

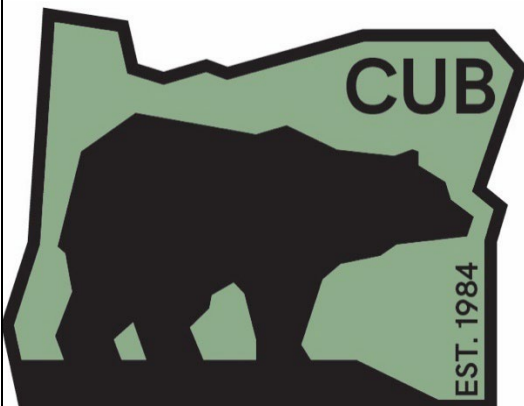
**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1908, UM 2206**

In the Matter of )  
)  
LUMEN TECHNOLOGIES, )  
)  
Proposed Commission Action Pursuant to )  
ORS 756.515 to Suspend and Investigate )  
Price Plan (UM 1908), and )  
)  
QWEST CORPORATION, )  
)  
Investigation Regarding the Provision of )  
Service in Jacksonville, Oregon and )  
Surrounding Areas (UM 2206). )  
)  
Hearing Relating to Order Nos. 22-340 and )  
22- 422 )

**POST-HEARING BRIEF  
OF THE  
OREGON CITIZENS' UTILITY BOARD**

January 6, 2023



**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

**UM 1908, UM 2206**

In the Matter of	)	
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LUMEN TECHNOLOGIES, <sup>1</sup>	)	OREGON CITIZENS' UTILITY
	)	BOARD'S POST-HEARING BRIEF
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22- 422	)	

**I. INTRODUCTION**

Pursuant to Administrative Law Judge (“ALJ”) Moser’s November 4, 2022 Ruling, the Oregon Citizens’ Utility Board (“CUB”) hereby submits its Post-Hearing Brief in the above-captioned proceeding. On September 27, 2022, Lumen Technologies, Inc. (“Lumen” or the “Company”) filed a Request for Hearing Pursuant to ORS 756.515(5) and asked for a hearing to determine whether the Public Utility Commission of Oregon’s (“Commission”) September 23, 2022 Order No. 22-340 is lawful and whether it should remain in effect. On October 28, 2022, the Commission issued Order No. 22-422 (“Modified Order”) which modified Order No. 22-340,

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<sup>1</sup> Formerly known as Qwest Corporation, United Telephone Company of the Northwest, CenturyTel of Oregon, and CenturyTel of Eastern Oregon.

after giving parties notice and opportunity to respond. Lumen provided comments that the proposed modification did not change its position on the lawfulness of the decision.

On December 12, 2022, Intervenor Priscilla Weaver submitted a Pre-Hearing Brief, and on December 13, 2022, Commission Staff (“Staff”), CUB, and Lumen each submitted a Pre-Hearing Brief. The Commission held the hearing on December 21, 2022. In this Brief, CUB will support and expand upon the arguments in its Prehearing Brief and show that that Order No. 22-340 as modified by Order No. 22-422 (the “Modified Order”) is lawful.

As discussed in CUB’s Prehearing Brief, the Public Utility Commission of Oregon’s (Commission) Modified Order is lawful pursuant to the broad authority granted by the Oregon legislature in its general powers and duties to ensure Oregonians are receiving safe and adequate service from, and are protected from unjust and unreasonable practices by, their telecommunications provider.<sup>2</sup> CUB maintains its arguments made in our Prehearing Brief by reference. In this Post-Hearing Brief, we address Lumen’s argument that the Commission’s Modified Order is unlawful because it believes the minimum service quality standards law and rules should apply. CUB disagrees. The record is clear that the issues in this docket are bigger than meeting minimum standards – people’s safety are at risk because of the quality of Lumen’s services and the quality of its responses or nonresponses to service issues reported by its customers. Accordingly, the Commission lawfully acted under its broad authority to do all things necessary to protect the people of Jacksonville, Applegate, and surrounding areas from harm.

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<sup>2</sup> UM 1908 – CUB’s Prehearing Brief (Dec. 13, 2022).

## **II. The minimum service quality standards are not the Commission’s only authority to address Lumen’s failure to provide safe and adequate telephone service.**

The Commission has been given clear and unambiguous authority to protect the public health and safety of Oregonians, and to ensure they are receiving safe and adequate telephone service.<sup>3</sup> Further, the Oregon legislature has directed the Commission to develop minimum service quality standards to ensure safe and adequate telephone service.<sup>4</sup> Accordingly, the Commission developed rules identifying those minimum standards and the remedies for violations of those standards.<sup>5</sup> However, as discussed in CUB’s prehearing brief, the existence of these standards does not remove the Commission’s obligation to protect Oregonians, including from unjust and unreasonable practices, and ensure they are receiving adequate telephone service. While the Commission’s directives to enforce this duty may be the same or similar remedy as available in another statute or rules, the Commission’s authority to remedy issues with customer telephone service quality is not limited to one statute—the entire statutory scheme must be considered.<sup>6</sup>

The Oregon legislature has granted the Commission “the broadest authority—commensurate with that of the legislature itself—for the exercise of [its] regulatory function.”<sup>7</sup> Given the history of ongoing outages and unreliable service and the steps Lumen has or has not taken to remedy the issues, the Commission rightfully recognized that the ongoing unreliable

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<sup>3</sup> ORS 759.040; 759.035; ORS 759.056(1); OAR 860-023-0005.

