BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1354

In the Matter of **QWEST CORPORATION** **Petition for Approval of a Price Plan Pursuant to ORS 759.255.**	**JOINT MOTION TO DISMISS**

JOINT MOTION TO DISMISS

Covad Communications Company, Integra Telecom of Oregon, Inc., McLeodUSA Telecommunications Services, Inc., Time Warner Telecom of Oregon, LLC, and XO Oregon, Inc. ("Joint CLECs"); Telecommunications Ratepayers Association for Cost-based and Equitable Rates ("TRACER"); and Citizens' Utility Board of Oregon ("CUB") (collectively "Joint Movants") hereby request that the Commission issue an order dismissing with prejudice Qwest's Petition for Approval of a Price Plan Pursuant to ORS 759.255, filed October 26, 2007 ("Qwest's Petition"). In support of this motion, Joint Movants state as follows:

INTRODUCTION

Qwest's Petition must be seen for what it is: a last ditch effort to obtain from the Commission the deregulation that it could not obtain from the Legislature. The "price plan" described in Qwest's Petition is nearly identical to the deregulation proposal that Qwest championed during the 2007 legislative session. Having failed to convince the Legislature to adopt its proposal, Qwest has scoured existing law for any possible means to achieve its desired goal. Qwest apparently settled upon ORS 759.255, a price cap statute that was never intended as a vehicle for deregulation. Unfortunately for Qwest, the Commission cannot and should not try to fit the square peg of deregulation into the round hole of price cap regulation under ORS 759.255.

Over the past two decades, the Legislature has repeatedly amended the enabling statutes to allow the Commission to adapt to changes in the telecommunications industry. In particular, the Legislature has provided the Commission with tools for transitioning from traditional rate of return regulation to alternative forms of regulation and eventually to deregulation, when appropriate.

In 1987, the Legislature passed a price listing statute, now codified at ORS 759.189. Qwest availed itself of this Alternative Form Of Regulation ("AFOR") in 1991. The Commission terminated Qwest's AFOR in 1996 due to serious degradation in the quality of Qwest's service.[1] In 1995, in response to a request from Qwest, the Legislature first authorized the Commission to approve prices without regard to an ILEC's return on investment. This price cap statute, codified at ORS 759.255, requires the Commission to make specific public interest findings that the

[1] See Order Nos. 91-1598 and 96-107 in *In re Petition of Pacific Northwest Bell Telephone Company to Price List Telecommunications Services*, UT 80.

proposed rates are just and reasonable and that service quality will be maintained. Until Qwest's pending petition, no ILEC had availed itself of this option.

In 1999, again at Qwest's urging, the Legislature enacted a different price cap regulation, codified at ORS 759.405 *et seq.*, that did not require a petition or Commission approval and instead established legislatively-mandated, permanent price caps for electing ILECs willing to commit substantial funds to infrastructure investments approved by the Oregon Economic and Community Development Commission. Qwest made a permanent election under the statute in November 1999, effective in December 1999. Qwest has been providing services subject to these permanent price caps ever since.

The Legislature also enacted a deregulation provision, ORS 759.052 (formerly ORS 759.030), making it possible for ILECs to completely exempt services from regulation if the ILEC could show sufficient competition existed. The Commission has deregulated a number of Qwest's services pursuant to ORS 759.052.[2] In 2005, Qwest sought to deregulate all of its business services, but the Commission denied the petition for failure to demonstrate sufficient competition.[3] In UX 29, the Commission determined that effective competition exists only within the Portland and Clackamas rate centers, and then only for basic business services provided to customers with four or more lines. The Commission also found that "Qwest clearly dominated the telecommunications market for all business services outside of the Portland and Clackamas rate centers." Order No. 06-399 at 2. In reaching its conclusion, the Commission noted in particular that Qwest currently has pricing flexibility downward to the price floors, yet "Qwest has not responded to its ostensibly competitive environment by lowering any of the

[2] *See, e.g.*, Order Nos. 98-018 (UX 18—Voice Messaging); 98-209 (UX 20—Enhanced Fax); 00-222 (UX 21—DS 3); 00-228 (UX 23—Centrex Prime); 03-368 (UX 27—Complete-A-Call); 03-609 (UX 28—800 Service Line and IntraLATA Toll); 06-238 (UX 30—Billing & Collection); 07-139 (UX 31—Trouble Isolation Charge).
[3] *See In re Qwest Corporation's Petition to Exempt from Regulation Qwest's Switched Business Services*, Order No. 06-399, UX 29 (July 12, 2006).

thousands of listed prices....Price and service competition cannot be deemed to exist where the largest competitor has not responded to competitive market entry by lowering price or changing the qualities of a product or service." Order No. 06-399 at 19. Despite the Commission's sweeping finding in the summer of 2006 that Qwest faced insufficient competition to warrant deregulation, Qwest nevertheless lobbied strenuously in the 2007 to obtain legislatively-mandated deregulation. Not surprisingly, these efforts failed in committee. Qwest simply does not face sufficient competition to justify deregulation, either through an order of this Commission or through legislative fiat.

