

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**

3 UT 125

4 In the Matter of

5 QWEST CORPORATION, fka U.S. WEST
6 COMMUNICATIONS, INC.

STAFF'S OPENING BRIEF

7 Application for an Increase in Revenues

8 **BACKGROUND**

9 Qwest Corporation's ("Qwest") election for price cap regulation under Senate Bill 622¹
10 became effective on December 30, 1999. Specifically, Senate Bill 622 authorized the
11 Commission to establish rates for basic services for utilities electing price cap regulation. *See*
12 ORS 759.410(3). In addition, ORS 759.410 provides for maximum prices (price caps) and
13 minimum prices (price floors) for non-basic services.² *See also* OAR 860-032-0190. Finally,
14 Qwest has downward pricing flexibility, subject to a price floor, for basic services under ORS
15 759.050 for all exchanges that are "competitive zones." All Qwest exchanges are competitive
16 zones.

17 On September 14, 2001, the Public Utility Commission of Oregon ("Commission")
18 approved Qwest's rates in UT 125, which then became the price caps under Senate Bill 622. *See*
19 Order No. 01-810, UT 125/Phase II at 3; *see also* ORS 759.415. The Commission's Order
20 approving Qwest's rates in UT 125 established the effective date of the newly-approved rates as
21 January 1, 2002. Under ORS 759.205, the rates approved in UT 125 are the lawful rates until
22 changed pursuant to the procedures in Chapter 759.

23 On November 13, 2001, the Northwest Public Communications Council ("NPCC") filed
24 an application for reconsideration of UT 125/Phase II, Order No. 01-810. In its application for

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¹ Or laws 1999 ch. 1093.

26 ² The term non-basic services is used herein to mean services "other than basic telephone service," as stated in ORS 759.410(3).

1 reconsideration, NPCC argued that Order No. 01-810 failed to properly apply federal law in two
2 ways. First, NPCC argued that the Commission should have concluded that the Federal
3 Communication Commission’s (“FCC”) “new services” test applied to CustomNet. Second,
4 NPCC argued that Qwest’s Public Access Line (“PAL”) rates did not comply with the FCC’s
5 “new services” test. On January 31, 2002, the Commission denied NPCC’s application for
6 reconsideration in Order No. 02-009.

7 Shortly after the Commission denied NPCC’s application for reconsideration, the full
8 FCC issued, on January 31, 2002, *In the Matter of Wisconsin Public Service Commission Order*,
9 Bureau/CPD No. 00-01 (2002) (the “New Services Order”), which generally affirmed the FCC’s
10 Common Carrier Bureau, *In the Matter of Wisconsin Public Service Commission CCB/CPD No.*
11 *00-1 (2000)* (the “Wisconsin Order”), which was under appeal to the full FCC when the
12 Commission entered Order No. 01-810 and 02-009.

13 The NPCC appealed the Commission’s Orders Nos. 01-810 and 02-009 to the Marion
14 County Circuit Court. The Marion County Circuit Court affirmed the Commissions Orders Nos.
15 01-810 and 02-009. The NPCC then appealed the Marion County Circuit Court’s decision to the
16 Oregon Court of Appeal. On November 10, 2004, the Oregon Court of Appeal reversed and
17 remanded with instructions to remand to the Commission to reconsider its orders No. 01-810 and
18 02-009 in light of federal law, specifically the New Services Order and other relevant FCC
19 orders. *See Northwest Public Communications Council v. Public Utility Commission of Oregon*,
20 196 Or App 94, 100 P3d 776 (2004) (“Court of Appeals Order”).

21 While the appeal was still pending and well before the Oregon Court of Appeals decision,
22 Qwest filed Advice Nos. 1935 and 1946. Those filings became effective on March 17 and
23 August 28, 2003, respectively, and significantly reduced Qwest’s PAL rates. In fact, the rates
24 Qwest has filed in this case are the same rates approved in Advice No. 1935 and 1946.

