even to tilt the playing field in its own direction. Rather, it is merely attempting to invoke its rights to bring Universal to the table in order to negotiate a new ICA to replace an outdated ICA, the terms of which expired almost five years ago, to reflect the current state of the law, technology and industry practices, and to bring it in line with the ICAs under which other CLECs in Oregon must operate.[7]

The *Strand II* decision discussed the court's prior *Strand I* decision and noted that the commission order at issue in *Strand I* was faulty because it "forced the incumbent to commence the negotiating process." However, in making this statement, the Sixth Circuit was not opining on the question of whether an ILEC is permitted to initiate interconnection negotiations. Rather, it was merely making the point that requiring an ILEC to file interconnection tariffs setting the rates for interconnection created a negotiating imbalance in favor of the CLEC by "forcing the incumbent to show its hand." *Strand II*, 367 F.3d at 585.

[6] Universal states that "there is at least one state commission decision arbitrating the terms of an interconnection agreement at the behest of an ILEC," apparently referring to Qwest's arbitration petition against AT&T in Iowa, and it argues that this arbitration was allowed "to proceed based upon evidence that the non-ILEC had engaged in negotiations with the ILEC." (Universal Initial Brief, p. 13.) First, Universal's reference to "at least one state commission" is perplexing given that the parties have previously addressed other state commission decisions in five states (including Oregon) that arbitrated the terms of an ICA "at the behest of an ILEC." Further, although it may be true that AT&T did agree to negotiate, there was no evidence that this was the basis for the Iowa Utilities Board's proceeding with the arbitration petition. More importantly, this Commission itself has previously arbitrated an interconnection agreement (in addition to the *ARB 365 Decisions*) brought by Qwest, against *AT&T* no less. See e.g., Order No. 04-268 and Arbitrator's Decision of April 19, 2004, in docket ARB 527.

[7] Of course, Congress' concerns about leveling the playing field were to encourage competitors to actually provide *local exchange services* in competition against ILECs. In contrast, Congress did not envision a "CLEC" like Universal that does *not* even provide local exchange services. That is, Universal has admitted, in the "other litigation" that Universal has referred to (Universal Initial Brief, p. 10, see also Universal's August 9, 2004 Motion to Dismiss, pp. 2-3) that Universal does *not* provide local exchange service to any customers. In fact, with minor exceptions, its sole business is to provide some of the services that Internet Service Providers ("ISPs") provide for themselves. Universal is essentially a wholesale provider of Internet-related functions to ISPs through its so-called "managed modem" service. (Other than providing wholesale services to ISPs, Universal provides some limited Internet services to a single municipality in Oregon and to a company owned by its Chairman.) Finally, Universal has acknowledged that 100 percent of the traffic to Universal is ISP-bound traffic. Universal is hardly the "local exchange" "competitor" that the Act envisioned.

Although the Act's purpose is to create a competitive telecommunications environment where one did not previously exist, and to permit new entrants into the telecom market, it is certainly against the spirit of the Act to use the negotiation process as a mechanism to hold ILECs hostage forever to outdated agreements. The Alabama Public Service Commission ("Alabama Commission") realized as much when it ruled that due to the fact that CLECs have now entered the market and are competing effectively, ILECs should be permitted to initiate renegotiation of new ICAs. The Alabama Commission's statements bear repeating:

> We conclude ***from our review of the controlling law*** that it is indeed permissible for ILECs such as BellSouth to initiate requests for negotiation which trigger the statutory arbitration window of Section 252(b). ***To construe the provisions of Section 252(b) to limit such requests for negotiations to CLECs in the present telecommunications environment would undermine the spirit, if not the letter, of Section 252(b)(1) to the substantial prejudice of ILECs.*** Provisions such as the one found in Section I.,B of the 1997 agreement between BellSouth and NOW which continue agreements that have by their terms expired until such time as the parties have negotiated and/or arbitrated new agreements are common place. To interpret Section 252(b)(1) to allow CLECs to exclusively determine when such agreements are in fact renegotiated would unfairly work to the detriment of ILECs. Congress surely did not intend such a result.[8]

The Sixth Circuit has also acknowledged that, although federal law requires ILECs to allow competitors access to their networks, ILECs should not be unfairly disadvantaged in the negotiating process. Although the issues in *Strand II* are different from the one presented here, the Sixth Circuit's observations, in striking down a Michigan Public Service Commission's order requiring Verizon (the ILEC) to pay reciprocal compensation to a CLEC in the absence of an interconnection agreement, are worth noting:

> If the orders in *Verizon North* and *Bie* placed a thumb on the negotiating scales, tipping them in favor of the competitors, then this MPSC order was a fist slamming down on the scales. The order does not just slightly unbalance the negotiations by forcing the incumbent to show its hand. It instead completely forestalls the need for negotiations.

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[8] *Petition for Arbitration of the Interconnection Agreement Between BellSouth Telecommunications, Inc. and NOW Communications, Inc., pursuant to the Telecommunications Act of 1996,* Docket 27461, Ala. PUC LEXIS 1052 (Ala. PSC, June 23, 2000) ("*BellSouth/NOW*"), p. 12.

> Rather than just forcing the incumbent to reveal the rates it wants to charge, which clearly disrupts the negotiations, this MPSC order completely obviates the need for negotiations by allowing the competitor to establish its own rate without any interaction between the incumbent and the competitor. *Strand II*, 367 F.3d at 585.

Accordingly, it is clear that, while Congress intended to create an environment that fosters competition in the local telecommunications market, it did not intend to unfairly disadvantage and hamstring ILECs in the process. Permitting Universal to hold Qwest hostage indefinitely and subject to its whim to the outdated ICA would slam a fist down on the scales against not only Qwest, but also other CLECs operating under current ICAs in Oregon.

CONCLUSION

Accordingly, based upon the arguments set forth herein, as well as in Qwest's other briefs filed in this matter, Qwest respectfully submits that the Commission should deny Universal's motion to dismiss in its entirety, and thus proceed with this arbitration proceeding.

DATED: December 14, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

ARB 589

I hereby certify that on the 14th day of December, 2004, I served the foregoing **QWEST CORPORATION'S SECOND ADDITIONAL BRIEF ON NEGOTIATION ISSUES** 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.

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