

1 BEFORE THE PUBLIC UTILITY COMMISSION

2 OF OREGON

3 UM 1908

4 In the Matter of  
5 LUMEN TECHNOLOGIES,  
6 Proposed Commission Action Pursuant to  
7 ORS 756.515 to Suspend and Investigate  
8 Price Plan.  
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**LUMEN’S REQUEST TO CLARIFY OR  
RECONSIDER RULING DATED  
SEPTEMBER 29, 2022 AND, IN THE  
ALTERNATIVE, TO CERTIFY THE  
RULING TO THE COMMISSION**

10 **I. REQUEST.**

11 Lumen Technologies, Inc., on behalf of itself and several of its operating companies,<sup>1</sup>  
12 respectfully requests clarification or reconsideration of the Ruling dated September 29, 2022 (the  
13 “Ruling”). In the alternative, if the ALJ will not provide the clarification or reconsideration requested,  
14 Lumen requests that the ALJ certify the Ruling for the Commission’s consideration under OAR 860-  
15 001-0110. OAR 860-001-0110(2) requires the ALJ to certify the Ruling to the Commission because the  
16 Ruling “may result in undue prejudice to a party” or because “[g]ood cause exists for certification.”

17 The specific parts of the Ruling that are the subject of this request are:

- 18 1. Incorporation of the records of UM 2206 and UM 1908; and
- 19 2. Permitting customers (and potentially other persons) who do not formally intervene as  
20 parties to participate in the contested case, including (but not limited to) providing  
21 comment and presenting written material including briefs.

22 The portions of the Ruling containing these decisions are as follows:

23 Furthermore, to facilitate the hearing requested by Lumen within the  
24 timeline specific by ORS 756.515(5) which is 60 days from September 27,

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25 <sup>1</sup> Lumen Technologies, Inc. is the parent of operating companies Qwest Corporation, United Telephone Company  
26 of the Northwest, CenturyTel of Oregon, and CenturyTel of Eastern Oregon. “Lumen,” as used in this Request,  
includes all of these operating companies.

1 2022, I designate this proceeding as a contested case, and append  
2 information on contested case rights to this ruling. Additionally, to ensure  
3 that the Commission can review the relevant record necessary to decide  
4 this matter, I consolidate docket UM 2206 into this proceeding and fully  
5 incorporate the record of UM 2206, and UM 1908, including General  
6 Protective Order No. 22-352. Docket UM 1908 will be the leading docket.

7 Ruling at 2.

8 I recognize that although this matter will be managed as a contested case,  
9 there is significant customer interest in this proceeding. Accordingly, the  
10 Administrative Hearings Division will work to accommodate customer  
11 participation, including participation of those customers not represented  
12 by attorneys. Customers not represented by an attorney may participate in  
13 all events in the above schedule, provide comment, and may present  
14 written material including briefs. That noted, any person not represented  
15 by an attorney may not make legal argument in this case. Customers not  
16 represented by an attorney but planning to participate heavily in this  
17 proceeding are encouraged to formally intervene.

18 Ruling at 3.

19 These portions of the Ruling violate Oregon law, including the Commission's own rules, because  
20 (1) the record in a contested case may consist only of evidence admitted to the record during the hearing;  
21 and (2) only parties, and not interested persons, may participate in contested cases.

## 22 II. DISCUSSION.

### 23 A. **The record in this contested case must be created at the hearing and all proposed 24 evidence must be offered and subject to objection before it is admitted.**

25 Lumen is not clear what the ALJ means by "fully incorporat[ing]" the records of UM 1908 and  
26 UM 2206. For example, numerous comments have been filed by customers, members of the public, and  
others in these two dockets. Comments have been taken at public meetings. Presumably, Staff has  
assembled records in connection with its investigations.

None of this material may become part of the record unless it is offered as evidence in the  
hearing and admitted by the ALJ after considering any objections that may be made. Lumen has  
numerous concerns about the relevance and reliability of this material, including that it contains multiple

1 levels of hearsay. Lumen wants to ensure that its ability to object to inclusion of any material in the  
2 record upon which the Commission bases its decision is preserved until the hearing.

3 Every finding of fact in a Commission order, whether made in a contested case or other-than-  
4 contested case, must be “supported by substantial evidence in the record.” ORS 183.482(8)(c);  
5 183.484(5)(c). Contested case hearings exist for the purpose of taking evidence and creating the record  
6 upon which a Commission decision must be based. ORS 756.558. “All hearings shall be open to the  
7 public and may be had before the Public Utility Commission, an examiner or any other person  
8 authorized to hold such hearing. *A full record thereof shall be kept.*” ORS 756.521.

9 Nothing may be made a part of the record in a contested case that is not admitted as evidence in a  
10 hearing. The Commission’s rules address the admission of evidence. OAR 860-001-0450. And the  
11 Commission has delegated authority to its ALJs to administer oaths, make evidentiary rulings, and  
12 determine the order in which evidence will be presented. OAR 860-001-0090. All parties must be  
13 afforded a reasonable opportunity to examine any witness, to object to the admission of evidence, and to  
14 respond to evidence that is submitted.