Having failed to accomplish the deregulation of most non-basic services both by petition to the Commission and through the Legislature, Qwest now asks the Commission to find a loophole, allowing Qwest to abandon its election under ORS 759.410 and to achieve deregulation without satisfying the standards imposed by ORS 759.052. Qwest's Petition ignores the detailed statutory scheme developed by the Legislature.

The statutory scheme in place today provides ILECs two distinct paths to price cap regulation and a third and exclusive path to deregulation. An ILEC that desires price cap regulation either may petition the Commission to approve a price plan pursuant to ORS 759.255 or may elect the legislatively-mandated permanent price caps under ORS 759.405, *et seq.* Under ORS 759.255, the Commission must find that the price plan is in the public interest, ensures just and reasonable rates, and protects high quality service. The Commission retains jurisdiction to review the plan and to modify the price caps as warranted. *See* ORS 759.255(3).

By contrast, under ORS 759.410, the Commission has limited authority to act. The Commission lacks authority to modify the price caps, which are permanent and established by operation of law. Once an ILEC elects price cap regulation pursuant to ORS 759.405 *et seq.*, as

Qwest did in 1999, the ***only*** means for removing the permanent price cap for a service is to petition the Commission for deregulation pursuant to ORS 759.410(7) and ORS 759.052. Once the election is made, the Commission lacks authority to lower the price caps, to raise the caps, or to remove the caps. Since the Commission's authority derives exclusively from the Legislature, Qwest cannot vest that authority in the Commission by "opting out" of its election. In fact, the statute clearly provides that an electing carrier thereafter shall be subject to the requirements of ORS 759.405 *et seq*. unless and until the services are deregulated pursuant to ORS 759.052.

Even if Qwest had not elected to be subject to permanent price caps, ORS 759.255 is not a deregulation statute. ORS 759.255 merely authorizes the Commission to "approve a plan under which the commission ***regulates prices*** charged by the utility, without regard to the return on investment of the utility." ORS 759.255(1) (emphasis added). The Commission must find that the plan "is in the public interest" and "shall consider among other matters, whether the plan: (a) ***[e]nsures prices*** for telecommunications services ***that are just and reasonable***". ORS 759.255(1) (emphasis added). This statute provides the Commission authority to set prices without respect to return on investment. It does not authorize the Commission to deregulate ILEC prices, which is precisely the relief Qwest seeks.

Qwest's proposed plan lacks any initial price caps for the vast majority of its services and provides only temporary caps on the remaining services. In substance, Qwest's Petition is a request for deregulation, which must be filed under ORS 759.052 and must satisfy the statutory criteria for deregulation. ORS 759.255 was not intended to be, and may not be used as, a substitute for the deregulation statute. Because the Commission lacks the authority to modify or eliminate the permanent price caps resulting from Qwest's election under ORS 759.405 *et seq*. and because the Commission lacks authority to grant a request for deregulation in the guise of a

price plan pursuant to ORS 759.255, Qwest's Petition must be dismissed with prejudice.

ARGUMENT

I. The Commission lacks authority to grant Qwest's Petition because the election for price cap regulation under ORS 759.410 is permanent.

Qwest claims that "[u]pon entry of a Commission order approving a price plan on terms and conditions that are acceptable to Qwest, Qwest will...provide[] notice of Qwest's election *out of* ORS 759.405 to 759.410."[4] Qwest's Petition necessarily depends on the assumption that Qwest may opt out of price cap regulation either with or without the Commission's approval. That assumption, however, is wholly unjustified because the Commission lacks authority to modify the permanent price caps imposed as a matter of law and the statutory language prohibits an electing telecommunications carrier to opt out at will. Furthermore, even if Qwest otherwise could petition for approval of an ORS 759.255 price plan, that statute does not authorize the Commission to waive Qwest's compliance with ORS 759.405 *et seq*. For these reasons, Qwest's Petition should be dismissed with prejudice.

A. The Commission lacks authority to modify permanent price caps imposed as a matter of law by ORS 759.410.

There is no question that the price caps are permanent and that the Commission lacks any authority to modify the price caps currently in place. As the Commission previously explained, ORS 759.400 *et seq*. "introduced a ***permanent*** price cap regulation option to ***replace*** rate of return regulation for telecommunications utilities that elect that option."[5] The initial price caps were the rates in place when Qwest elected price cap regulation in 1999, although the rates were subject to a one-time adjustment in a rate case then pending.[6] As the Commission recognized, the rate case offered "the Commission's ***only*** opportunity to adjust Qwest's price caps."[7]

---

[4] Qwest's Petition at 23.
[5] *In re the Application of Qwest Corporation for an Increase in Revenues*, Order No. 01-810, UT 125 (September 14, 2001) at 3 (emphasis added).
[6] See Order No. 01-810 at 3; *see also* ORS 759.415.
[7] Order No. 01-810 at 3 (emphasis added); see also ORS 759.415.