<sup>4</sup> ORS 759.450(2).

<sup>5</sup> OAR 860-023-0055.

<sup>6</sup> UM 1908 – CUB’s Opening Brief at 11-14 (Dec. 13, 2022).

<sup>7</sup> OPUC Order No. 08-487 at 4 citing *Pacific Northwest Bell Tel. Co. v. Sabin*, 21 Or App 200, 214, 534 P2d 984, *rev den* (1975).

telephone service is putting Oregonians' lives at risk and lawfully issued the Modified Order pursuant to its broad regulatory authority and duty to protect customers.

Oregon law does not limit the Commission's authority to remedy telephone service issues to the minimum service quality standards' directives as Lumen has argued in this matter. As the Court of Appeals properly recognized in *Pacific Northwest Bell Telephone Co. v. Katz*, the entire statutory scheme of Commission regulatory authority must be considered in understanding its regulatory authority.<sup>8</sup> A telecommunications utility is required to provide safe and adequate services,<sup>9</sup> and the Commission is vested with the power and jurisdiction to supervise and regulate every telecommunications utility in Oregon and to "do all things necessary and convenient in the exercise of its power and jurisdiction."<sup>10</sup> This regulatory authority includes taking action to protect utility customers from unjust and unreasonable practices, to make sure customers have adequate utility service, and to require Lumen to take action necessary for the protection of health and safety of its customers.<sup>11</sup>

In *Katz*, the Commission appealed the circuit court's decision reversing the Commission's order directing Pacific Northwest Bell Telephone Co. ("PNB") to refund customers over collected revenues finding that the refund was unlawful retroactive ratemaking per ORS 759.185(4).<sup>12</sup> PNB argued that since the legislature specifically authorized refunds under ORS 759.185(4), it limited the Commission's authority to issue refunds in any other circumstance.<sup>13</sup> The court agreed that the refunds were not authorized under ORS 759.185(4), but determined that statute was not the only authority the Commission has to authorize refunds.<sup>14</sup>

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<sup>8</sup> *Pacific Northwest Bell Telephone Co. v. Katz*, 116 Or.App. 302, 310-311 (1982).

<sup>9</sup> ORS 759.035, 759.506(1); OAR 860-023-0005.

<sup>10</sup> ORS 756.040(2).

<sup>11</sup> ORS 756.040(1); ORS 756.035(2).

<sup>12</sup> *Katz* at 305.

<sup>13</sup> *Katz* at 310.

<sup>14</sup> *Id.* at 305-311.

The *Katz* court recognized that the legislature granted the Commission “broad regulatory power” to perform its delegated function, stating “[i]t is well settled that an agency has such implied powers as are necessary to enable the agency to carry out the powers expressly granted to it,” and that nothing in ORS 759.185(4) or (5) limited the Commission’s authority to order a refund.<sup>15</sup> The court also found that to limit the Commission’s authority to refund monies over collected from rates out of compliance with a Commission order would be inconsistent with its regulatory role, and such a holding would deprive the Commission of its authority to protect customers.<sup>16</sup> Later court decisions reiterate the holding in *Katz* by identifying that the Commission’s general grants of authority, in ORS 756.040 and other general statutes, do *not* allow for a decision that is “specifically contrary” to the limitations in a statute.<sup>17</sup>

In *Pacific Northwest Bell Telephone Co. v. Eachus*, the Court of Appeals agreed that ORS 756.515, ORS 756.040(1) and ORS 756.040(2) are broad enough to allow the Commission to issue an order declaring existing rates to be interim.<sup>18</sup> However, because ORS 759.205 specifically states that existing rates “are the lawful rates until they are changed as provided in this chapter,” the court found that “the effect of an order declaring those existing rates to be interim would have been to allow a rate reduction before the reduced rate had been approved” and inconsistent with the statute.<sup>19</sup>

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<sup>15</sup> *Katz* at 309-310 (citing ORS 756.040(1)–(2)).

<sup>16</sup> *Id.*

<sup>17</sup> *Pacific Northwest Bell Telephone Co. v. Eachus*, 135 Or.App. 41, 49-50 (1995).

