

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 REPLY BRIEF

7 Application for an Increase in Revenues

8 **INTRODUCTION**

9 According to Qwest's opening brief, the Commission should be allowed to alter the price
10 cap for residential caller ID service because Order No. 01-810 is not effective in its entirety.
11 Qwest is incorrect for many distinct reasons. First, the language of the Court of Appeals
12 decision does not support Qwest's argument that the entire UT 125 rate design has been reversed
13 and remanded to the Commission. Instead, the Court of Appeals decision is clearly limited to
14 only the payphone aspects of the Commission Order under federal, not state, law. Second,
15 SB 622 does not allow Qwest to prospectively alter the price caps. Third, Qwest voluntarily
16 lowered its PAL rates well before the Court of Appeals decision. Fourth, the Proposed
17 Commission Decision demonstrates that the unambiguous revenue requirement Stipulation
18 prevents Qwest from rebalancing its rates. Fifth, ORS 759.205 prevents the Commission from
19 retroactively altering the price caps established in the Commission Order.

20 As a result, Staff submits that Qwest's rebalancing proposal should be denied for each of
21 these reasons. While any of these reasons may be independently sufficient, the combination of
22 them leaves no doubt that the Qwest's rebalancing proposal is legally unsupportable and should
23 be denied.

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1 **DISCUSSION**

2 **1. The Court of Appeals Order only reversed the payphone aspects of the**
3 **Commission's Order.**

4 Qwest argues that the Public Utility Commission of Oregon's ("Commission") Order No.
5 01-810 ("Commission Order") is no longer "effective" because the Oregon Court of Appeals
6 decided that the Commission order is "unlawful." *See* Qwest's Opening Brief at 5. Qwest's
7 argument, however, ignores that fact that the Court of Appeals decision only reversed as
8 unlawful the payphone aspects (Public Access Line ("PAL") rates and CustomNET service) of
9 the Commission's Order. *See Northwest Public Communications Council v. Public Utility*
10 *Commission of Oregon*, 196 Or App 94, 97 (2004). In addition, the Court of Appeals decision
11 reversed only the payphone aspects of the Commission's Order under federal, not state, law.
12 Qwest continues to ignore the scope of the Court of Appeals decision, which only applies to two
13 distinct payphone services. Qwest also chooses to ignore that the Court of Appeals only
14 addressed the rates charged for these two services. The Court's decision said nothing about
15 Qwest's revenue requirement. The decision says nothing that even suggests Qwest is entitled to
16 adjust its rates so that they cover the UT 125 revenue requirement. The absence of a revenue
17 requirement discussion distinguishes the payphone case from the Trojan remand case, which
18 Qwest cites in its opening brief. The Trojan case was clearly a revenue requirement case. The
19 payphone case was not. If the Court of Appeals had considered Qwest's revenue requirement it
20 would have concluded that Qwest's decision to opt into price cap regulation precludes the rate
21 increase it now seeks.

22 Furthermore, the Court of Appeals decision found that the payphone aspects of the
23 Commission's Order were unlawful under federal law but it did not find that the Commission's
24 Order was not "effective." In fact, Qwest has been charging the rates established under the
25 Commission's Order since the effective date in that Commission Order, with the exception of a
26 few prices lawfully lowered. The Court of Appeals decision does not suggest that the

1 “effectiveness” of the rates established in the Commission Order was stayed or somehow made
2 ineffective pending the outcome of appeals, nor did Qwest request such an outcome. The
3 absence of a stay or clear general invalidation of Order No. 01-810 means that this order
4 established permanent price caps for Qwest’s non-basic services, including residential caller ID
5 service. The Commission cannot now change the price cap for residential caller ID service.

6 Indeed, Qwest’s novel argument that the rates are not “effective” seems driven by the fact
7 that the Commission does not have the authority to establish a new price cap for Qwest’s
8 residential caller ID service. Because the Commission does not have this authority (*i.e.* the
9 authority to increase Qwest’s rates for non-basic services going forward), Qwest argues that the
10 Commission Order establishing the permanent price caps has never been “effective” even though
11 they have been charging those rates for more than four years. However, the Commission’s Order
12 was a final order that was not stayed and the rates, therefore, were and are effective.