Several years later, Qwest nevertheless sought to raise price caps for residential Caller ID. The Commission denied the request after reaffirming the permanent effect of Qwest's election and Order No. 01-810:

> Pursuant to Senate Bill 622, now codified as ORS 759.400 et seq., telecommunications utilities were given the option to replace traditional rate of return regulation with price cap regulation....[T]he price caps established in Order No. 01-810 entered in Phase II of this docket ***became the permanent price caps under the law.***[8]

Commission staff recognized that, as a matter of law, "[h]aving elected price cap regulation, Qwest cannot prospectively raise rates for non-basic services above the price established in Phase II."[9] The Commission agreed, concluding that it lacked authority to reexamine Qwest's rates as a result of Qwest's election under ORS 759.410.[10]

This important limitation on the Commission's authority distinguishes ORS 759.405 *et seq.* from ORS 759.255. Although 759.255 is an alternative to rate of return regulation based upon price limitations, the price caps under 759.255 are not set by legislative fiat, and the Commission retains authority to set and to modify the price caps. By contrast, under ORS 759.410 the price caps are fixed by the Legislature as a matter of law at the rates in place at the time of the carrier's election. Those rates may not be modified lawfully, by Qwest or by the Commission.

Despite the statutory prohibition, Qwest's proposal necessarily requires the Commission to modify the price caps for non-basic services, something the Commission clearly lacks the authority to do. *See Pac. Nw. Bell Tel. Co. v. Sabin*, 21 Or App 200, 213 (1975) (stating that a regulatory agency's "power arises from and cannot go beyond that expressly conferred upon it").

---

[8] Order No. 06-515 (UT 125), n.2 at 1-2 (emphasis added).
[9] Order No. 06-515, n.7 at 4.
[10] Order No. 06-515 at 11; *see also* Staff's Opening Brief (UT 125), which notes that "the Commission does not have the lawful authority" to grant Qwest's Petition because "in electing for price cap regulation, Qwest opted out of traditional revenue requirement regulation" and instead "chose to have price flexibility for non-basic services limited only by 'price caps' and 'price floors'." Brief at 3, 5. "[T]he price caps established [under] Order No. 01-810 were *the last and only opportunity* for the Commission to adjust Qwest's price caps for non-basic services." Brief at 3 (emphasis added).

In fact, the only difference between this proceeding and Qwest's Petition in UT 125 to modify price caps on residential Caller ID service is that Qwest now proposes that the price caps be removed entirely as a prerequisite for granting a new price cap plan under ORS 759.255. The Commission lacked the authority to grant the request in UT 125, and the Commission lacks the authority to grant the petition in UM 1354 for the same reason.

Because the Commission cannot modify the price caps once the election is made, the Commission is without authority to grant Qwest's Petition.

B. The plain language of the statute prohibits an electing carrier from opting out at will.

Cognizant, perhaps, of the dilemma, Qwest asserts without any legal authority that Qwest may unilaterally "elect[] *out of* ORS 759.405 to 759.410" if the petition is granted.[11] In effect, Qwest presumes that, while the Commission's authority is limited by law, the electing carrier has the ability to opt in and out of price cap regulation at will. The unambiguous statutory language simply does not provide Qwest with the right to opt out of price cap regulation once the election has been made.

Pursuant to ORS 759.405, a telecommunications carrier that elects to be subject to the statute thereafter "***shall*** be subject to...price regulation requirements of this section and ORS 759.410." ORS 759.405(1) (emphasis added). This clear mandate is twice reiterated in ORS 759.410. Section (1)(c) sets forth the intent of the Legislature in enacting price cap regulation, providing in pertinent part that:

> It is the intent of the Legislative Assembly that...[a] telecommunications carrier that opts out of rate of return regulation under this section and ORS 759.405 ***shall be subject to price cap regulation***....

ORS 759.410(1)(c) (emphasis added). Section (2) again states that an electing telecommunications carrier "***shall be subject to price regulation as provided in this section.***" ORS 759.410(2) (emphasis added).

---

[11] Qwest's Petition at 23.

The term "shall" is a command and, when used in a statute, expresses what is mandatory rather than discretionary. *Preble v. Dept. of Revenue*, 331 Or 320, 324 (2000); *Roach v. Jackson County*, 151 Or App 33, 38 (1997). By repeatedly and consistently using the phrase "shall be subject to price cap regulation as provided in this section" the Legislature expressed a clear intent that an electing carrier thereafter shall be required to comply with the provisions in ORS 759.405 and 759.410. The statute neither states nor implies any exceptions to this rule.

The clear intent of the Legislature is further demonstrated by the breadth of the exemption described in ORS 759.410(2). Specifically, an electing telecommunications carrier "shall not be subject to ***any other retail rate regulation***, including ***but not limited to*** any form of earnings-based, rate-based or rate of return regulation." ORS 759.410(2) (emphasis added). This broad proscription includes every other form of retail rate regulation and, by its plain terms, is not limited merely to earnings-based or rate of return regulation. In other words, once a telecommunications carrier elects price cap regulation under ORS 759.405 *et seq.*, the carrier cannot be subject to any other rate regulation, including a price plan under ORS 759.255. No exception exists for a telecommunications carrier that wishes to opt out of the statutory scheme after having made the election, and the Commission may not and should not construe a statute to insert what has been omitted. *See, e.g.,* ORS 174.010.

