BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UT 125
DR 26/UC 600

In the Matter of	§
QWEST CORPORATION fka	§
US WEST COMMUNICATIONS, INC.	§

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL'S OPENING BRIEF IN SUPPORT OF ITS MOTION

Northwest Public Communications Council (NPCC) provides this Opening Brief as requested by the ALJ's *Prehearing Conference Memorandum* dated November 30, 2023.

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Nature of the Case

This is not a case where Qwest ripped off its customers, got caught, and thus owes "money damages" to ratepayers based on conversion. Indeed, the money being sought is not now, nor was it ever, Qwest's money; it rightfully belongs to the ratepayers who were overcharged on Qwest services for seven years, and they are just seeking recovery ***of their own money.*** Qwest is basically holding that money in trust.

Given its history and the recent Court of Appeals' ruling, this case is a PUC enforcement action in which the PUC has (to date) seemingly ignored its prior orders and effectively abrogated its duties to protect ratepayers from excessive and unreasonable exactions imposed by a regulated monopoly telecom entity, and has been caught in those failures – twice – by the Court of Appeals.

One way to look at the case and all the parties is by analogy to a criminal proceeding: Qwest is the defendant who has violated the law by theft; NPCC members are Qwest's victims; the PUC is the prosecuting attorney charged with proving the crime; and the ALJ is responsible for

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imposing an "appropriate remedy" akin to restitution in a criminal proceeding. Granted, this is only an analogy but it perfectly conveys the roles of the parties and the factual and financial situation now back before the PUC.

Introduction

The key phrase controlling this case is "interim rates subject to refund with interest, at a rate of 11.2%." That phrase is found in no fewer than five prior PUC orders. *See* 96-107, 00-190 n.1, 00-191, 06-515, and 07-497. The further we stray from that phrase the less likely a lawful and just result will occur without further expensive and time-consuming appeals. And as everyone has acknowledged, time is of the essence here.

We begin in 1996 with the PUC's own language that is at the heart of the current proceedings. *See* PUC Order 96-107 dated April 24, 1996, p, 6:

> U.S. WEST's AFOR is terminated effective May 1, 1996, pursuant to the terms and conditions contained therein. U.S. WEST's rates for services thereafter shall be considered interim rates

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> subject to refund with interest, at a rate of 11.2 percent.

Therefore, since April 24, 1996, everyone — the PUC, Qwest, and Qwest's victims a/k/a ratepayers — knew from the time the AFOR terminated on May 1, 1996 to the time the interim period ended (i.e., when the PUC finally established the new rates using the proper rate setting protocol), that Qwest was going to be charging "***interim rates.***"

Everyone also knew that those rates might be higher than the eventual NST-compliant rates, hence the additional characterization of those rates as "***subject to refund***."

Finally, everyone also knew that during the interim period, Qwest would be holding any overcharge revenues and thereby using the ratepayers' money for its own purposes, hence the final piece of the characterization: "***with interest at a rate of 11.2% per annum***."[1]

As a consequence, everyone knew in 2007 that when the new rates were finally set, refunds of any overcharges imposed from 1996 to 2007

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[1] 11.2% compounded monthly was Qwest's internal rate of return.

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were due and owing once new rates were adopted. The PUC, however, has ignored its statutory duty to protect ratepayers and has to date refused to insist that those refunds be paid. And Qwest — a company holding over $320 million in monies lawfully belonging to its customers — was not only happy for that reprieve but actively enabled and encouraged it by ignoring *its own duty* to comply with the law and make those refunds and by fighting at the PUC and in court to never make them *at all*. No excuse to evade its refund obligation was too absurd, too outlandish, for Qwest to employ in that continued evasion, and the PUC has so far swallowed those ridiculous excuses like fine wine.

Naturally, Oregon appellate courts have not been similarly fooled and thus have been unwilling to go along with the unholy alliance between the PUC and Qwest as evidenced by their ***twice*** reversing PUC decisions, decisions that can only legitimately be called either "egregious mistakes" or perhaps more pointedly "derelictions of duty."