15 The Commission’s rules also directly address admission of the record in another Commission  
16 proceeding, which is one of the issues raised here. “If a party offers in evidence all or part of the record  
17 from another Commission proceeding, then the party must provide a copy of the offered record to the  
18 ALJ and copies to other parties upon request.” OAR 860-001-0490. This specific rule requires any part  
19 of a record from another Commission proceeding to be provided to the parties, “offered” in evidence by  
20 a party, and treated as all other proffered evidence. The record of other proceedings may not be made  
21 part of a contested case record simply by an ALJ’s prehearing ruling, especially when those items have  
22 not even been identified.

23 Requiring that a party offer evidence to be made part of the hearing record so it may be objected  
24 to and met with rebuttal evidence is based not only on Oregon statutes and Commission rules, it is also  
25 based on basic principles of due process. Evidence alluded to in the Ruling appears to contain  
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1 statements that are adverse to Lumen’s interests, including unverified, unsubstantiated claims of service  
2 issues. Such claims cannot lawfully be admitted into the record without the opportunity to object to the  
3 evidence and to cross-examine its proponents. Due process requires the opportunity to be heard at a  
4 meaningful time and in a meaningful manner. *Cole v. DMV*, 336 Or. 565, 588, 87 P.3d 1120 (2004),  
5 *citing Mathews v. Eldridge*, 424 U.S. 319, 333 (1976). The opportunity to confront and cross-examine  
6 adverse witnesses is necessary to comport with the fundamental requirements of due process under the  
7 Fourteenth Amendment. *Id.*, *citing Goldberg v. Kelly*, 397 U.S. 254, 269 (1970). Therefore, for any  
8 assertions of fact that are offered, the evidence must be subject to objection, the declarants must be  
9 subject to cross-examination, and Lumen must be allowed the opportunity to offer rebuttal evidence.  
10 This can be accomplished only when the specific evidence is offered at the hearing.

11 If the ALJ did not intend to change the procedures by which evidence will be admitted to the  
12 record from how the Commission is required to handle contested cases, then a simple clarification to  
13 that effect would suffice. If, on the other hand, the ALJ does intend to permit such material to be  
14 considered as evidence in the record without further procedures to offer and admit that evidence, then  
15 Lumen requests the ALJ to certify the Ruling to the Commission so these concerns may be addressed.  
16 Admitting such material to the evidentiary record prior to the hearing and without providing the parties  
17 an opportunity to be heard on any objections would result in undue prejudice to Lumen, constituting  
18 good cause to certify the Ruling to the Commission.

19 **B. Only customers who intervene as parties may fully participate in the hearing.**

20 The other part of the Ruling Lumen objects to is that which permits customers who do not  
21 intervene as parties to participate in the hearing, including providing comment and presenting written  
22 material such as briefs. The Commission’s rules are clear that only parties may fully participate in a  
23 hearing. Customers must intervene in a proceeding to become a party. OAR 860-001-0300(2). Anyone  
24 else may become an “interested person;” however, their role is severely limited:

25 A person may ask to be listed as an “interested person” in a particular  
26 proceeding. An interested person receives electronic mail notifications of

1 filings made and documents issued by the Commission or ALJ in that  
2 particular proceeding. *An interested person is not a party to the*  
3 *proceeding, and is not entitled to file pleadings, present evidence for the*  
*record, conduct cross-examination of witnesses, become a signatory to a*  
*protective order, or file briefs.*

4 OAR 860-001-0300(7) (emphasis added). Public input may be received in rulemaking proceedings  
5 (OAR 860-001-0200); however, it has no place in contested cases.

6 The Ruling would grant greater rights to non-parties than the Commission's rules permit. The  
7 timing and nature of the information the Ruling allows non-parties to provide is also vague, stating that  
8 such non-parties may "provide comment, and may present written material including briefs." This  
9 opens the door to non-parties' offering information and arguments that are not subject to cross-  
10 examination or rebuttal, which are required by basic principles of due process as discussed above. The  
11 ALJ should clarify that this hearing will be conducted consistently with the Commission's rules and that  
12 only *parties* will be entitled to participate.

### 13 **III. CONCLUSION.**

14 For the foregoing reasons, Lumen requests that the ALJ clarify or reconsider the Ruling to  
15 provide that:

- 16 1. Nothing will be made a part of the record upon which the Commission's decision is  
17 based that is not offered and received as evidence in the hearing, after consideration of  
18 any objections that may be made; and
- 19 2. No person will be allowed to participate in the hearing unless they are a party under the  
20 Commission's rules.

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1 If the ALJ does not so clarify or reconsider the Ruling in both respects, then the ALJ should certify the  
2 Ruling for the Commission's consideration under OAR 860-001-0110.

3 DATED: October 14, 2022.

4 **PERKINS COIE LLP**

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