ORDER NO. 07-453

ENTERED 10/22/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

IC 13

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

DISPOSITION: STAY LIFTED WITH CONDITIONS

In this complaint proceeding, Universal Telecommunications, Inc., d/b/a USPOPS (Universal), seeks enforcement of its interconnection agreement (ICA or Agreement) with Qwest Corporation (Qwest). It also seeks an order prohibiting Qwest from terminating service to Universal pending the resolution of the complaint. We find that Universal has: (1) knowingly and willfully violated the ICA it seeks to enforce, (2) failed to make any payments whatsoever to Qwest for services performed under the agreement, (3) failed to take reasonable measures to protect its customers and its customers' end users from service disruptions that might result from Universal's actions; and (4) misled Qwest and this Commission with respect to its creditors and its relationship with one of those creditors. Accordingly, we lift our temporary stay order and allow Qwest to begin the disconnection of services to Universal within two business days of this order.

Background

On April 19, 2006, we issued Order No. 06-190, which adopted, with modifications, the Arbitrator's Decision establishing the terms of an ICA between Universal and Qwest. In that order, we expressly prohibited Universal's proposed use of VNXX arrangements for the provisioning of services. We adopted the Arbitrator's decision that:

> 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]

We concluded that we "cannot approve an interconnection agreement that allows parties to participate in an illegal arrangement, regardless of their mutual enthusiasm for doing so."[2]

In Order No. 06-484, we subsequently approved an ICA submitted by the parties in conformance with Order No. 06-190. That Order approved the following language contained in Section 7.3.4.5 of the ICA: "Qwest and CLEC shall not exchange VNXX traffic." (*See also* Order No. 06-190, Appendix A, p. 16.)

On or about September 16, 2006, Universal filed a complaint with the U.S. District Court of Oregon (U.S. District Court) challenging several aspects of the Commission's Order No. 06-190. At no point during the proceedings before the U.S. District Court did Universal seek a stay from either the Commission or the U.S. District Court of the effectiveness of the approved ICA or the associated Commission orders.[2]

Complaint and Motion

On July 16, 2007, Universal filed with the Commission 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 raised numerous disputes about Qwest's treatment of Universal's traffic and billing of exchanged traffic. Universal also asserted that Qwest had threatened in a letter from Valene Kipp to Jeff Martin, dated July 3, 2007, 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 further claimed that such disconnection would cause its customers, most of whom are internet service providers (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 asked the Commission to immediately issue an order prohibiting Qwest from terminating service to Universal pending resolution of the disputed issues in the Complaint. The Commission docketed the Complaint as docket IC 13.

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[1] Order No. 06-190, Appendix A, at 15.
[2] Id. at 7.
[2] Official Notice of docket ARB 671 is taken, affirmed by statements of counsel at the July 19 and August 3, 2007, teleconferences.
[4] Motion, p. 2.
[5] *Id.*, p. 3.

Administrative Law Judge (ALJ) Allan Arlow convened telephone conferences in IC 13 on July 19, 2007, and July 23, 2007. Counsel for Universal asserted at the teleconference 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 affirmed that it had not sought a stay from either the Commission or the U.S. District Court relative to the provisions of the ICA and agreed with the ALJ's statement that "the Complaint presumes the legality of the agreement."

At a subsequent teleconference on August 3, 2007, counsel for Universal acknowledged that his client had been, and was currently, violating the terms of the ICA prohibiting the exchange of VNXX traffic, stating that its reasons for noncompliance were purely financial. Based upon this, and other information provided by counsel for the parties, we dismissed Universal's complaint without prejudice. We explained:

> …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 be able to prove that it 'has suffered actual injury due to the alleged misconduct,' should the Commission ultimately hear the Complaint.[3]

Based upon Universal's acknowledgement of the legality of all of the provisions of the ICA, including the prohibition on the utilization of VNXX for the provision of its services, and its confirmation that it had not sought a stay of either the ICA or the Commission's orders relating thereto, in our Order No. 07-366, we declined to address the merits of Universal's complaint until such time as Universal could affirmatively demonstrate its compliance with our explicit ruling in docket ARB 671.