<sup>18</sup> *Id.* (because ORS 759.205 specifically states that existing rates “are the lawful rates until they are changed as provided in this chapter,” the court found that “the effect of an order declaring those existing rates to be interim would have been to allow a rate reduction before the reduced rate had been approved” and inconsistent with the statute); *Citizens' Util. Bd. of Oregon v. Pub. Util. Comm'n of Oregon*, 154 Or. App. 702, 707 (1998) (the Commission’s general grants of authority, in ORS 756.040 and other general statutes, do not authorize the Commission to approve rates that are “specifically contrary” to the limitations in ORS 757.355 and ORS 757.140(2)).

<sup>19</sup> *Id.* at 49.

In *Citizens' Utility Board of Oregon v. Public Utility Commission of Oregon*, the Court of Appeals reviewed the Commission's finding that Portland General Electric ("PGE") was entitled to recover from ratepayers a return *of* its investment in the retired Trojan generating facility and a return *on* the investment.<sup>20</sup> Citing *Eachus*, the court reiterated that the Commission's general grants of authority, in ORS 756.040 and other general statutes, do not authorize the Commission to approve rates that are "specifically contrary" to the limitations in ORS 757.355 and ORS 757.140(2).<sup>21</sup>

The Oregon Legislature directed the Commission to develop minimum service quality standards for telecommunication providers like Lumen.<sup>22</sup> These set the floor for service quality requirements for telecommunications' services,<sup>23</sup> but they do not necessarily provide a remedy for every situation that may impact customers experiencing problems with their phone service. Nor do they specifically prohibit the Commission from providing customers a remedy to problems with service adequacy and safety,

Hypothetically, a telecommunications utility would be in compliance with the repair clearing time rule if it clears 90% of trouble reports within 48 hours, even if the remaining 10% outstanding are the most egregious problems.<sup>24</sup> The minimum service quality standards permit at least 10% of trouble reports to remain, regardless of infrastructure difficulties or situational circumstance. For example, the company would be within compliance if 10% of trouble reports were related to phone outages in a community in the path of an active wildfire. While this extreme danger is not, at present, the situation in the Jacksonville area, the premise is the same.

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<sup>20</sup> *Citizens' Util. Bd. of Oregon v. Pub. Util. Comm'n of Oregon*, 154 Or. App. 702, 707 (1998).

<sup>21</sup> *Id.* at 717.

<sup>22</sup> ORS 759.450; OAR 860-023-0055.

<sup>23</sup> UM 1908 – Staff's Opening Brief at 11.

<sup>24</sup> *See* OAR 860-023-0055(6).

Lumen may or may not be clearing 90% of trouble tickets within 48 hours, but the issue here is not limited to whether Lumen is addressing trouble reports in a timely manner (although that is part of the concerns arising from customer complaints). The main issues are related to whether Lumen is addressing the trouble reports at all and, if so, are the remedies meaningful so as to prevent the problems from reoccurring and keeping customers from risk of serious harm. CUB agrees with Commission Staff that without accurate information about trouble tickets and how Lumen resolved those issues, the Commission’s ability to fully assess the scope of service quality issues is hampered, and “Lumen should not be allowed to escape its obligations to provide safe and adequate service by refusing to provide accurate and reliable information to the Commission.”<sup>25</sup> To hold that the Commission does not have the power to protect customers from a utility’s action or nonaction, whether the problems stem from 90%, 75%, or even 5% of the number of resolved service quality issues, would be inconsistent with the Commission’s role as a regulator.

Like *Katz*, the Commission’s broad and general authority allows it to issue the Modified Order directing Lumen to show it is addressing customer service issues in a timely manner. The record shows that Lumen’s customers in the Jacksonville, Applegate, and surrounding areas have been experiencing ongoing service quality issues that have put Oregonians at risk of being unable to call emergency services or receive wildfire evacuation notices, despite attempts by Commission Staff to assist Lumen in implementing a meaningful solution to these problems. The minimum service quality standard statute and rules do not contain language specifically contrary to the Commission’s exercise of its broad regulatory authority. To hold that the Commission is limited to the procedures set by those standards when

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<sup>25</sup> UM 1908 – Commission Staff’s Opening Brief at 6 (Dec. 13, 2022).



the record shows how dangerous the telephone outages can be in these rural communities, would be inconsistent with its regulatory role and such a holding would deprive the Commission of its authority to protect customers.<sup>26</sup>

### III. CONCLUSION

The Commission's Modified Order is lawful exercise of its regulatory authority. The record shows that Lumen's customers in the Jacksonville, Applegate, and surrounding areas have experienced ongoing service quality issues for nearly ten years. The unreliability of this service poses significant safety concerns for these customers who live in an area with limited infrastructure and limited or no alternative means of communication. With the Modified Order, the Commission lawfully directed Lumen to prioritize customer issues in this area so as to ensure they are protected from serious harm that may arise from unreliable and inadequate telephone service.

Dated this 6<sup>th</sup> day of January 2023

Respectfully submitted,

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<sup>26</sup> *Id.*