ORDER NO. 07-366

ENTERED 08/22/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

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In the Matter of	)	
	)	
UNIVERSAL TELECOMMUNICATIONS, INC., vs. QWEST CORPORATION	)	ORDER
	)	
Complaint for Enforcement of Interconnection Agreement.	)	

DISPOSITION: COMPLAINT DISMISSED WITHOUT PREJUDICE; MOTION FOR TEMPORARY EMERGENCY RELIEF HELD IN ABEYANCE PENDING FILING BY UNIVERSAL

Background

On April 19, 2006, the Commission issued Order No. 06-190 adopting with modifications the Arbitrator's Decision in docket ARB 671. On August 22, 2006, the Commission issued a Final Order in that docket, No. 06-484 (Final Order), approving the Interconnection Agreement (ICA) executed by both Universal Telecommunications, Inc., d/b/a USPOPS (Universal), and Qwest Corporation (Qwest) and submitted to the Commission in conformance with Order No. 06-190. Among the conclusions in the Arbitrator's Decision adopted by the Commission in Order No. 06-190, was the following at Appendix A, page 15:

> In light of the Commission's continuing jurisdiction over the proper use of NPA NXXs and the enforcement of NANPA guidelines for their use in Oregon, it is clear that VNXX is not a permissible means for transporting ISP-bound, or any other, traffic. Furthermore, in light of the Commission's Order in UM 1058 and Conditions 7 and 8 of Universal's Certificate, continued use of VNXX arrangements for the transport of any traffic by Universal is clearly a violation of its certificate and the Commission's Order.[1]

[1] By Order No. 06-229, issued May 12, 2006, we granted a temporary stay of the effectiveness Order No. 06-190 until August 22, 2006, the date the Final Order, No. 06-484, became effective.

Furthermore, the approved ICA contained language in Section 7.3.4.5 specifically ordered by the Commission stating directly "Qwest and CLEC shall not exchange VNXX traffic." (Order No. 06-190, Appendix A, p.16.) In requiring this language, the Commission stated at page 7, "This Commission cannot approve an interconnection agreement that allows parties to participate in an illegal arrangement, regardless of their mutual enthusiasm for doing so."

On September 15, 2006, the Commission received a Notice of Summons indicating that Universal had filed an appeal of Order No. 06-190 with the U.S. District Court of Oregon (U. S. District Court). However, at no time subsequent to the entry of the Final Order did Universal seek a stay of the effectiveness of the approved Interconnection Agreement or the associated Commission orders, from either the Commission or the U.S. District Court, pending the outcome of the appeals process.[2]

Complaint and Motion

On July 16, 2007, Universal filed a Complaint to Enforce Interconnection Agreement (Complaint), a Motion for Temporary Emergency Relief and Request for Expedited Consideration (Motion) and a supporting affidavit. The Complaint asks the Commission to enforce the terms of the Agreement by calculating the Direct Trunked Transport (DTT) Relative Use Factor (RUF) as 42% Universal/58% Qwest until there was new traffic data and to exclude ISP-bound traffic from the calculation and further exclude any language in the ICA inconsistent with Order No. 06-190. Next, Universal requests that the Commission enforce the terms of the ICA "by declaring that Qwest should only assess upon Universal DTT charges that reflect the capacity of DTT facilities that Universal actually utilizes." Universal also asks the Commission to declare reciprocal compensations for both §251(b)(5) traffic and Internet Service Provider (ISP) bound traffic at the rate of $.0007 per minute of use. With respect to the debt relationship of the parties, Universal asks the Commission to order Qwest to reverse invoiced amounts for DTT charges and reciprocal compensation to reflect its interpretation of the ICA and for reimbursement of fees and costs related to the enforcement of the ICA and "any and all other equitable relief deemed appropriate by the Commission."[3]

In its Motion, Universal asserts that, in its July 3, 2007, letter, Qwest threatened that if Universal did not pay Qwest $278,387.17 in full by July 19, 2007, Qwest would "begin the disconnection process of all Universal Telecom, Inc. services, effective July 23, 2007."[4] Universal asserts that such disconnection would cause its customers, most of whom are ISPs, to experience serious service interruptions that "would, in turn, cause thousands of internet end users to experience serious disruption in their ability to access the internet."[5] Claiming that the ICA does not permit Qwest to take such unilateral action, Universal asks the Commission to immediately issue an order

[2] Official Notice of docket ARB 671 is taken, affirmed by statements of counsel at July 19 and August 3, 2007, teleconferences.
[3] Complaint, pp. 4-5.
[4] Motion, p. 2.
[5] *Id.*, p. 3.

prohibiting Qwest from terminating service to Universal pending resolution of the disputed issues in the Complaint.