In addition, we ordered Universal to provide information as to its plans to either immediately comply with the Commission orders or to protect its customers and

[3] Order No. 07-366, pp.6-7

end users from service disruptions. At the same time, however, we ordered Qwest to take no action to disconnect or otherwise impair service to the end-user customers of internet service providers utilizing the services of Universal pending our further consideration of the matter. [Order No. 07-366, p. 8, Ordering Clause 5.]

The Universal Plan

On September 4, 2007, Universal provided the requested information and indicated that it would soon enter into a transaction to sell its business, assets and customer base to a third party buyer (Buyer), which it described as "an established provider of managed modem services." Universal further stated that the Buyer would serve the existing customer base "without discernible change in service terms or quality."[6] On September 7, 2007, Universal provided a copy of the Asset Purchase Agreement (Agreement) also dated September 7, 2007, governing the transaction. The Agreement indicated that the Buyer was (**Confidential 1**), a Pennsylvania corporation that "currently provides wholesale dial-up and managed modems operations in various markets throughout the United State… (sic)" Except for the purchase price, which Universal indicated was all that had been redacted from the submission, the terms of the Agreement relative to our consideration are the following:

> 3. ...Seller shall sell, transfer, convey, assign and deliver (collectively 'transfer'), or cause to be transferred, to Buyer, free and clear of all Encumbrances, and Buyer shall purchase and acquire, all of Seller's books and records…relating primarily or exclusively to the Business, the Services and the Customers.
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> 4. …on the Activation Date designated for each Customer or Combination of Customers, Seller shall transfer and assign to Buyer and Buyer shall purchase all rights and benefits to such Customers. It is acknowledged by both parties that it will be impossible, impracticable, or detrimental for Buyer to transfer certain Customers listed in Exhibit A to Buyer's Network. As such, Buyer may, in its sole discretion, reject the transfer of any Customer listed on Exhibit A and Seller shall not be compensated by Buyer for such Customers.[7]
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> * * * * *

[6] Compliance Filing, pp. 2-3.

[7] Exhibit A to the Agreement was not included with the Universal Response, but was submitted September 28, 2007, under the existing Protective Order No. 07-321 pursuant to a request from the ALJ. According to counsel for Universal, the exhibit is a list of all of Universal's customers, but includes one no longer a customer.

> 7. It is agreed by the Parties herein that Seller is not assigning to Buyer nor is Buyer assuming the rights, obligations or liabilities contained in any Contract or Agreement, whether expressed or implied, between Seller and any of the Seller's Customers, Sellers third party carriers or vendors, and/or other third parties. Seller shall indemnify and hold Buyer harmless from and against any and all claims and/or Judgments arising out of the any Loss, liabilities or obligation of Seller relative to such agreements and contracts. (sic)
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> * * * * *
>
> 9. Seller and Buyer expressly understand and agree that Buyer is not assuming any liabilities or obligations of Seller, including but not limited to unearned revenue of Seller, and Seller shall indemnify and hold Buyer harmless from and against any and all claims and/or Judgments arising out of the any Loss, liabilities or obligations of Seller what so ever. Conversely, Buyer shall not assume any accounts receivable of Seller. (sic)
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> * * * * *
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> 14.(c) No consent, approval or authorization of, or declaration, filing or registration with, any Governmental Body is required for the execution, delivery and performance by Seller of this Agreement and any Transaction Documents, and for the consummation by Seller of the transactions contemplated hereby. No consent, approval or authorization of any third party is required for the execution, delivery and performance by Seller of this Agreement and any Transaction Documents and the consummation by Seller of the transactions contemplated hereby.
>
> 14.(d) Except for the disclosures contained on Attachment A hereto, there are no Claims pending or, to Seller's knowledge, threatened against Seller with respect to the operation of the Assets or Customers, before or by any Governmental Body or nongovernmental department, commission, board, bureau, agency or instrumentality or any other person or entity.

The Attachment A referenced in paragraph 14.(d) of the Agreement consists solely of references to litigation between Universal and Qwest before the

U.S. District Court arising out of Commission orders and disputes currently before the Commission. Thus, according to Universal, Qwest is the only entity to whom it may be significantly indebted. The transfer would otherwise thus be as stated in paragraph 3 "free and clear of Encumbrances."