In the latest appellate opinion, the Oregon Court of Appeals was as gentle as it could be, not wanting to expressly accuse the PUC of

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shenanigans but also clearly upset that the PUC has for years inexplicably ignored its statutory duties, its own prior orders, and basic common sense, in not compelling Qwest to make the refunds everyone — the PUC, Qwest, and Qwest's victims a/k/a ratepayers — know beyond any doubt have been lawfully owed since 2007.

It is long past time for the games to end and justice to be done. And there's only one way, obvious-to-everyone for that to happen: Qwest must cease its contempt and pay the refunds and interest owing.

Relevant Procedural History

UT 125 has been pending quite a while, since at least 1991 (see Order 91-1595 establishing an AFOR for the purpose, in part, of setting new rates). Qwest failed to fulfill the terms of the AFOR and shortly after the AFOR was terminated on May 1, 1996. On May 19, 1997, the PUC entered Order 97-171 that held Qwest was required to charge new, as yet undetermined rates for PAL and CustomNet services starting on May 1, 1996, and that any rates Qwest charged after that date would be deemed "interim rates subject to refund, with interest at 11.2% per annum." *See*

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Order 97-171. The "interim" would last until new rates were set and the refunds paid.

Between 1991 and 1996, the UT 125 ratemaking proceeding was still ongoing and still trying to set "new" lawful rates. Using older law, and in spite of the FCC's clear directions, the PUC believed it could set the new rates using "traditional" Return on Investment (ROI) ratemaking which took into account a "fair return" for Qwest.

In 1996, the FCC had ordered that any new rates from 1996 forward, which included the new rates the PUC had been considering in UT 125, had to be NST compliant and the PUC could not use the ROI ratemaking method. The PUC ignored the FCC and NPCC's argument that it had to use NST protocols to set those new rates and set them using the "traditional" method. *See* Order 97-171. Order 97-171 was affirmed by the trial court.

NPCC appealed to the Oregon Court of Appeals. The PUC's use of incorrect ratemaking protocols in 97-171 was reversed by the Court of Appeals in *NPCC v. PUC*, 196 Or.App. 94 (2004). The Court of Appeals

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held that any new rates determined in UT 125 had to be bounded by NST protocols if those rates were set after 1996, and when the PUC set those rates in 1997 (Order 97-171) using traditional ROI protocols, it erred.

Following remand, the UT 125 ratemaking proceeding was still alive and well albeit cabined by the stern instructions of the Court of Appeals. The PUC finally set new rates consistent with NST protocols on November 15, 2007 when the PUC entered stipulated Order 07-497. In that Order, the PUC found that rates Qwest had been charging ***since 2003*** based on its advices were, in fact, NST compliant and the stipulation was approved.

But nothing was said in 07-497 about the new rates applicable between 1996 and 2003—the interim period in which the law required NST compliance. The issue of NST rates between 1996 and 2003 is now directly before the PUC in this remanded proceeding, and as shown below, it can only be determined in one fashion.

Why 2003 is Important

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Between 1997 when Qwest was ordered to make refunds of $102 million (refunds that were never made) and 2004, the parties participated in the appeal in which the rates the PUC adopted in 2000 were found to be out of compliance with NST rate setting protocols. *See NPCC v. PUC*, 196 Or.App. 94, 99-100 (2004) (PUC had incorrectly used "traditional revenue-based" rate setting methods instead of the NST rate setting methods required by federal law). The parties had to go back to the drawing board. After the Court of Appeals reversed those unlawful rates in 2004, the PUC took 3 years to approve rates that were actually NST-compliant, which finally happened in Order 07-497.

In the meantime, following full briefing of the *NPCC v. PUC* appeal and before the Court of Appeals' decision was rendered in 2004, Qwest saw the writing on the wall and in 2003 issued two advices: Advices 1935 and 1946, in which it announced it had "voluntarily" reduced its CustomNet and PAL charges to rates that were ultimately accepted as NST-compliant in 2007 (Order 07-497).