Allan J. Arlow, Administrative Law Judge (ALJ), convened telephone conferences on July 19, 2007, and July 23, 2007. Counsel for Universal asserted that "this complaint is not related to the federal district court proceeding. * * * This complaint is about the operation of the existing agreement between the parties and does not go to the heart of the matter before the federal district court." Counsel for Universal agreed with the ALJ's statement that "the Complaint presumes the legality of the agreement," to which Qwest counsel objected, noting the exchange of letters between the parties gave Universal's legal objections to the ICA as the sole basis for its refusal to pay Qwest charges. Counsel for Universal stated that its position may have begun as a legal objection but has "evolved over time."

At the conclusion of the second telephone conference, the ALJ indicated that he would pose certain questions to be briefed by the parties relative to the Universal Motion due July 26, 2007. On July 23, 2007, Qwest filed an Answer to Universal's Complaint to Enforce Interconnection Agreement and Counterclaim of Qwest Communications Against Universal Telecommunications, Inc. (Answer), along with supporting confidential and non-confidential affidavits of Qwest Senior Access Manager, Wholesale Carrier Relations, Nancy Batz (Batz).[6] On July 26, 2007, Qwest filed its Response to Commission Questions Propounded by Administrative Law Judge Allan Arlow (Qwest Response) and Universal filed its Memorandum in Support of the Motion for Temporary Emergency Relief (Universal Response).

On August 1, 2007, the ALJ conducted another telephone conference for the purpose of posing additional questions to counsel:

1. Are there still VNXX activities going on; *i.e.*, numbers going on Qwest switches in Eugene and in Portland which are native to other exchanges?

2. Are Qwest and Universal exchanging VNXX traffic?

During the conference, counsel for both parties also confirmed that neither was contesting the legality of the ICA before the Commission and that as of that date no stay had been sought before the judge in federal court.

[6] Qwest withdrew its counterclaim on July 30, 2007, asserting that it was not technically necessary because no separate claim was involved in the counterclaim and, should it prevail on the merits of the Complaint, it would attain its legal objectives and facilitate a more prompt resolution of the issues.

On August 2, 2007, counsel for Universal sent an e-mail to the ALJ, which read in pertinent part as follows:

> In response to your inquiry of yesterday morning, namely, 'are Qwest and Universal exchanging VNXX traffic in Oregon?', Mr. Smith and I have conferred. In response to your question, Qwest and Universal agree that: Qwest and Universal exchange traffic that originates outside of the Portland, Eugene, Corvallis, Roseburg, & Medford local calling areas that would technically qualify as VNXX as that term has been defined by this Commission.

Qwest also responded on that date with a Supplemental Response to Commission Question Propounded by Judge Allan Arlow (Supplemental Response). The Supplemental Response at pages 1-2, in pertinent part, was the following:

> Yes, Qwest believes that VNXX traffic continues to be exchanged. Prior to the effective date of the new interconnection agreement ("ICA") between Qwest and Universal, Universal notified Qwest of its intent to place modems in three local calling areas ("LCAs")—Corvallis, Roseburg, and Medford—in addition to the Eugene and Portland LCAs, where Universal has had modems for several years. Thus, all ISP traffic originating in those LCA's is treated as local, non-VNXX traffic. However, Universal has not, to Qwest's knowledge, taken steps to place modems into the following LCAs from which ISP traffic is currently being originated and delivered to Universal: Astoria/Cannon Beach/Seaside, Baker City, Bend/Redmond, Florence/Mapleton, Hermiston, Klamath Falls, Newport, Pendleton, Salem, and St. Helens. Thus, if Universal has not placed modems in any of these LCAs, the traffic originating from them is VNXX traffic.

