

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

AR 464

In the Matter of a Proposed Rule Regarding  
Telephone Directory "Blue Pages"

COMMENTS OF QWEST  
CORPORATION

Qwest Corporation ("Qwest") respectfully submits these comments on the rules proposed by Commission Staff ("Staff") in this rulemaking proceeding.

**A. There Is No Need for the Proposed Rule**

Qwest believes that there is no need for the Commission to issue a rule requiring telecommunications utilities to include government and human services sections in directories that they publish or have published. Creation of such a rule would foist regulation upon an area that has continued to respond to consumer needs in the absence of regulation.

Since Mr. Long first proposed such a rule in 1987, Qwest's directories in Oregon have included government listings, classified and set apart in the front of the directory, marked with a distinctive blue border. In addition, the Yellow Pages include a comprehensive listing of useful and important information and telephone numbers, including those for mental health agencies, community services, and other human services, at the front of the directory with distinctive borders. This information has been provided and continues to be provided in the absence of any regulation requiring such information. Moreover, the Yellow Pages directory itself includes numerous categories used for listings of public and private human services organizations. *See* Comments of Dex Media, Inc. for a more detailed discussion of the classified listings of human service organizations in the existing Yellow Pages.

There is no indication that directory publishers are intending to limit provision of this type of information in the future. In fact, Dex Media, Inc. has represented to the Commission that it has no plans to stop including the government listings in its directories. Indeed, it is likely that the inclusion of such information makes the directory a more useful publication and that market forces will continue to support their inclusion and potential expansion.

The lack of any need for regulation in this area is underscored by the apparent absence of any complaints or other petitions to the Commission for this sort of regulation. To Qwest's knowledge, it is Mr. Long and Mr. Long alone who has been advocating for this issue for at least the past 17 years. In the absence of a demonstrated demand for regulation, and in the presence of a market responding to perceived consumer need by voluntarily providing the same sort of information, the Commission should stay its hand. The legislature has directed the Commission to administer its statutes "to encourage innovation within the industry by a balanced program of regulation and competition." ORS 759.015. The directory business is becoming more and more competitive, with paper publishers competing not only with each other, but also with Internet and other forms of electronic providers. Yet the proposed rule would apply – and probably could only apply – to telecommunications utilities and not to these other directory providers. Such a rule would actually stifle innovation by imposing regulation that would freeze the status quo, and operate in a discriminatory manner in a competitive environment.

Moreover, not only has this information in directories been made available continually since Mr. Long first raised this issue 17 years ago, there is a recent, significant development which renders his proposed rule not only unnecessary, but also archaic. Pursuant to federal action, dialing code 2-1-1 has been set aside to provide public access to information about, and referral to, health and human services. The 2-1-1 system has been implemented in several communities in Oregon and will continue to serve more and more communities over the coming years. Qwest submits that 2-1-1 provides the sort of information that Mr. Long seeks, yet in a much more useable and updated manner. 2-1-1 is available as a free call to anyone with a phone;

## 2- COMMENTS OF QWEST CORPORATION

telephone directories, on the other hand, are not always accessible to people when they are in need of information. In addition, 2-1-1 is staffed by trained operators who can help callers identify the resources that they need and provide them with the telephone numbers. Moreover, the 2-1-1 database is updated daily, while printed directories can be updated only on an annual basis. For all of these reasons, the 2-1-1 service is much more beneficial to a person in need than a classified listing in a directory that may or may not be available to a person.

The potential unavailability of utility telephone directories to all consumers is another important factor that would limit the impact of Staff's proposed rule. The proposed rule would require blue pages listings only in directories provided by telecommunications utilities and thus would directly impact only customers of telecommunications utilities, and not customers of other telecommunications providers. We understand that the Commission has been advised that its limited jurisdiction would not permit a rule that requires similar material to be in directories provided to customers of other telecommunications providers. Thus, the proposed rule applies only to telecommunications utilities, expressly exempts cooperative corporations, and does not apply to competitive providers. The fact is, however, that more and more people are choosing to obtain telecommunications service from providers other than telecommunications utilities, such as competitive providers, wireless providers, cooperatives, cable companies, and VoIP providers. Thus, the rule that Staff proposes will have less and less impact upon consumers' ability to access human services and government numbers over time. On the other hand, services such as 2-1-1 can provide that access more broadly and on a non-discriminatory basis.<sup>1</sup>

Finally, section (3) of the proposed rule appears simply to state that utilities are bound by whatever obligations exist in their tariffs relating to the directory listings that must be provided

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<sup>1</sup> Qwest has previously submitted to Staff informal comments discussing why rules that apply only to telecommunications utilities are unlawfully discriminatory. Those comments are attached hereto as Exhibit 1, and incorporated herein.

to its customers. Qwest respectfully submits that no rule is required to support the conclusion that a utility is bound by its tariffs.