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DISCUSSION

1. The Court of Appeals Order is limited to the application of federal law to the payphone aspects (PAL rates and CustomNET service) of the Commission's Order No. 01-810.

Qwest's proposal to raise its residential caller ID service to offset lower PAL rates seems to assume that the Oregon Court of Appeals reversed all aspects of the Commission's Order No. 01-810. The Court of Appeals Order, however, is limited to the application of federal law to the payphone aspects of Order No. 01-810. First, the Court of Appeals Order notes that Appellant does not challenge the rates for PALs under Oregon law but, rather, federal law. *See Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Or App 94, 97 (2004). Second, the Court of Appeals Order discusses the payphone aspects of Order 01-810 and federal requirements. *See Id.* 98-100. Third, the Court of Appeals ordered the Commission to reconsider Order 01-810 in light of federal law related to PAL rates and CustomNet service. *See Id.* at 100.

The Court of Appeals Order, itself, does not impact any other rate established under state law in Order No. 01-810. In Docket UT 125/Phase II, the Commission adopted Qwest's proposed changes, which Staff also generally accepted, for PAL rates. *See Order No. 0-1-810 at 49.* In this proceeding, Qwest is asserting that because the Commission accepted its proposal on PAL rates in UT 125, which were later found to be inconsistent with federal law, the Commission must increase other customer rates. Qwest's position ignores the fact that the Court of Appeals Order on Order No. 01-810 only deals with PAL rates and CustomNET services under federal law and does not impact other aspects of Order No. 01-810.

2. Consistent with Qwest's flexibility under price cap regulation, Qwest voluntarily lowered its PAL rates in Advice No. 1935, which became effective on August 28, 2003.

In this proceeding, Qwest has filed PAL rates that are the same as its existing PAL rates. Therefore, there is no rate difference to offset. More than a year before the Oregon Court of Appeals issued an opinion in this matter and after the Marion County Circuit Court had upheld

1 the legality of Commission Order No. 01-810, Qwest voluntarily filed Advice 1935, which
2 substantially lowered its current PAL rates.

3 Under Qwest's seeming rationale, any voluntary rate decrease would entitle them to an
4 offsetting rate increase. This is clearly incorrect. In electing for price cap regulation, Qwest
5 opted out of traditional revenue requirement regulation. Instead, Qwest choose to have pricing
6 flexibility for non-basic services limited only by "price caps" and "price floors." Basic service
7 rates can be changed with Commission approval. However, such changes may not be based
8 upon traditional ratemaking principles. *See* ORS 759.405(1); ORS 759.410(2). Qwest is clearly
9 not under rate of return regulation. Qwest cannot exercise its pricing flexibility (*i.e.* to lower
10 PAL rates) and then also argue that it should receive an offsetting revenue increase by way of
11 raising an established "price cap" for its residential caller ID service. Furthermore, Qwest cannot
12 contend that this situation is unique because the Oregon Court of Appeals ordered a change in
13 PAL rates. Such an argument is incorrect because Qwest voluntarily lowered its PAL rates
14 under price cap regulation more than a year before the Court of Appeals order was issued.

15 **3. The Commission does not have the authority to establish a new price cap for**
16 **Qwest's residential caller ID service.**

17 ORS 759.410 provides for maximum prices for nonbasic services. The rate Qwest
18 proposes to increase in this proceeding, residential caller ID, is a non-basic service. *See* OAR
19 860-032-0190(4). While the initial price caps were the rates in place when Qwest elected price
20 cap regulation on December 30, 1999, ORS 759.415 allowed the price caps for non-basic
21 services to be adjusted in a pending rate case, UT 125. Therefore, the price caps established
22 Order No. 01-810 were the last and only opportunity for the Commission to adjust Qwest's price
23 caps for non-basic services such as residential Caller ID. The Commission could entertain a
24 request from Qwest to raise basic service rates. However, ORS 759.405(1) and ORS 759.410(2)
25 make clear that such a request may not be based on traditional ratemaking principles.