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It is crystal clear that Qwest knew the rates it set in 2000 via "traditional" rate setting were not NST-compliant, and also clear that Qwest knew exactly how to calculate NST-compliant rates as evidenced by its advices. This is why NPCC's claim for refunds applies to the interim period 1996 to **2003** and not 1996 to 2007.

Even though Qwest was legally authorized to only charge NST-compliant rates, and statutorily prohibited from collecting revenue otherwise, after May 1, 1996, Qwest nevertheless refused—and flagrantly continues to refuse to the point of contempt—to comply with Oregon law and the orders of the PUC which clearly show Qwest must calculate and pay refunds to ratepayers who were indisputably overcharged during the "interim" period between 1996 and 2003. Worse than that: the PUC—the entity ***charged by statute*** with protecting telecom ratepayers from such predatory practices by companies like Qwest—has for some reason *protected Qwest, its profits and business at the expense of its tiny customers,* by failing to order Qwest to make the

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refunds due and owing since November, 2007. The Court of Appeals has corrected that mistaken understanding:

> Under the applicable regulatory scheme, ***the PUC does not have discretion to simply ignore NPCC's allegations*** that Qwest's pre-2003 payphone rates violate section 276. And if, after proper inquiry, the PUC finds that Qwest's pre-2003 payphone rates exceeded that allowed by federal law and amount to "unjust and unreasonable exactions," ***the PUC has a duty to protect ratepayers, including NPCC's members, by providing some appropriate remedy. Such a remedy may include ordering refunds for overcharges … .***

NPCC, 323 Or.App. at 168 (emphasis added). Nothing was said in that opinion about the PUC protecting Qwest because the PUC is supposed to be the advocate and protector of small ratepayers in their struggle with large, powerful, monopoly telecom providers who are, by their nature, predatory. Without PUC protection, ratepayers are sunk, as evidenced by the fact that NPCC's members have suffered financial harm at the hands of Qwest that has lasted 25 years and which has driven all but two

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of them out of business. Qwest's plan to avoid justice by delaying it cannot be allowed to succeed.

The Motion to Show Cause

Based on Qwest's failure to comply with Oregon law and the PUC's apparent lack of concern for its statutory duties, on January 26, 2017, NPCC filed its *Motion for an Order to Show Cause or in the Alternative to Clarify Order 07-497*. NPCC sought a ruling as to why Qwest should not be found in contempt of PUC orders and federal and Oregon state law that required Qwest to calculate and then pay refunds of overcharges it had imposed on Oregon ratepayers from 1996 to 2003 regarding PAL and CustomNet services. Qwest filed its response to the *Motion to Show Cause* on March 24, 2017, and NPCC filed its reply on April 14, 2017.

On November 16, 2017, in Order 17-473, the PUC—somewhat amazingly—denied NPCC's *Motion to Show Cause*. In so doing, the PUC made multiple incorrect statements on several critical points. NPCC appealed.

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On December 14, 2022, the Oregon Court of Appeals found the PUC's reasons for its denial of the Motion to Show Cause to be wholly without merit, reversed the PUC's ruling denying the *Motion to Show Cause*, because the PUC relied on "findings that are not supported by substantial evidence" and remanded the case to the PUC with *very explicit* directions regarding *very limited* further proceedings. *See NPCC v. Qwest*, 323 Or.App. 151 (2022, petition denied).

In one error, the Court of Appeals said that the PUC incorrectly held that its prior orders 00-190, 00-191, and 02-068 had "comprehensively resolved all [NST] refund liability from May 1996 through 2000." In another error, the Court found the PUC incorrectly held that it had resolved "all outstanding issues" related to NST refund liability in its Order 07-497 when it was stated it was "designed to resolve all outstanding issues." Both of these statements were expressly found to be incorrect by the Court of Appeals in no uncertain terms. Footnotes 4 and 5 of the opinion point out several additional errors which, hopefully, have now been put to rest.

