

**Qwest**

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Alex M. Duarte  
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March 3, 2006

Honorable Christina Smith  
Administrative Law Judge  
Public Utility Commission of Oregon  
P. O. Box 2148  
Salem, OR 97308-2148

Re: UM 1232- Qwest's Response to Complainants' Notice of Supplemental Authority

Dear Judge Smith:

Qwest respectfully submits this letter in response to Complainants' February 28, 2006 letter of Supplemental Authority and Request to Supplement the Record.

First, Qwest made diligent and reasonable attempts to verify that the two Commission orders cited in its reply had no negative history. Qwest, however, was not aware that the two orders had been reversed and remanded by an unpublished opinion and an unpublished letter of the Marion County Circuit Court.

For the Commission's convenience, Qwest notes that the most pertinent portion of Judge Lipscomb's opinion is that the court found *McPherson v. Pacific Power & Light Company*, 207 Or. 433, 449 (1956) distinguishable because *McPherson* "did not address the Commission's authority upon remand after judicial review overturning the rates previously approved by the Commissioner," and that *McPherson* "certainly does not state that the Commission has no authority to consider past problems in setting new rates after the old rates are overturned on appeal." *Util. Reform Project v. Or. Pub. Util. Comm'n*, Opinion and Order, Case No. 02C14884, at 2 (Marion Cty. Ct. Nov. 2003). (Emphasis added.) The unpublished letter adopted Judge Lipscomb's reasoning. Thus, contrary to Complainants' broad assertion, neither court found that the Commission had independent authority to issue refunds, and the Commission continues to maintain that it lacks authority to issue refunds.<sup>1</sup> Rather, in the Court's view, the

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<sup>1</sup> Upon remand, the ALJ referenced the Commission's appeal of the Circuit Court's order and noted that the Commission's legal position was "that refunds are statutorily prohibited." See Order No. 04-597, dockets DR 10/UE 88/UM 989 (Oct. 18, 2004), at pp. 7-8, and Appendix A, at p. 19. The ALJ also expressed concern that "[s]hould the Commission direct PGE to refund costs attributed to earnings on Trojan investment without considering whether other factors offset this amount, as URP and MGK urge the Commission to do, the Commission would inappropriately engage in single-issue ratemaking." Order No. 04-597, p. 6, and Appendix A, at p. 17.

Qwest understands that the Circuit Court's order is currently on appeal before the Court of Appeals, case number A123750, and is awaiting a briefing schedule. Thus, Judge Lipscomb's order cited by Complainants is not even final and could still be reversed on appeal.

refunds or rate adjustments there depended on judicial review ordering specific relief to the complainants in those cases. Qwest has emphasized in its pleadings that Complainants here have not attempted to challenge the reasonableness of the rates and have not pursued any challenge to those rates under the appropriate statutory provisions.

Additionally, Qwest respectfully refers the Commission to a companion case that Complainants did not include with their supplemental authority, although it is cited in therein: *Citizens' Util. Bd. of Or. v. Pub. Util. Comm'n*, 962 P.2d 744 (Or. Ct. App. 1998), dismissing review, 58 P.3d 822 (Or. 2002) (refusing to vacate the Court of Appeals opinion). The Oregon Court of Appeals there rejected the argument that ORS 756.040 granted the Commission broad powers to apply specific statutory provisions because other statutory provisions limited the Commission's authority. "The general grants of authority in ORS 756.040 and other general statutes do not empower PGE to charge or PUC to approve rates of a kind that are specifically contrary to the limitations in ORS 757.355 and ORS 757.140(2)." *Id.* at 751-52. As Qwest discussed in its pleadings, other provisions demarcate the scope of the Commission's authority to act in this case and therefore undermine Complainants' reliance on ORS 756.040.

Finally, contrary to Complainants' assertions, Qwest did not raise new factual arguments in its reply to support its position that Complainants knew or should have known of the basis for any cause of action in March 2002. In its reply, Qwest merely cited undisputed evidence to rebut assertions that Complainants made in their response brief. This undisputed evidence, consisting of Commission notices and party filings in Washington, Minnesota and Oregon (docket UM 823), shows that, not only were the Complainants on actual notice of the facts giving rise to their causes of action in March 2002, but their representatives who are listed on the pleadings were also on actual notice. This is not new evidence, and Qwest respectfully submits that it would be inappropriate and unjust for the Commission to refuse to consider this undisputed evidence.

Thank you for your attention to this matter. If you have any questions regarding this response, please feel free to call me at your convenience.

Very truly yours,

A handwritten signature in black ink, appearing to read 'Alex M. Duarte', written in a cursive style.

Alex M. Duarte, Qwest  
Peter Spivack, Hogan & Hartson LLP

cc Service List

**CERTIFICATE OF SERVICE**

**UM 1232**

I hereby certify that on the 3rd day of March, 2006, I served the foregoing QWEST CORPORATION'S LETTER IN RESPONSE TO COMPLAINANTS' SUPPLEMENTAL AUTHORITY AND REQUEST TO SUPPLEMENT THE RECORD in the above entitled docket on the following persons via U. S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

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DATED this 3rd day of March, 2006

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