In fact, the Commission has already recognized the restriction on the right of a carrier to opt out of price cap regulation. In AR 438, the Commission considered amendments to cost allocation rules for telecommunications utilities, deciding to "add[] an exemption from cost allocation manual requirements for price-cap companies subject to ORS 759.405."[12] The Commission rejected a similar exemption for companies subject to ORS 759.255 because "these companies could return to rate of return regulation" unlike the carriers subject to ORS 759.405.[13] The inability of price cap companies to opt out of the regulatory scheme after election is the sole

[12] *In re Allocation of Cost Rules for Telecommunications Utilities and Cooperatives*, Order No. 02-886, AR 438 (December 19, 2002).
[13] Order No. 02-886 at 3.

distinction relied upon by the Commission in the order. Although the order specifically mentions only the prohibition against returning to earnings-based regulation, the applicable provision in ORS 759.410(2) is very broad and encompasses a return to "any other" rate regulation, including "but not limited to" earnings-based regulation. It would be a perverse result if a price cap company, which cannot re-elect earnings-based regulation, could achieve the same result simply by proposing a plan under ORS 759.255 and later opting back out. The resulting loophole would render the express limitations in ORS 759.410 illusory. *See Central Catholic Educ. Ass'n v. Archdiocese of Portland*, 323 Or 238, 243 (1996) (statutes should not be read in a way that renders one statute ineffective).

Furthermore, the Legislature has specifically provided for the manner in which an electing carrier may eliminate the permanent price caps: by petitioning for deregulation pursuant to ORS 759.052. Section 7 of ORS 759.410 provides that "[n]othing in this section or ORS 759.405 is intended to limit the ability of a telecommunications carrier to seek deregulation of telecommunications services under ORS 759.052." Because there exists a specific provision providing for deregulation for utilities subject to ORS 759.405 *et seq.*, Qwest must petition for deregulation pursuant to ORS 759.052. *See Jordan v. SAIF Corp.*, 343 Or 208, 217 (2007) (stating the familiar canon of construction that a specific statutory provision controls over a general provision or statute).

Because the repeated, consistent and unambiguous provisions of ORS 759.405 and 759.410 express the clear intent of the Legislature to create a permanent election, Qwest may not opt out of price cap regulation merely by stating a desire to do so. Absent further legislative action, Qwest's only option if it wishes to eliminate the current price caps is to seek deregulation pursuant to ORS 759.410(7) and 759.052. Qwest's Petition should therefore be dismissed.

//

//

C. Even if the Commission could otherwise approve the proposed price plan, ORS 759.255(5) does not provide for waiver of the requirements under ORS 759.405 *et seq.*

Even if Qwest could alternate freely between alternate forms of price cap regulation, ORS 759.255(5) does not authorize the Commission to waive the requirements of ORS 759.405 *et seq*. ORS 759.255(5) states that

> If the commission approves a plan under subsection (1) of this section, the commission may waive, in whole or in part, compliance by the telecommunications utility with ORS 759.120, 759.125, 759.130, 759.135, 759.180 to 759.205, 759.215, 759.220, 759.285 and 759.300 to 759.393.

Under established principles of statutory construction, the inclusion of specific matters in a statute generally implies a legislative intent to exclude related matters not mentioned. *State v. Johnston*, 176 Or App 418, 425 (2001). Since ORS 759.405 *et seq*. is excluded from the list of requirements the Commission may waive, it is reasonable to conclude that the Legislature did not intend those requirements to be waivable as part of an approved price plan under ORS 759.255. Since the requirements of ORS 759.255 and ORS 759.410 are inconsistent and the latter requirements may not be waived, the Commission cannot approve Qwest's proposed plan and should therefore dismiss the petition.

II. The deregulation Qwest seeks is not available under ORS 759.255.

Although Qwest filed its petition pursuant to a price cap regulation, ORS 759.255, Qwest is effectively seeking deregulation by requesting that the Commission eliminate most of the permanent price caps currently in place. The Legislature never intended ORS 759.255 to be used for deregulation, as the text and legislative history make clear. In fact, the Legislature created a specific statute providing for deregulation but only if sufficient competition exists. ORS 759.052. Since deregulation is not available under ORS 759.255, Qwest's Petition should be dismissed with prejudice.

//

A. By requesting that the Commission eliminate most price caps immediately or in the near future, Qwest seeks deregulation and not a new "price plan."

Qwest filed its petition pursuant to ORS 759.255, seeking approval of what Qwest refers to as a "price plan." The plan would cap the rates for primary line basic service for residential and business customers (defined as the first line to a specific location).[14] The price caps for these services would be allowed to increase up to $2.00 per month during first four years of the plan; thereafter, the price caps for primary line basic service would be eliminated. In other words, the plan would allow an immediate price increase of $2.00 per month for the first line to a location, and prices would be deregulated in four years without regard to the competitive conditions at that time.