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The case is now before ALJ Hon. John Mellgren for determination and implementation of the Court of Appeals' orders and directives, including enforcement of all PUC prior orders.

Current Proceedings

After shooting down the PUC's decisions in Order 17-473 related to its refusal to order Qwest to make refunds of overcharges, and after disposing of various other chimeric errors fostered by Qwest, the Court of Appeals narrowed the issues to be decided in *this* remanded proceeding to only two:

1. The PUC is required to make a finding of the NST rates applicable during the time period 1996 to 2003 and compare NST rates to the rates Qwest actually charged to see if any overcharges occurred; and

2. If Qwest is found to have overcharged its ratepayers during that interim period, then the PUC must decide whether refunds are an appropriate remedy.

This Opening Brief addresses those two issues.

What the Case is <u>Not</u> *About*

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Initially, it is important not to be dragged off into the weeds during what little remains of this 27-year proceeding. Qwest will almost certainly attempt to do that using similarly-meritless arguments to those it used in its specious response to the Motion to Show Cause and other prior pleadings. Why? Because Qwest's refund liability—which is fully known to Qwest—has been estimated to be over $320,000,000.00.[2]

However, nowhere in the Court of Appeals' 2022 decision is the PUC or any of the other parties instructed, or even *allowed*, to re-litigate any prior issues in the case, so any arguments by Qwest or the PUC that

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[2] NPCC would have an exact figure for the overcharges and interest owing but it does not yet have access to Qwest's billing records. Many ratepayers' records are, understandably after 27 years, not complete which is why NPCC has sought these records from Qwest. NPCC has requested the records several times only to have Qwest first promise to provide them, then refuse to do so in its most-recent response to this request. It is likely the ALJ will be forced to order their production.

If Qwest refuses to produce them, the law gives the ALJ and the parties the legal right to extrapolate the overcharges from missing data by looking at known data. This is allowed due to Qwest's spoliation of evidence. *See, e.g., Rizzuto v. Davidson Ladders, Inc.,* 905 A.2d 1165 (Conn. 2006).

Despite its legal obligation to maintain them, it is anticipated Qwest will raise an argument that it "did not know" to retain these records and thus no spoliation occurred. Qwest certainly knew in 1996 that all charges it made from that point forward were "interim subject to refund," thus putting Qwest on notice to preserve that evidence. This issue will be further addressed in phase two of the proceeding, if necessary.

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the parties should or must revisit such prior issues should be ignored if not mocked, in part because they have been waived, in part because they would violate the law of the case, and in part because those arguments are hopelessly obtuse. No fact issues remain for adjudication. The only issues are issues of law and are based on interpretation of prior PUC orders and appellate court opinions.

By way of example, NPCC derives from Qwest's request for record supplementation that Qwest plans to drag all of us into the "2000 refund issue." However, any refunds Qwest made in 2000 to parties other than NPCC members and for purposes unrelated to NST compliance matters (so-called "Phase 1 refunds") have literally *nothing* to do with refunds of the NST overcharges being sought in this proceeding today. Not only has Qwest waived any such arguments – even if those arguments had merit, which they don't – because those 2000 refunds were based on the PUC's determination that Qwest was making "too much profit" on charges not related to NST compliance that were made to *all* of its ratepayers, and

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those refunds addressed *that* violation. The Court of Appeals has assisted in debunking that argument:

> The Phase 1 refunds and bill credits ***did not redress any alleged violation of federal law***. Indeed, the PUC acknowledged NPCC's position at the time that ***Qwest may be liable for additional refunds under section 276*** [i.e., NST overcharges] but concluded that the record before it did not allow it to resolve that question. Thus, the language in the Phase 1 orders that the refund was a "one-time, lump sum" does not support Qwest's position that the PUC agreed that Qwest had no liability for potential violations of section 276.

NPCC, 323 Or. App. at 39 (emphasis added).

Note that in none of the orders surrounding the 2000 refunds are the phrases New Services Test or NST or PAL or CustomNet, even *mentioned* much less used as the foundation for those refunds. It is thus law of the case that nothing in the 2000 refunds is germane to our current, remaining issues concerning NST overcharges.