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1 Undeterred, Qwest proposes a new, higher price cap for residential caller ID.
2 Presumably, Qwest will have to argue that Order No. 01-810, issued almost five years ago, is not
3 a final order and the price caps can, therefore, be altered. If Order No. 01-810 was not a final
4 order and the price caps in effect prior to the issuance of the order were held in effective
5 abeyance by the appeal of the PAL rates, the effective price caps were the rates Qwest was
6 charging when it elected price cap regulation. However, Qwest has been operating under the
7 price caps established in Order No. 01-810, not the price caps in effect when it elected price cap
8 regulation. This would create a complex set of problems. For example, the rates Qwest charged
9 for analog Private Line service were below the price floors when it elected for price cap
10 regulation. *See* Order No. 01-810 at 16-17. While those rates were made lawful in Order No.
11 01-810 by raising them, if Order No. 01-810 is not final, Qwest has been using unlawful rates for
12 analog Private Line service.

13 **4. The filed rate doctrine prevents the Commission from retroactively altering the**
14 **price caps established in Order No. 01-810.**

15 The filed rate doctrine is applicable to telecommunication utilities as codified in ORS
16 759.205, which provides that “[no] telecommunications utility shall charge, demand, collect or
17 receive a greater or less compensation for any service . . . than is specified in printed rate
18 schedules as may at the time be in force, or demand, collect or receive any rate not specified in
19 such schedule.” The filed rate doctrine provides that rates filed with the Commission are the
20 only lawful charges that the telecommunications utility may charge. *See* ORS 759.205; *see also*
21 American Tel. and Tel. Co. v. Central Office Telephone Inc., 524 U.S. 214, 222, 118 S.Ct. 1956
22 (1988) (quoting Louisville & Nashville R. Co. v. Maxwell, 237 U.S. 94, 97 (1915)). In addition,
23 the rates are deemed lawful until changed as provided under Chapter 759. *See* ORS 759.205.

24 Qwest may argue that the filed rate doctrine is not implicated in this proceeding because
25 it is only requesting a prospective, as compared to a retroactive, rate change to its residential
26 caller ID service. That assertion, however, ignores the requirements of ORS 759.410 and OAR

1 860-032-0190(4), which provide that Qwest cannot charge more than the established “price
2 caps” for non-basic services. As a result, Qwest’s filing to raise the rates of residential caller ID
3 are not simply a prospective rate increase but, instead, an unlawful attempt to treat Order No. 01-
4 810 as “interim” in violation of the filed rate doctrine.

5 Stated differently, ORS 759.410 does not allow Qwest to raise its residential caller ID
6 rates. In order to circumvent ORS 759.410, Qwest may argue that its filing is simply a re-setting
7 of the rates in Order No. 01-810. Such an argument completely ignores the applicability of the
8 filed rate doctrine and the fact that the rates established in Order No. 01-810 are the only lawful
9 charges and can only be changed prospectively. Because Qwest elected for “price cap”
10 regulation, it does not have the opportunity to prospectively raise rates for non-basic services
11 above the price caps established in Docket UT 125. Therefore, Qwest’s attempt to raise its
12 residential caller ID service is unlawful under the current regulatory structure.

13 **CONCLUSION**

14 For the foregoing reasons, Staff respectfully submits that Qwest cannot raise any other
15 rate to offset the PAL rates that were filed in this proceeding.

16 DATED this 19th day of May 2006.

17
18 Respectfully submitted,

19 HARDY MYERS
20 Attorney General

21 /s/ Jason W. Jones
22 Jason W. Jones, #00059
23 Assistant Attorney General
24 Of Attorneys for Staff of the Public Utility
25 Commission of Oregon
26

1 **CERTIFICATE OF SERVICE**

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3 I certify that on May 19, 2006, I served the foregoing upon all parties of record in this
4 proceeding by delivering a copy by electronic mail and mailing a copy by postage prepaid first
5 class mail or by hand delivery/shuttle mail to the parties accepting paper service.

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