Paragraph 14.(d) of the Agreement also provides that "there are no claims pending…by any instrumentality or any other person or entity" other than those of Qwest as set forth in Attachment A. While declining to disclose the purchase price, and thus making it impossible to determine whether the amount would be equal to or greater than that currently claimed by Qwest to be due under the ICA, Universal stated: "Universal cannot represent that it can make full payment to Qwest or any other secured creditor."[12]

Subsequently Disclosed Information

On October 4, 2007, Qwest provided additional information to the Commission, including a copy of an October 3, 2007, e-mail from Universal's counsel. In that e-mail Universal's counsel states, in part:

> Universal has two secured creditors, including Silicon Valley Bank and Richard Roderick. SVB is by far the larger of the two, and holds a lien on all of Universal's assets nearly two and one half times greater than the amount to be received from (**Confidential 2**). No shareholder, director, insider or any other third party will receive any amount from the sale of (**Confidential 3**).

According to a Report submitted by Universal's counsel on October 5, 2007, Richard Roderick's secured interest was perfected on August 3, 2007, while the IC 13 Complaint was pending. We note that August 3 was the very day of the prehearing conference during which Universal acknowledged that it was in violation of the VNXX provisions of our Order. The security interest granted to Mr. Roderick would therefore have a superior right to any claims Qwest might have made if it later prevailed before the Commission in the pending IC 13 Complaint. According to the unredacted copy of the Agreement supplied by Universal, the calculated sales price under the Agreement was (**Confidential 4**) percent of the monthly net revenues, which were estimated at $(**Confidential 5**), resulting in a total sales price of approximately $(**Confidential 6**), of which $(**Confidential 7**) had already been deposited in Universal's account at Silicon Valley Bank.[4]

[12] Universal Reply, Footnote 2.

[4] E-mail from James C. Waggoner, Universal counsel, dated October 11, 2007.

The amount owed to Silicon Valley Bank was $(**Confidential 8**), consisting of a line of credit of $(**Confidential 9**) and a term loan of $(**Confidential 10**), plus interest accrued since October 4, 2007. Universal is co-owned by Stephen Roderick and Richard Arthur Roderick, Universal's newly disclosed creditor. Richard Roderick is an officer and a director and holds a stock interest. Stephen and Richard are brothers.[5] This new information directly conflicts with multiple statements and assertions earlier made by the company and its counsel.

Despite the fact that Richard Roderick was both an officer, an owner and a creditor of Universal as well as a co-owner of 10D Telecom, Inc., counsel for 10D Telecom, Inc., K.C. Halm, and counsel for Universal, John Dodge—members of the same law firm and residents in the same Washington, D.C., office—had previously assured the Commission that there was no business relationship between Universal and 10D other than the involvement of Stephen Roderick, Universal's CEO, in both enterprises. An excerpt from a September 11, 2007, teleconference between the two attorneys and ALJ Arlow provides:

> ALJ Arlow: Now, first of all, I think I need to understand the relationship between Universal and 10D. Now, obviously, they're separate corporate entities. And one of the questions, of course, is what constitutes an affiliation. Not only can an affiliation be by one company being a subsidiary of another, or two companies being wholly owned by a third party, but also you can have common directors or common management. And so what I would like, first of all, to have for the record is a statement from Mr. Halm about any overlapping or interlocking ownership or management of the two entities.
>
> Mr. Halm: Well, Your Honor, subject to check with my client, we do know that Stephen Roderick, as the record clearly demonstrates and as we identified in the application for 10D Telecom, is a CEO of Universal Telecom and principal shareholder of that company, and is also a principal owner and operator of 10D Telecom, which quite frankly at this point is a very small concern. I can state with some certainty that there is a bit of overlap with respect to management, that is the persons that Mr. Roderick has hired to help run these two businesses.