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Issues to be Addressed

All remaining issues are issues of law. To show this, the following example is provided. Issues of arithmetic are matters of law, not fact. Another way to say this is that courts do not have discretion to misconstrue arithmetic. *See In re Brown,* 614 S.W.3d 712, 720 (Tex.2020)(conditionally granting mandamus because courts have "no discretion or authority to misinterpret the law or the rules of arithmetic"). Two plus two equals four as a matter of law.

CustomNet charges. During the interim period between 1996 and 2007, no one knew for sure which rates for Qwest services would qualify as NST-compliant. One of those services was called CustomNet (fraud protection). Between 1996 and 2003, Qwest was allowed to charge (and did charge and collect) "interim rates subject to refund with interest" in the amount of $2.00 per line per month for that service. In 1996, since we did not know the lawful NST rate (because it had not yet been set), there could be no calculation of overcharges. All anyone knew at the time were the rates Qwest was actually charging:

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ACTUAL CHARGE per line/per month	—	**NST**	=	**OVERCHARGE**
$2.00	—	??	=	??

However, once NST rates were determined by stipulation in 2007, and the NST-compliant CustomNet charge was found to be only 11 cents per line per month, standard arithmetic allows us to calculate the overcharges:

ACTUAL CHARGE per line/per month	—	**NST**	=	**OVERCHARGE**
$2.00	—	$0.11	=	$1.89/line/month

See NST rate schedule approved in 07-497 (Appendix A), which contains the actual charges being made for all of Qwest's services and their corresponding NST-compliant rates.

The undisputed facts and the unyielding laws of arithmetic thus show that for CustomNet services alone, Qwest was ***overcharging*** its ratepayers $1.89 per line per month from 1996 until approximately August 2003—the date when Qwest voluntarily reduced the rate for that service as shown in Qwest Advice number 1946.

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There are approximately 7,924 lines or "ANIs" in issue. A very rough calculation of overcharges at $1.89 per line per month for the period May 1, 1996 to August 1, 2003 would yield overcharges of $1,302,943.32 ($1.89 x 7,924 lines x 87 months). This does not include interest at 11.2% from 1996 to the present nor does it include overcharges for excessive PAL line charges. This also assumes Qwest actually began charging $0.11 per line per month in August 2003.

All of Qwest's other relevant charges for Public Access Line (or PAL) services were similarly excessive as a matter of law as determined by prior PUC orders and the undisputed facts regarding rates charged during the interim period from 1996 to 2003 as shown by the Appendix to Order 07-497.

Question 1: What is the 1996-2003 NST rate?

We know what the NST rates were in 2007 because they were set in Order 07-497. The question is: do those same NST rates apply to charges made between 1996 and 2007. The answer is: yes.

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The PUC has been directed by the Court of Appeals to make a finding which it did not expressly announce in 07-497, namely that the NST-compliant rates set in 2007 applied to the *entire* interim period May 1996 to November 2007.

> Thus, the Phase 2 rate design order entered on remand ***did not determine whether Qwest's pre-2003/2006 payphone rates complied with the NST,*** nor whether to order refunds for that time period. That makes sense, given that the PUC generally sets rates prospectively.
>
> ***As far as we can tell, the PUC has never (properly) determined whether Qwest's 1996-2003 payphone rates were NST-compliant.***
>
> But, as our review of the PUC's prior orders in this docket makes clear, ***the PUC has not yet determined whether Qwest's pre-2003 payphone rates are NST-compliant.***
>
> ***And if, after proper inquiry, the PUC finds that Qwest's pre-2003 payphone rates exceeded that allowed by federal [NST] law*** and amount to "unjust and unreasonable exactions," the PUC has a duty to protect ratepayers, including NPCC's members, by providing some appropriate remedy.

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NPCC, 323 Or.App. at 40-42 (emphasis and brackets added, parentheses in original). Thus, the order for an "inquiry" to determine overcharges requires the PUC to announce that NST rates set in Order 07-497 are applicable to the interim period between 1996 and 2003.