Although the plan would cap the rates for extended area service and switched access service at current rates, Qwest would be allowed to increase or decrease the rates for all other regulated retail services, including intrastate private line and special access services, subject only to a price floor. Since nearly all of Qwest's non-basic services are currently subject to permanent price caps under ORS 759.405 *et seq.*, Qwest is effectively requesting that the existing price caps be eliminated. In other words, if Qwest's plan is approved, Qwest services will not be subject to price caps and will not be subject to rate of return regulation. Qwest will have achieved deregulation without having to surmount the burden of proving that sufficient competition exists, as required by ORS 759.052.[15]

---

[14] Qwest asks that the Commission modify the classifications in OAR 860-032-0190(3)(a), (b), (c), and (d), which classify residential and business flat rate and measured service as "basic telephone service," and waive application of OAR 860-032-0190(3)(e) and (f), which classify private branch exchange (PBX) trunk service and multiline or "complex" business service as "basic telephone service." In other words, Qwest requests pricing flexibility for all residential and business lines beyond the first line to a customer location, and for PBX service, so these services would not be considered "basic telephone service" for purposes of applying ORS 759.425(2)(a).

[15] Qwest offers few incentives in exchange for deregulation. Qwest would commit not to seek an exemption under OAR 860-023-0055(16)(d) from the service quality reporting requirements during the first five years of the plan. Qwest would commit to invest $2 million to continue to improve the quality of its network, increase the deployment

There really is no question that what Qwest seeks is deregulation. Deregulation is immediate for all retail services except the first line to a residential or business location. For those lines, deregulation is merely delayed for four years. Only EAS and switched access retain existing price caps. The problem for Qwest is that ORS 759.255 does not authorize deregulation.

B. The Legislature never intended ORS 759.255 to be used for deregulation.

When interpreting statutes, Oregon courts and agencies follow the framework set forth in *PGE v. BOLI* to discern the legislative intent. *PGE v. Bureau of Labor and Indus.*, 371 Or 606, 610-12 (1993); *accord* ORS 174.020(1)(a) ("In the construction of a statute, a court shall pursue the intention of the legislature if possible."). Application of the *PGE* framework shows that the legislature never intended ORS 759.255 to allow deregulation.

The text of the statutory provision is the starting point for interpretation and is the best evidence of the Legislature's intent. *PGE*, 371 Or at 610. A court or an agency will also examine the "context of the statutory provision at issue, which includes other provisions of the same statute and other related statutes." *Id.* at 610-11. Also, in analyzing the text and context of a statute, courts and agencies may consider rules of construction that inform them how to read the text and how to interpret the provision in context. *Jordan*, 343 Or at 217.

In this case, neither the text nor context of the statute contemplate deregulation under ORS 759.255. ORS 759.255 explicitly authorizes only a "plan under which the commission ***regulates*** prices charged by the utility" and exempts from rate of return regulation the "***[p]rices approved***" under the plan. ORS 759.255(1) (emphasis added). Merriam Webster's Collegiate Dictionary 985 (10th ed. 1994) defines "regulate" as "to govern or direct according to rule," "to bring under the control of law or constituted authority," "to reduce to order, method, or

---

of advanced services, and help bring broadband connections to Oregon's K-12 schools. Also, Qwest would agree to Commission review of Qwest's performance every five years.

uniformity," or "to fix or adjust the . . . amount . . . or rate of."[16] In other words, considering the plain and ordinary meaning of the language, ORS 759.255 authorizes only a plan under which the Commission fixes or limits prices charged by the utility. The statute clearly contemplates affirmative regulation, not deregulation.

Furthermore, a common rule of construction holds that, if there is a general and particular statute or provision, the particular statute or provision controls. *Jordan,* 343 Or at 218 (citing ORS 174.020(2)); *see also State ex rel. Woodel v. Wallace*, 89 Or App 478, 481 (1988) ("In the absence of evidence of contrary intent, the specific statute controls."). ORS 759.052(1) specifically authorizes the Commission to exempt a telecommunications service from regulation if the Commission finds that price or service competition exists, if the service is found to be subject to competition, or if the public interest no longer requires full regulation of service. The Commission must exempt a service from regulation if both price and service competition are found to exist. ORS 759.052(2). Because the Legislature has enacted a specific deregulation statute, neither the Commission nor Qwest may rely on ORS 759.255, a general price cap statute, to accomplish deregulation.

Yet another canon of statutory construction provides that statutes on the same subject matter should be construed as consistent and in harmony with one another and so as to give effect to all. *State ex rel. Huddleston v. Sawyer*, 324 Or 597, 603 (1997); ORS 174.010. If the lower standards of ORS 759.255 may be substituted as the test for deregulation, then the higher standards of ORS 759.052, which the Legislature intended as the deregulation statute, will be

[16] Similarly, Black's Law Dictionary 1156 (5th ed. 1979) defines "regulate" as "[t]o fix, establish, or control; to adjust by rule, method, or established mode; to direct by rule or restriction, to subject to governing principles or laws. . . . Regulate means to govern or direct according to rule or to bring under control of constituted authority, to limit and prohibit, to arrange in proper order, and to control that which already exists."

rendered ineffective. *See Central Catholic Educ.,* 323 Or at 243. ORS 759.255 simply cannot be construed to provide the relief Qwest seeks, namely deregulation.