[5] Statement of Universal counsel at conference of October 11, 2007. We also take official notice of CP 1378, *In the Matter of the Application of 10D Telecom, Inc.*, and note that the statement of counsel regarding the relationship of Stephen and Richard is also mentioned in the 10D Telecom website, which states the following: "10D Telecom is the latest of a group of companies founded right here in Oregon by Steve and Richard Roderick." On a web page captioned "About Steve and Richard" it states that they are brothers as well as business associates, and that "[i]n 1999, utilizing their knowledge and experiences, they created Universal Telecom a successful local telephone company."

> But I do believe that there are separate contractual arrangements between 10D and suppliers and vendors and those of Universal telecom.[15]
>
> * * * * *
>
> I've come here intent on demonstrating to you and to Mr. Duarte and to the folks at Qwest that 10D Telecom is not part of this arrangement, is not part of the Universal/ (**Confidential 11**) transaction and has nothing to do with that.[16]

Addressing the pending complaint proceeding between Universal and Qwest, Mr. Dodge made the following statement later during the teleconference:

> I only have the following factual observations. At this point it matters not whether the stay is lifted or remains in effect vis-à-vis the immediate payment of $320,000, which Universal disputes, to Qwest. If Your Honor lifts the stay, Qwest will be no closer to realizing that money because it does not exist in a form that can be given over to Qwest immediately.
>
> Whether there will be a net $320,000, if Universal ultimately disposes of all assets, I honestly do not know. But I suspect there will not be that much. That means that Qwest will join Universal's other creditors and try to get what payment it can.[17]

Subsequent to the prehearing teleconference, and after the two secured parties were identified, John Dodge, counsel for Universal, responded that Qwest and the Commission had merely failed to ask the right questions:

> Silicon Valley Bank's filing was made ***seven (7) years ago,*** and has been a matter of public record each and every day since. Qwest has simply failed to comprehend or pursue its fundamental due diligence obligations and having now discovered its embarrassing oversight—and unwilling to admit it failed to ask a question earlier it now understands as important to its interest—is lashing out at Universal and its counsel….The Commission should not penalize

[15] Tr. p. 6, l. 6-p.7, l. 6.
[16] Tr. p. 12, ll. 2-6.
[17] Tr. p. 23, ll. 5-17.

> Universal for Qwest's lack of diligence. (Emphasis in original.)[19]

Mr. Dodge's letter makes no mention whatsoever of the secured interest given by Universal to Richard Roderick, Universal's CEO's brother and business partner, in the weeks preceding the prehearing conference. The statement of Mr. Dodge at the prehearing teleconference, discussing Qwest's status as but one of several creditors, clearly failed to disclose what he knew as fact (as demonstrated by his comment in his letter): that there were already secured creditors, including the CEO's brother and a Universal and 10D principal. Furthermore, Mr. Dodge did know the extent to which Qwest would be left empty-handed--*completely*: The bank's interest is 2½ times the price of the Agreement. Mr. Dodge's statement was therefore incomplete and misleading about the extent of Universal's debts.

Stated differently, the Agreement provided that the payments were to be made to the Seller and that there were no claims pending other than those of Qwest. Universal cannot reasonably dispute that liens or security interests in assets that have yet to be settled by payment are clearly "claims pending" upon the assets.[20] Neither, in light of the disclosure of the ownership, management and creditor relationships of Richard Roderick with Universal and 10D, can counsel for Universal claim that it "answered every question from Judge Arlow fully and truthfully,"[6] nor when it claimed during the teleconference that it did not know "whether there will be a net $320,000, if Universal ultimately disposes of all assets."

Discussion

The plan proposed by Universal is, in essence, that Qwest continue to provide service to Universal and be prevented from disconnecting any circuits until the transaction covered by the Agreement is consummated. Universal offers nothing in return, neither payment on a going-forward basis for future service nor an escrow account into which it will pay for past and prospective charges.

We required Universal to provide a plan to bring it into compliance with our VNXX policy in a manner that would cause minimal inconvenience to its ISP customers and, in turn, the ISPs' end-user customers. However, paragraph 4 of the Agreement makes clear that the Buyer has the absolute freedom to, and appears likely will, abandon the very VNXX customers whose well-being we were concerned with when we stayed Qwest's authority to disconnect circuits. At the same time, it asks the Commission to continue the stay in effect until all customers are transferred to another carrier who will not interconnect directly with Qwest and will therefore have no direct financial relationship with Qwest as Universal has had.