Since retroactive ratemaking is illegal, the PUC must necessarily hold that the NST rates approved in 07-497 serve as the NST rates for all times after May 1, 1996; NST is NST is NST. That is, unless Qwest had successfully sought to "change" NST rates between 1996 and 2003 by opening a new rate case (which it did not do), then the only alternative to adoption of the NST rates found in 07-497 would be for the PUC to go back in time and perform retroactive rate making. But that cannot be legally done at this late juncture, nor should it be.

Even if it was proper to do so (which it is not), given inflation it is highly likely that the cost-based NST rates between 1996 and 2003 – which are calculated based on the provider's costs – would be *less than*, not more than, the NST rates set in 2007. Qwest's refund liability for

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interim charges using the NST rates approved in 2007 is thus necessarily *lower* than it would be under retroactive ratemaking.

Question 2: Did Qwest Overcharge Its Customers?

Once the NST rates for 1996-2007 are announced, the PUC may determine that overcharges have occurred in one of two ways:

1. Require Qwest to produce its actual billing records for the interim time period so that the rates Qwest charged may be compared to the NST-compliant rates found in 07-497, or

2. Determine whether Qwest was charging only tariffed rates during the interim time period and then compare those tariffed rates to the NST-compliant rates found in 07-497.

By doing this, the PUC will be in position to fulfill the first phase of the case as directed by the Court of Appeal: it will determine that the rates Qwest charged between 1996 and 2003 were not NST-compliant, and that Qwest was overcharging its customers. This will then allow the PUC to proceed to subpart (b) of phase one and determine what type of remedy would be "appropriate" for the overcharges Qwest imposed on its ratepayers for over seven years.

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Question 3: What is an "appropriate remedy" in this case?

The Court of Appeals said that once overcharges are found, the PUC must establish "some appropriate remedy." Judge Mellgren described this as "whether the law requires the Commission to order refunds." As shown below, the only remedy that satisfies both the "appropriate" and "legally required" descriptors is imposition of refunds.

First, there is no legitimate question that refunds for overcharges are appropriate in every overcharge case. If a party overcharges another party, either accidentally or intentionally, the only remedy that puts the parties back into the same position they would have been in had the overcharge not occurred is to refund the money back to the party who paid it. While in some circumstances this may be done in the form of either billing credits on future bills or by making a cash refund, it is obvious that if the parties are no longer doing business with each other and hence no future invoices will be generated against which a billing credit could be applied, the "credit" method of refund is no longer available, leaving only the method of a cash refund.

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Importantly, the PUC itself has already determined in past orders that refunds are the appropriate remedy when, in Order 96-107 and in multiple subsequent orders, it stated that all rates charged by Qwest between 1996 and the date NST-compliant rates were set as "interim rates ***subject to refund*** with interest." The obligation to order refunds is therefore the law of the case, plus it is difficult to imagine what the words "subject to refund" could mean in this context if they do not mean "subject to ***refund***." Once the 1996-2007 NST rates are announced and the overcharges Qwest imposed are determined to have taken place, an appropriate, legally-required remedy must be refunds.

Additionally, even the amount of those refunds has been described in Order 96-183, p. 4, where the PUC held that the refunds would be "equal to the difference between the permanent [NST-compliant] rate level established in pending docket UT 125, and the current interim level, assuming that the latter amount of revenues is greater than the former." The PUC also stated that the refund procedure would be similar to that

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used in ORS 757.215(4) and 759.185(4). *Id*. *Accord*: Order 97-171, pp. 105-07 (refunds are equal to overcharges).

Of critical importance is that the Court of Appeals suggested in no uncertain terms that refunds are the only "appropriate remedy" for these overcharges.