Both Qwest in Exhibit 1 and the other parties have commented on various legal issues surrounding the validity and enforceability of Staff's proposed rule. The Commission should be cautious in proceeding in an area where its jurisdiction and actions are not free from challenge, particularly where the need for these rules has not been demonstrated. Before committing its resources, as well as those of the industry, to the development and enforcement of rules, the Commission should seriously consider whether they are needed at all. In view of the considerations outlined in this letter, Qwest believes that these rules are not needed.

#### **B. The Proposed Rule Should Be Modified**

In the event that the Commission does decide to issue a rule regarding the inclusion of government and human resource listings, Qwest has two specific comments on Staff's proposed rule.<sup>2</sup>

First, Qwest understands that Staff's intention was to codify in the proposed rule only the providers' historical practice of providing government listings in directories. Qwest believes that there is an inconsistency in the proposed rule that can be resolved by a simple amendment, that would also conform the rule to general, current practices. Section (2) of the proposed rule states: "Telecommunications utilities subject to this rule must, at a minimum, provide alphabetical listings of city, county, state, regional, and federal government offices, and public school and school district offices." This is the only mandatory requirement in the proposed rule of the specific types of listings that must be provided. This requirement, however, appears inconsistent with the more general statement in section (1) of the proposed rule that: "Every telecommunications utility that publishes an annual telephone directory, or has one published by

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<sup>2</sup> Qwest is not commenting on the proposed rules submitted by Mr. Long, since it is Staff's rule that is the subject of the Notice of Proposed Rulemaking in this docket. Should the Commission wish to consider a different proposed rule, Qwest respectfully requests the right to comment on further proposals.

an affiliate or third party publisher, must publish a specialized directory of government and human services telephone numbers." The inconsistency arises from the fact that section (2) requires the publication only of government numbers, including human services provided by the government, and section (1) arguably also requires the inclusion of private entities that provide human services.

Qwest does not believe that the intent of the proposed rule is to require the inclusion of private human services entities, as that would be a significant broadening of the current practice. Qwest, therefore, suggests that section (1) be revised to delete the words "and human services" from the referenced sentence. Alternatively, one could substitute the words "including government" for the word "and", to clarify that the mandatory listing of human services in the blue pages is limited to government agencies.

Second, Qwest takes issue with the language in section (2) of the proposed rule that: "Telecommunications utilities are encouraged to include private non-profit corporations that provide human services to the public in the specialized directory." While Qwest appreciates that this language confirms Qwest's comment above that Staff did not intend for the proposed rule to *require* the inclusion of private human service entities in the specialized directory, Qwest also believes that this language is inappropriately vague. It is unclear what sort of legal obligation would be imposed on a telecommunications utility by a statement of "encouragement" in a rule.

"Rule" is defined as "any agency directive, standard, regulation or statement of general applicability that implements, interprets or prescribes law or policy . . ." ORS 183.310(9). This definition implies that a rule prescribes specific conduct. Due process also requires that "[g]overnment regulation must be sufficiently clear so that ordinary people can understand what conduct is being prohibited, . . . and so that the regulation 'does not encourage arbitrary and discriminatory enforcement.'" *Chalmers v. City of Los Angeles*, 762 F3d 753, 757 (9<sup>th</sup> Cir 1985).

While Qwest would like to believe that a statement of encouragement in a rule is completely non-binding and cannot be the subject of any enforcement whatsoever, Qwest is


concerned that another party might try to enforce some sort of obligation based upon this vague language in a rule. For example, a party could argue that such language imposes an obligation to undertake a good faith effort to do the thing that is encouraged. In short, Qwest is concerned that such a vague requirement could lead to litigation, and that the potential exists for arbitrary and discriminatory enforcement. For these reasons, Qwest suggests that this sentence be removed from the rule if one is issued.

### CONCLUSION

For the foregoing reasons, the Commission should exercise its discretion and decline to issue a rule that merely captures the status quo. Such a rule is not only unnecessary, it would also stifle competition and innovation in this developing industry. If the Commission does decide to issue a rule along the lines proposed by Staff, then it should revise the rule as suggested by Qwest to remove an inconsistency and eliminate a vague provision.