In fact, Qwest has demonstrated by its own actions that the proper statutory procedure is to petition for deregulation under ORS 759.052. For example, in UX 29 Qwest filed a petition to deregulate all switched business services. Although Qwest's petition was denied, Qwest clearly recognized that it was required to make a proper showing of sufficient competition pursuant to ORS 759.052.

Since the text and context of the statute show that the ORS 759.255 was never intended for deregulation but merely to authorize an alternative to rate of return regulation based on price caps, Qwest may not seek and the Commission may not grant deregulation under ORS 759.255. If Qwest wishes to deregulate services, it must comply with the requirements of ORS 759.052.

If the legislative intent remained unclear after analyzing the text and context, the Commission could then consider the legislative history. *PGE*, 317 Or at 611-12. In this case, the legislative intent is clear and no further interpretation is necessary. Even if the intent were not clear, the legislative history only confirms that ORS 759.255 was proposed to authorize price caps, not deregulation.

Oregon Senate Bill 413 ("SB 413"), later codified at ORS 759.255, was introduced and adopted in 1995. The Commissioner of OPUC testified in support of SB 413, stating that the legislation "would give the Commission greater discretion in approving new forms of regulation with price cap features."[17] Qwest similarly testified that the legislation "would authorize the Public Utility Commission to replace rate of return regulation with what we refer to as price limit regulation," which Qwest described as follows:

---

[17] Testimony, Senate Comm. on Bus. and Consumer Affairs, SB 413, March 14, 1995, Ex. G (statement of Roger Hamilton, Commissioner of Public Utility Commission). See Attachment A, appended hereto.

> ***The Commission determines maximum allowable prices—that is, price limits or price caps***—based on existing prices and other factors such as prevailing prices in the market....With price limit regulation the focus is directly on what customers are really concerned about—the prices they pay.[18]

Qwest then outlined the reasons to move away from rate of return regulation and "to move toward price regulation."

Qwest's testimony illustrates the sole purpose of ORS 759.255: not to authorize deregulation but to create an alternative form of regulation based on price caps rather than rate of return. The statute's text, context, and history all manifest this single purpose. Qwest's attempt to use ORS 759.255 to eliminate the permanent price caps already imposed and to achieve deregulation without having to make a showing of sufficient competition is disingenuous at best. Qwest's Petition should therefore be dismissed with prejudice.

//

//

//

//

//

//

//

//

//

//

//

//

[18] Testimony, Senate Comm. on Bus. and Consumer Affairs, SB 413, March 14, 1995, Ex. D (statement of Chuck Leonard, Vice President of US West Communications) (emphasis added). See Attachment B, appended hereto.

CONCLUSION

For the foregoing reasons, the Commission should dismiss Qwest's Petition under ORS 759.255 with prejudice. If Qwest believes that sufficient competition exists to justify deregulation of some or all of its services, then Qwest should file an appropriate petition pursuant to ORS 759.410(7) and ORS 759.052 in a separate docket and make the required showing.

Respectfully submitted this 10th day of January, 2008.

DAVIS WRIGHT TREMAINE LLP

Mark P. Trinchero, OSB # 88322
Kelly L. Harpster, OSB #06347
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201
Tel: (503) 241-2300
Fax: (503) 778-5299
marktrinchero@dwt.com

Of Attorneys for Joint CLECs

THE CITIZENS' UTILITY BOARD OF OREGON

Jason Eisdorfer by MPT

Jason Eisdorfer, OSB # 92292
610 S.W. Broadway, Suite 308
Portland, OR 97205
Tel: (503) 227-1984
Jason@OregonCUB.org

ATER WYNNE LLP

Arthur A. Butler by MPT

Arthur A. Butler, WSB #87384 (pro hac vice)
Nathan _ Karman,
601 Union Street, Suite 1501
Seattle , WA 98101-3981
Tel: (206) 623-4711
Fax: (206) 467-8406
aab@aterwynne.com

Of Attorneys for TRACER

BEFORE THE SENATE
COMMITTEE ON BUSINESS AND CONSUMER AFFAIRS

Senate Bill 413

Testimony of Roger Hamilton
Commissioner
Public Utility Commission of Oregon

March 14, 1995

Bill No. SB 413
Senate Business and Consumer Affairs
Exhibit: G
Date: 3-14-95 No. Of pages: 2
Submitted by: Roger Hamilton

The Commission supports the adoption of SB 413.

This bill will give the Commission more flexibility regulating telecommunications utilities in a rapidly changing telecommunications environment and in achieving its legislative mandate. ORS 759.015 states "it is the goal of the State of Oregon to secure and maintain high-quality universal telecommunications service at just and reasonable rates for all classes of customers and to encourage innovation within the industry by a balanced program of regulation and competition." Increasing competition for various kinds of telecommunications services calls for regulatory flexibility in achieving this statutory balance.