> However, we can say that the PUC incorrectly concluded that, outside of its prior orders, no "authority or remedy [is] available to NPCC to pursue ***refunds*** for this time period [i.e., 1996 to 2003]." The PUC's broad regulatory authority consists of "powers *and* duties." ORS 756.040(1) (emphasis added). In addition to its "power and jurisdiction to supervise and regulate every public utility and telecommunications utility in this state, and to do all things necessary and convenient" in exercising that power, the PUC "*shall* represent" ratepayers "in all controversies respecting rates," *id.*, "*shall* make use of [its] jurisdiction and powers" to "protect" ratepayers "from unjust and unreasonable exactions and practices," *id.*, "*shall* inquire into any * * * violation of any law of this state * * * relating to public utilities and telecommunications utilities by any public utility or telecommunications utility doing business therein," and "*shall* enforce all laws of this state relating to" such utilities, ORS 756.160(1) (emphases added). And "a liberal construction of both the PUC's power to 'supervise and regulate public utilities' and its duty to protect ratepayers by obtaining adequate service at fair and reasonable rates supports the PUC's implied authority to

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> correct legal errors that lead to 'unjust and unreasonable exactions.'" *Gearhart v. PUC*, 356 Or. 216, 244, 339 P.3d 904 (2014) (*Gearhart II*) (quoting ORS 756.040(1) and ORS 756.062(2)). ***The PUC has authority to correct such errors by ordering refunds***, "and ***if the PUC could not order refunds, it would be limited in its ability to protect ratepayers***." *Id.*
>
> Under the applicable regulatory scheme, the PUC does not have discretion to simply ignore NPCC's allegations that Qwest's pre-2003 payphone rates violate section 276. And if, after proper inquiry, the PUC finds that Qwest's pre-2003 payphone rates exceeded that allowed by federal law and amount to "unjust and unreasonable exactions," ***the PUC has a duty to protect ratepayers, including NPCC's members, by providing some appropriate remedy. Such a remedy may include ordering refunds for overcharges***, *see Gearhart II*, 356 Or. at 247, 339 P.3d 904 (holding that the PUC had implied authority to order PGE to issue ***refunds*** to ratepayers for amounts associated with a retired nuclear generating facility), and one way it may do so is by amending its prior order, as NPCC sought in its motion, *see* ORS 756.568 (The PUC "may at any time" amend any PUC order upon notice to the telecommunications utility and an opportunity to be heard).

NPCC, 323 Or.App. at 167-68. The Court of Appeals and the record in this case do not allow, or even suggest, any other form of "appropriate

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remedy." It is also unjust to deprive ratepayers of the overcharges they paid, and much worse to allow Qwest to keep those illicit gains.

From the quote from the *NPCC* opinion above, it is clear that the Court of Appeals is serious about the PUC's obligations to protect ratepayers by conducting an investigation to ferret out unreasonable exactions such as overcharges and correcting any overcharges with "some appropriate remedy" that the Court all but said must consist of refunds to affected ratepayers.

Thus, the only remedy in this case that fulfills both the Court of Appeals mandate that the remedy be "appropriate" and Judge Mellgren's admonition that the remedy be 'legally required' is cash refunds of the amount of all overcharges. Given the passage of time and in accordance with PUC's prior orders, the remedy must also include payment of "interest at a rate of 11.2% per annum."

"Phase one" of Judge Mellgren's *Memorandum* is thereby accomplished.

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Prayer

The ALJ should order the PUC to make a finding that the NST-compliant rates established in Order 07-497 are the NST rates for the interim period between May 1996 and November 2007.

The ALJ should then find, consistent with arithmetic and the facts supporting the stipulation in Order 07-497, including the Reichman letter dated March 31, 2006 and its accompanying Appendices showing Qwest's charges made from 1996 to 2003, that Qwest is guilty of overcharging Oregon ratepayers during the interim period.

The PUC should then be ordered to determine that refunds of overcharges with interest are the only "appropriate remedy" and allow the parties to proceed to phase two where the actual dollar amounts of refunds and interest may be calculated and the refunds ordered.

RESPECTFULLY SUBMITTED:

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I hereby certify that I electronically Filed and Served a copy of the foregoing OPENING BRIEF as follows:

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