DATED: February 7, 2005.

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October 23, 2003

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**Re: PUC Docket AR 464**

Dear Mike:

Thanks to you and Phil for taking the time to meet with us on October 2 regarding the legal basis for the Commission's considering the rules proposed by Mr. Long in this docket. I am writing on behalf of Qwest Corporation to address certain of these legal issues, namely: (1) the scope of a 1988 Attorney General opinion and (2) why issuing the proposed rules would violate certain telecommunications utilities' rights under (a) Section 253 of the Telecommunications Act and (b) the Equal Protection Clauses of the Oregon and United States Constitutions. I understand that other parties will address other legal issues, and I do not address those in the interest of brevity.

**1. Scope of the 1988 Opinion**

Staff of the Commission has raised the question of whether a 1988 Attorney General Opinion has already addressed the issue of whether the Commission can lawfully issue the proposed rules. Or. Op. Atty. Gen. OP-6216 (1988) (the "1988 Opinion"). Qwest does not believe that the 1988 Opinion is broad enough to justify the promulgation of the proposed rules.

The 1988 Opinion considered the question of whether the Commission has the authority to adopt rules regarding the content and placement of government and human services listings "in telephone directories published by public utilities." The opinion concluded that the Commission does have that authority with respect to every

[13141-0585/PA032930.162]

telecommunications public utility "that publishes a directory." The common sense interpretation of the quoted phrase would include only telecommunications utilities (as telecommunications public utilities are known under the current statutes) that directly publish telephone directories using their own publishing assets, and not those telecommunications utilities that arrange for directory publication through affiliates or unaffiliated third parties. Under the current state of the industry, the 1988 Opinion would not include Qwest and most other telecommunications utilities within its scope. That interpretation is also borne out by a subsequent Commission decision.

In Order Nos. 84-266 and 84-267, the Commission approved the transfer of directory publishing assets from Pacific Northwest Bell ("PNB"), Qwest's predecessor, to U S WEST Direct, an affiliate. In subsequent years, the Oregon directory was published by U S WEST Direct and its successors. In Order No. 89-1044, the Commission ordered PNB to "reacquire the directory publishing assets previously transferred to U S WEST Direct " and to "resume publishing its directories." (The Commission subsequently issued a 1994 order that "would obviate the need to . . . have USWC reacquire its publishing assets and publish its own directories." Order No. 94-069.) By ordering PNB to "resume publishing its own directories" in 1989, the Commission must have concluded that PNB was not publishing directories at that time, even though they were being published for PNB by an affiliate. Thus, the 1988 Opinion applies only to those few telecommunications utilities who publish their own directories using their own assets.

The proposed rules are considerably broader than the scope approved by the Attorney General in the 1988 Opinion. The proposed rules would apply to each telecommunications utility "that publishes, sells its customer database, or authorizes for publication/electronic distribution any database or directory listing telephone names and addresses of its subscribers . . ." The 1988 Opinion, however, applies only to telecommunications utilities that publish their own directories. Thus, the proposed rules greatly exceed the scope of the 1988 Opinion. The limited scope of the authority approved by the Attorney General in the 1988 Opinion raises significant issues concerning the lawfulness of any rules regarding directories that the Commission may consider issuing, as discussed next.



## **2. The Proposed Rules Would Violate Section 253 of the Telecommunications Act**

Not only would the proposed rules exceed the Commission's authority as interpreted in the 1988 Opinion, they would also violate Section 253 of the Telecommunications Act because they are not competitively neutral. Section 253(a) prohibits state requirements that may have the effect of prohibiting the ability of an entity to provide telecommunications services. *City of Auburn v. Qwest Corp.*, 260 F.3d 1160, 1175 (9<sup>th</sup> Cir.), cert. denied, 122 S. Ct. 809 (2001). The FCC has stated that "[i]n evaluating whether a state or local provision has the impermissible effect of prohibiting an entity's ability to provide any telecommunications service, we consider whether it 'materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment.'" *In the Matter of TCI Cablevision of Oakland County, Inc.*, 12 FCC Rcd 21396, 21439, 1997 FCC LEXIS 5164 (rel. Sept. 19, 1997). The increased expense that would be imposed on certain telecommunications utilities by the proposed rules would have the effect of impeding the ability of such telecommunications utilities to provide services, particularly for utilities that may be unable to recover the increased costs imposed by such a requirement because of their ratemaking treatment. This problem is exacerbated by rules that do not apply across the board to competitors.