The Commission currently has some flexibility in regulating telecommunications utilities through legislation that was adopted in 1987. Using this authority, the Commission has been regulating U S WEST Communications under an Alternative Form of Regulation which is a modified form of price regulation. This option has given the utility greater pricing flexibility while protecting consumers of essential services.

SB 413 would give the Commission greater discretion in approving new forms of regulation with price cap features. Specifically, it would enable the Commission to authorize a price regulation plan without regard to the utility's return on investment. This is requested by U S WEST to enable the company to better respond to the current competition trends in the industry. While the Commission supports the greater flexibility, we cannot say at this time how we will implement this legislation if adopted.

The current price cap plan will expire on January 1, 1997. Prior to that time, we will be analyzing how the current plan has operated and whether the plan has made our ratepayers better off as they would have been under pure rate-of-return regulation. Also, at the beginning of 1996, we will be embarking upon a year-long proceeding to determine whether to continue the current plan for U S WEST, or to approve some other form of regulation that would be in the public interest. Therefore, I cannot predict at this time whether, or the extent to which, we would be using this legislation to approve a new form of regulation for U S WEST in 1997. The outcome will ultimately be determined in a proceeding which we will conduct in 1996, and will be based upon a number of considerations relating to the public interest including reasonable prices and service quality. It will also be dependent upon the input we receive from other parties that will be affected by such a plan, including customers of the utility.

Nevertheless, we support this legislation in the event that we would need the additional flexibility to approve an appropriate alternative form of regulation that would be in the public interest in the years ahead. With this understanding the Commission endorses SB 413.

Bill No. SB 413
Senate Business and Consumer Affairs
Exhibit: Ex D
Date: 3-14-95 No. Of pages: 6
Submitted by: Chuck Lenard

SB 413

TESTIMONY BEFORE THE SENATE COMMITTEE ON BUSINESS & CONSUMER AFFAIRS MARCH 14, 1995

CHUCK LENARD
VICE PRESIDENT - OREGON, U S WEST COMMUNICATIONS

Thank you Mr. Chairman and members of the committee for the opportunity to appear here today representing U S WEST in support of Senate Bill 413. For the record, my name is Chuck Lenard and I am the Vice President - Oregon for U S WEST Communications.

Over the past ten years, the Oregon Legislative Assembly has on three occasions found it appropriate to make significant statutory modifications in order to facilitate the transition of telecommunications regulation to be consistent and compatible with the competitiveness of the telecommunications marketplace. That marketplace is on the verge of major new changes and, as a result, we are here today to request that the Public Utility Commission be granted the ability to modify regulation in a way which we believe will better meet the needs of the public and the industry in the future.

Senate Bill 413 is, as I suggested, enabling legislation. In and of itself, the measure doesn't change the rules. Rather, it authorizes the Oregon Public Utility Commission to change the rules if they find that doing so is in the

public interest. That's the approach the legislature took in 1985 in adopting HB 2200, in 1987 with the passage of House Bill 2656, and most recently in 1993 with House Bill 2203. Because it will be up to the Commission to determine whether the newly allowed form of regulation is in the public interest, it is not necessary for the Legislature to conclude that a change in regulation is necessarily the right thing to do -- only that it may be.

Having said that, I would like to explain the change in regulation this bill would allow. Today, utility regulation in this state is generally referred to as being earnings or rate of return based. Very simply that means that the appropriateness of prices is determined by looking at earnings. If earnings are considered to be too high, then prices are reduced and if earnings are considered to be too low, prices can be increased.

Unfortunately, while I can describe the concept simply, there really isn't anything simple about rate of return regulation. In fact, it is extremely cumbersome and will be made much more so by the complexities of our increasingly competitive environment and rapidly changing technologies. In 1991 the Public Utility Commission did authorize for U S WEST an alternative form of rate of return regulation which provided some relief from the complexities of the rate of return approach. While this alternative regulation plan has been relatively well suited to the early 90s, the fact that it is still rate of return based presents some problems for the future.

Senate Bill 413 would authorize the Public Utility Commission to replace rate of return regulation with what we refer to as price limit regulation. The price limit approach is relatively simple. The Commission determines maximum allowable prices -- that is, price limits or price caps -- based on existing prices and other factors such as prevailing prices in the market. This is much less complicated than the rate of return approach which involves lengthy studies and debate over appropriate depreciation rates and which expenses and investment should or should not be included in the determination of earnings. With price limit regulation the focus is directly on what customers are really concerned about -- the prices they pay. We believe the change has the potential to save regulators and ourselves considerable time and resources.

As nice as it is to think about those savings, there are some other reasons to position ourselves for this change which I believe are even more significant. First of all, as we transition to a competitive environment, earnings based regulation, which was designed to operate in a monopoly environment, just doesn't work well. Recall that I indicated that if a company under rate of return regulation isn't earning adequately, they are allowed to increase their rates in order to improve the earnings. Now imagine in a competitive environment that the local telephone company is losing some of its customers and, as a result, its earnings are declining. Raising prices hardly seems like the solution. In a competitive environment it will only make the situation worse. So as telecommunications markets become increasingly competitive, the ability of lawmakers and regulators to assure telephone companies of an acceptable earnings level really disappears.....unless,....

adequate earnings can be achieved by increasing prices where competition has not yet occurred. Since competition occurs first in metropolitan areas, that means price increases for rural customers and, in fact, it may be only a short-term solution because it will likely hasten the entry of competitors able to undercut the increased prices. The risk of all this can be eliminated through a price regulation plan in which rural as well as urban customers will fully understand where prices are capped. Uncertainty as to the impact of market changes on price are eliminated.