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[19] Letter from John Dodge, counsel for Universal, October 5, 2007, pp. 3-4.
[20] *See* definitions of "Pending": "Not yet completed" and "Claim": "A demand for compensation." *Black's Law Dictionary*, Revised 4th Edition.
[6] Universal Letter of October 5, p. 2.

It thus appears that Universal would provide Qwest as its only recourse (since Universal will be out of business and beyond our jurisdiction) the ephemeral right to sue the Universal corporate shell for whatever the proceeds are from the sale of Universal's business. But, these proceeds have already been pledged to superior lienholders, the first of whom has a perfected right to an amount approximately 2½ times the proceeds of the sale and the second of whom is a Universal officer, director and stockholder.[21]

Furthermore, while Universal suggested to Qwest and the Commission that there might be some financial benefit to Qwest if there was forbearance from disconnecting circuits, Universal knew full well, but failed to disclose, that it had already assigned the proceeds of the sale to persons beyond the reach of the proceeding.

Finally, we are very troubled by Universal's lack of candor from both Universal's and 10D's counsel about the state of Universal's financial affairs and that one of the Universal's undisclosed assignees is a brother and business associate of Universal's CEO. Universal attempts to excuse this by claiming that Qwest and the Commission failed to ask the right questions. As discussed above, the ALJ requested a clear representation of the relationships among the parties. An ALJ is not expected to rigorously cross-examine an attorney in order to obtain a truthful response. Attorneys have an ethical duty to be forthcoming with the facts both in the District of Columbia[22] and in the State of Oregon.[23] We may address this aspect of the case in a separate action.[24]

DECISION

The stay contained in Ordering Clause 5 of our Order No. 07-366, entered August 22, 2007, will be lifted. We find as a matter of law that, via its letter from Valene Kipp to Jeff Martin, dated July 3, 2007, Qwest has complied with the notice provisions of the ICA. No further notice by Qwest is necessary to begin the disconnection of circuits and associated facilities dedicated to the provision of service to Universal. It is unclear whether the provisions set forth in our rules governing abandonment of service apply here. Assuming, without deciding that they do, we also waive the notice requirements on abandonment of service by competitive providers set forth in OAR 860-032-0020(11) so that further Qwest losses shall be limited to the greatest extent practicable.[7]

We recognize that Universal's ISP customers and, in turn, their end-user customers will be inconvenienced by a temporary loss of dial-up internet service. It was for their benefit that, more than six weeks ago, the Commission placed a temporary stay

[21] Universal letter, October 4, 2007, Exhibit B.
[22] *See* Comment [2], Rule 3.3, Candor to Tribunal, D.C. Rules of Professional Conduct, Amended.
[23] Rule 3.3, Candor to Tribunal, Oregon Rules of Professional Conduct.
[24] The Law Firm of Davis Wright Tremaine LLP is hereby cautioned to preserve all documents and written and electronic correspondence and memoranda relative to this matter.
[7] We treat Qwest's October 9, 2007, Request to Lift Stay or Schedule Prehearing Conference as a "petition to waive any time period" as provided by OAR 860-032-0020(16).

upon disconnection in effect, so that Universal would have the opportunity to assist them in preparing for the possibility of the need to migrate their business to other providers of telecommunications services. In order to be certain that Universal's ISP customers are aware of our action taken here today, a copy of this Order is being sent to all of Universal's customers, as identified in Exhibit A of the Asset Purchase Agreement and referenced in paragraph 4 thereof.

ORDER

IT IS ORDERED that:

1. Ordering Clause 5 in Order No. 07-366, entered August 22, 2007, is hereby RESCINDED.

2. Within two business days of the effective date of this order, Qwest Corporation may, at its discretion, pursuant to the terms of the Interconnection Agreement between the Parties, disconnect or otherwise impair services currently provided to Universal.

Made, entered and effective OCT 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 to the United States District Court.