Requirements prohibited by Section 253(a) may be saved under Section 253(b) if they are imposed "on a competitively neutral basis" and are "necessary to preserve and advance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services, and safeguard the rights of consumers." It is unclear whether a requirement such as would be imposed by the proposed rules would be "necessary" to serve one of these enumerated purposes. Even if it were, however, it is clear that the requirements imposed by the proposed rules would not -- and could not -- be imposed in a competitively neutral manner. Under the 1988 Opinion, the Commission's authority may extend only to telecommunications utilities that directly publish their own directories, as discussed above. If that is so, then the rules would apply only to a small subset of telecommunications utilities -- those that publish their own directories -- and not to other telecommunications utilities, let alone cooperatives, competitive providers, or directory publishers themselves.

As drafted, the proposed rules would apply to telecommunications utilities that publish directories as well as those that distribute databases or authorize the publication of directories. Even if the Commission had the authority to impose these rules on all telecommunications utilities -- an issue that is not addressed by the 1988 Opinion -- they still would apply only to one group of competitors, telecommunications utilities, and not to cooperatives, competitive providers, and directory publishers of all sorts (including physical books, Internet providers, directory assistance providers, and CD-ROMs). The 1988 Opinion recognizes that the Commission's authority to impose directory requirements could extend only to telecommunications utilities and not to cooperatives. The Commission's jurisdiction also could not extend to non-utility directory publishers. Imposing requirements upon only one type of entity out of a set of competitors would give the other, non-burdened providers a cost advantage and would violate the requirement that state requirements be competitively neutral. Certainly, such a requirement would "materially inhibit[] or limit[] the ability of any competitor or potential competitor to compete in a fair and balanced legal and regulatory environment." *In the Matter of TCI Cablevision of Oakland County, Inc., supra.*

### **3. The Proposed Rules Would Violate the Equal Protection Clauses of the Oregon and United States Constitutions**

Similarly, by imposing requirements upon telecommunications utilities that publish their own directories that do not apply to all other telecommunications providers or any directory publishers, the proposed rules impermissibly discriminate against the burdened parties. "The Equal Protection Clause of the Fourteenth Amendment 'is essentially a direction that all persons similarly situated should be treated alike.'" *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 439, 87 L. Ed. 2d 313, 105 S. Ct. 3249 (1985); see also *Plyler v. Doe*, 457 U.S. 202, 216, 72 L. Ed. 2d 786, 102 S. Ct. 2382 (1982)." *Lawrence v. Texas*, 123 S. Ct. 2472, 156 L. Ed. 2d 508 (2003), O'Connor, J., concurring. Article I, Section 20 of the Oregon Constitution provides similar protections. *City of Klamath Falls v. Winters*, 289 Or. 757, 769 n.10, 619 P.2d 217 (1980).


Even if the proposed rules could apply to all telecommunications utilities and not just those that publish their own directories, they still could not apply to non-telecommunications utilities, including cooperatives, competitive providers, and publishers of directories in a multitude of formats. Other than the limits of its own

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jurisdiction, there is no rational basis to impose format and content requirements on telecommunications utility publishers of directories that do not apply to other publishers of such material, particularly where the non-utility providers are becoming, or may already be, the dominant providers. Such a requirement discriminates in two senses: it does not treat all telecommunications providers alike and it does not treat all directory publishers alike. The Commission does not have the legal authority to impose such a discriminatory requirement. The discrimination that would be inherent in the Commission's issuing the proposed rules underscores the limits of its authority to promulgate rules relating to the format and content of directories, a matter far afield from the provision of telecommunications services.

For all of these reasons, as well as those articulated by the other parties, the Commission does not have the legal authority to issue the proposed rules and it should, therefore, close this docket. Thank you for your consideration of these comments.

Sincerely yours,



Lawrence Reichman

LR:hmr

cc: Phil Nyegaard  
Brooks Harlow  
Jim Tiger  
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**CERTIFICATE OF SERVICE  
AR 464**

I hereby certify that on this day I served the foregoing **Comments of Qwest Corporation** on the following persons by causing to be mailed a true copy thereof, contained in a sealed envelope, with postage prepaid, addressed to said persons at the following addresses and deposited in the post office at Portland, Oregon, on this day:

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DATED: February 7, 2005.

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