While there are numerous reasons to move toward price regulation, I want to share just one more with you because I think it is very important to this state. The change in regulation which this bill would allow can greatly increase the incentive for telecommunications companies to invest in state of the art infrastructure in Oregon. The reason is simple. Under rate of return regulation, there is a definite limit on what can be earned from existing or new investment. On the other hand, as I indicated earlier, where competition exists, there really is no way for government to assure that earnings do not decline to below acceptable levels. There is, in effect, a ceiling but no floor and that's not a very attractive environment to invest in. The incentive for a company to risk millions to provide information highway type services to schools, libraries, businesses, and homes, will be much greater if earnings caps are eliminated and price caps are substituted. Customers will be protected from unreasonable prices and will be able to avail themselves of the many new services which we are hearing about daily.

Price regulation really isn't a new idea but it has caught on lately as the way to beneficially adapt regulation to the quickly evolving telecommunications marketplace. There are now 14 states which have adopted price regulation and there are legislative or commission actions pending in 16 more states to make it happen.

I am obviously a believer in this new approach to regulation but, again, it isn't necessary for you to conclude today or in this legislative session that it is absolutely the right thing - only that it may be and that it is appropriate to enable the PUC to make that decision.

Thank you very much.

PRICE REGULATION STATUS

Price Regulation Plans in Effect

- Delaware
- Illinois
- Indiana
- Kansas
- Michigan
- Missouri
- Nebraska
- North Dakota
- New York (Rochester)
- Ohio
- Pennsylvania
- Virginia
- West Virginia
- Wisconsin

Price Regulation Plans Pending Approval

- Alabama
- Arizona
- Georgia
- Iowa
- Kentucky
- Louisana
- Maine
- Massachusetts
- Mississippi
- Nevada
- New York (NYNEX)
- Utah
- Washington
- Washington, D.C.
- Wyoming

Alternative Rate of Return Regulation

- Alaska
- California
- Colorado
- Florida
- Idaho
- Maryland
- Minnesota
- New Jersey
- Oregon
- Rhode Island
- Texas

Traditional Rate of Return Regulation

- Arkansas
- Connecticut
- Hawaii
- Montana
- New Hampshire
- New Mexico
- North Carolina
- Oklahoma
- South Carolina
- South Dakota
- Vermont

CERTIFICATE OF SERVICE

DOCKET UM 1354

I hereby certify that I have this day served a true and correct copy of PETITION TO INTERVENE upon all parties of record, electronically to all parties and by U.S. Mail to all parties who have not waived paper service.

Art Butler Ater Wynne LLP 601 Union Street, Suite 1501 Seattle, WA 98101-3981 aab@aterwynne.com	Roger Dunaway Ater Wynne LLP 601 Union Street, Suite 1501 Seattle, WA 98101-3981 rtd@aterwynne.com
Lowrey R. Brown Citizens' Utility Board of Oregon 610 SW Broadway, Suite 308 Portland, OR 97205 lowrey@oregoncub.org	Jason Eisdorfer Citizens' Utility Board of Oregon 610 SW Broadway, Suite 308 Portland, OR 97205 jason@oreconcub.org
Robert Jenks Citizens' Utility Board of Oregon 610 SW Broadway, Suite 308 Portland, OR 97205 bob@oregoncub.org	Jason W. Jones Department of Justice Regulated Utility & Business Section 1162 Court St. NE Salem, OR 97301-4096 jason.w.jones@state.or.us
Michael T. Weirich Department of Justice Regulated Utility & Business Section 1162 Court St. NE Salem, OR 97301-4096 michael.weirich@doj.state.or.us	Lawrence Reichman Perkins Coie LLP 1120 NW Couch St., 10th Floor Portland, OR 97209-4128 lreichman@perkinscoie.com
Alex M. Duarte Qwest Corporation 421 SW Oak St., Suite 810 Portland, OR 97204 alex.duarte@qwest.com	James E. Green Verizon Northwest Inc. 20575 NW Von Neumann Dr., Suite 150 Mail Code: OR030156 Beaverton, OR 97006 james.e.green@verizon.com
William A. Haas McLeodUSA Telecommunications Inc. P.O. Box 3177 6400 C St. N.W. Cedar Rapids, IA 52406 whaas@mcleodusa.com	Richard A. Finnigan 2112 Black Lake Blvd. SW Olympia, WA 98512 rickfinn@localaccess.com

DATED at Portland, Oregon this 10th day of January, 2008.

Barbara Lasswell

Barbara Lasswell
Assistant to Mark Trinchero