After reviewing the submissions, the ALJ called a further teleconference for August 3, 2007. The representations made by counsel in response to the ALJ's questions at the August 3, 2007, teleconference are critical to this decision. Counsel for Universal acknowledged that the foregoing paragraph in the Qwest Supplemental Response was factually correct. Portions of the transcription of the colloquy between ALJ Arlow and Mr. Mark Trinchero, counsel for Universal, from the audiotape of that conference that are also relevant are as follows:

ALJ ARLOW: According to this email from Mr. Trinchero, there's traffic going…for example, from Pendleton and Seaside/Cannon Beach into the Portland switch. Is that correct, Mr. Trinchero?

MR. TRINCHERO: That is my understanding, Your Honor.

* * * * *

ALJ ARLOW: So that you've got Pendleton or Seaside and Cannon Beach numbers resident in the Portland switch and that's where the modems are that take those Cannon Beach and Seaside calls?

MR. TRINCHERO: That is my understanding.

* * * * *

ALJ ARLOW: Mr. Trinchero, is there some overarching reason why, three hundred and forty-four days after the Commission's order became effective that you're still sending Pendleton and Seaside traffic into Portland?

MR. TRINCHERO: Your Honor, as I understand it from the client, they are a very small company and making network changes is a rather expensive proposition for them.

* * * * *

ALJ ARLOW: You're asking the Commission essentially to enforce the agreement, Mr. Trinchero?

MR. TRINCHERO: Yes, Your Honor.

* * * * *

ALJ ARLOW: The reason that Universal still has numbers from Astoria/Cannon Beach/Seaside, Baker City, Bend/ Redmond, Florence/Mapleton, Hermiston, Klamath Falls, Newport, Pendleton, Salem and St. Helens numbers resident in either the Medford, Roseburg, Eugene or Portland switches is because they are a small company?

MR. TRINCHERO: Well, yes.

DISCUSSION

Universal has come to the Commission for assistance seeking enforcement of its interpretation of a contract approved pursuant to lawful Commission orders. At the same time, Universal acknowledges that it has been in willful violation of the Commission's explicit ruling on the prohibition of VNXX traffic. Thus, we have a circumstance where the improper conduct is not only against Qwest, which is required to transport the VNXX traffic Universal has associated with numbers from other exchanges with modems located in Qwest switches in Portland, Eugene, Roseburg and Medford, but against the Commission as well. Universal has engaged in improper conduct by violating an admittedly legal order of the Commission. Such traffic, furthermore, is included by Universal in its calculations of the compensation that it asserts it is due from Qwest.

One of the basic tenets of the law is that "Those who seek equity must do equity."[7] In Oregon, "unclean hands" is an equitable doctrine under which the court, or, in this case, an administrative agency, in order to protect its own integrity, will deny equitable relief to a party in a transaction if that party, relative to the same transaction, is "guilty of improper conduct no matter how improper the [other party's] behavior may have been." *Merimac Co. v. Portland Timber*, 259 Or 573, 580 (1971). *See generally* Edward Fadeley, *The Clean-Hands Doctrine in Oregon*, 37 Or L Rev 160 (1958). Several limitations restrict application of the doctrine. First, "the misconduct must be serious enough to justify a court's denying relief on an otherwise valid claim. Even equity does not require saintliness." *North Pacific Lumber Co. v. Oliver*, 286 Or 639, 651 (1979). Examples of serious misconduct include crimes, fraud, disloyalty to an employer and bad faith. *Id.* (citing cases). Second, a court will not invoke the maxim if doing so will work an injustice. *Taylor v. Grant*, 204 Or 10, 26 (1955) (quoting 30 CJS 487, *Equity*, § 98). Third, the party in favor of whom the maxim is invoked must prove that he or she has suffered actual injury due to the alleged misconduct. *Martin v. Allbritton*, 124 Or App 345, 352 (1993).

We find that Universal's knowing and willful violation of a Commission order for almost a year and assertion to Qwest for the greater part of that time that its non-compliance was justified by its belief that the Commission order was in error constitutes "serious misconduct" within the definitional case law developed in the State of Oregon. In addition to the violation of a Commission order, we note that Universal's VNXX arrangements by their very nature deprive Qwest of revenues for the transport of interexchange toll traffic and cause discrimination among similarly situated Qwest customers: Qwest customers who are customers of ISPs that utilize Universal's services pay less for the completion of interexchange calls than do other Qwest customers in the same exchange. Furthermore, Qwest has stated that VNXX traffic has been included in the RUF calculation. Each of these circumstances is sufficient to show that Qwest may

[7] *See, e.g.,"A Verbatim Report of the Cause of Doe dem. Tatham v. Wright Tried at the Lancaster Lammas Assizes, 1834 Before Mr. Baron Gurney and a Special Jury, by Alexander Fraser of Cliffords Inn, the Accredited Reporter in the Case"*, p. 272. *See also Bennitt v. Wilmington Star Mining Co*., 119 Il. 9 (1886): "It is one of the Maxims of the Court of Chancery that those who seek equity must do equity."

be able to prove that it "has suffered actual injury due to the alleged misconduct," should the Commission ultimately hear the Complaint.

For these reasons, we decline to address the merits of Universal's Complaint. Until such time as Universal can affirmatively demonstrate its compliance with our explicit ruling in docket ARB 671, we will not entertain any complaint from Universal arising out of the ICA approved therein. The Complaint should be dismissed without prejudice.

Universal knowingly and willfully violated the approved ICA, which also provides sufficient grounds for this Commission to deny its request for relief. Indeed, if we were to provide relief to Universal while it continues to willfully violate a lawful Commission order, it would undermine public faith in our ability to adhere to the basic principles of fairness and equity in the administration of the mandate given us by the Legislature. At the same time, however, we cannot ignore the uncontested assertion by Universal that Qwest's imminent disconnection of services would cause Universal's customers, most of whom are ISPs, to experience service interruptions that "would, in turn, cause thousands of internet end users to experience serious disruption in their ability to access the internet."[8]

Accordingly, before issuing a definitive ruling on the Motion, we direct Universal to promptly report to the Commission whether it intends to immediately comply with the Commission's prior orders prohibiting VNXX traffic or, in the alternative, what plans it has to protect its customers and internet end-users in the event the Commission allows Qwest to commence disconnection. Such plans should specify actions already undertaken, if any, and the efforts made to quickly and promptly protect these customers from service disruptions. If these plans call for the abandonment of service, Universal should include a discussion of how it anticipates complying with the applicable rules governing such action.[9]

Universal shall make the filing within 10 days of this order. Upon receipt, the Commission will expeditiously determine what final action is appropriate to protect the financial interests of Qwest while protecting the third party customers and ISP end-users. Until such time as the Commission has had the opportunity to review the filing and issue an order relative thereto, Qwest shall take no action to disconnect or otherwise impair service to the end-user customers of the ISPs that utilize Universal's services.

ORDER

IT IS ORDERED that:

1. The Complaint to Enforce Interconnection Agreement filed by Universal Telecommunications, Inc., is dismissed without prejudice.

[8] Universal Motion., p. 3.
[9] See OAR 860-032-0020.

2. No further Complaint submitted to the Commission by Universal Telecommunications, Inc., relative to the Interconnection Agreement approved in Order No. 06-484, shall be allowed unless accompanied by a sworn Affidavit executed by its Chief Executive Officer stating that the company is fully compliant with the rulings of the Commission in Order No. 06-190 as discussed above.

3. The Motion for Temporary Emergency Relief and Request for Expedited Consideration is held in abeyance pending further information to be submitted by Universal Telecommunications, Inc.

4. Within 10 days from the date of this order, Universal Telecommunications, Inc., shall file information as to its plans to either immediately comply with Commission orders or to protect its customers and end-users from service disruptions.

5. Qwest Corporation shall take no action to disconnect or otherwise impair service to the end-user customers of internet service providers utilizing the services of Universal Telecom, Inc., until such time as the Commission shall, by order, indicate.

Made, entered and effective AUG 2 2 2007.

Lee Beyer
Chairman

Ray Baum
Commissioner

John Savage
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.