13 **2. The Commission does not have the authority to change the price cap for Qwest’s**
14 **residential caller ID service.**

15 Qwest argues that its voluntary election for price cap regulation does not impact its
16 ability to raise the rates for residential caller ID. *See* Qwest’s Opening Brief at 11. However,
17 Qwest seems to agree that ORS 759.415 only allowed the price cap for nonbasic services to be
18 adjusted in the rate case that was pending when Qwest made its election. *See Id.*

19 The premise of Qwest’s assertion, however, is that the Commission’s Order has not been
20 effective for more than four years although it has been charging the rates it ordered. Thus,
21 Qwest’s argument is that the Commission has authority to change the price cap for residential
22 caller ID service because the price caps established over four years ago in the Commission’s
23 Order have never been effective. Under Qwest’s rationale, all the price caps established in the
24 Commission’s Order over four years ago are subject to change in this proceeding. In fact,
25 Qwest’s admits as much in a footnote to its opening brief when it states that “the present status of
26 all of the rates the Commission approved in the Order may be unclear.” *See Id.* At 6, fn 3.

1 If the price caps established in the Commission’s Order and the rates that Qwest has been
2 charging for more than four years are not lawful, what are the lawful price caps and rates? There
3 is only one possible answer: The rates in effect prior to the issuance of Order No. 01-810. If
4 these rates are the lawful price caps, a number of issues arise. For example, as Staff pointed out
5 in its opening brief, the rates Qwest charged for analog Private Line service were below the price
6 floors when it elected for price cap regulation. *See* Order No. 01-810; *see also* Staff’s Opening
7 Brief at 6. If the rates established in the Commission’s Order were not the effective or lawful
8 rates, Qwest’s Private Line rates are and have been unlawful.

9 In response, Qwest argues that the Commission should not be concerned with the fact
10 that its premise is that the Commission’s Order remains uncertain and ineffective almost five
11 years later because it does not seek to revise any other rates at this time. *See* Qwest Opening
12 Brief at 6, fn 3. Qwest’s logic, however, is unpersuasive because if the Commission’s Order was
13 not truly final and effective there may be a multitude of consequences regardless of Qwest’s
14 statement that it is voluntarily limiting its request to raise only one popular residential service.
15 Indeed, Qwest’s election to price cap regulation means that Qwest cannot raise its rates for
16 nonbasic services above the price cap established in the Commission’s Order.

17 **3. Qwest completely ignores the fact that it voluntarily lowered its PAL rates well**
18 **before the Court of Appeals decision.**

19 Qwest fails to mention that it voluntarily lowered its PAL rates more than a year before
20 the Court of Appeals decision was issued. As noted in Staff’s opening brief, Qwest incorrectly
21 seems to believe that any time it exercises its pricing flexibility it is allowed to get an offsetting
22 rate increase. Here, Qwest voluntarily exercised its price cap flexibility to lower PAL rates.

23 Under Qwest’s rationale, it would be guaranteed a revenue requirement of approximately
24 \$63 million even when it voluntarily lowers rates under its price cap regulation flexibility. SB
25 622 established the price cap regime that allowed Qwest the pricing flexibility to lower those
26 rates below the caps so long as they did not go below the price floors. However, SB 622 did not

1 provide that Qwest is entitled to an offsetting revenue requirement adjustment each time it
2 exercises its elected price cap pricing flexibility.

3 **4. The Proposed Commission Decision provides another reason why Qwest should**
4 **not be allowed to raise its residential caller ID service rates.**

5 In a memorandum issued June 7, 2006, ALJ Petrillo attached a Proposed Commission
6 Decision that concludes that the terms of the revenue requirement Stipulation approved in phase
7 I of this docket prevent Qwest from raising its residential caller ID service rates. While Staff did
8 not raise the revenue requirement Stipulation in its opening brief, it agrees that the Proposed
9 Commission Decision is consistent with the unambiguous language of the revenue requirement
10 Stipulation.

11 In Staff's view, the unambiguous language of the revenue requirement Stipulation is
12 another reason that Qwest cannot raise its rates for its residential caller ID service. While Staff
13 continues to believe that each of the issues it raised in its opening brief, and as elaborated on
14 here, are independently sufficient to deny Qwest's requests to raise residential caller ID service,
15 Staff agrees that the Proposed Commission Decision offers an additional rationale for denying
16 Qwest's request. Staff submits that the Commission Order should deny Qwest's request based
17 upon each of Qwest's legal shortcomings, including but not limited to, the unambiguous
18 language of the revenue requirement Stipulation.

19 **5. ORS 759.205 prevents the Commission from retroactively altering the price caps**
20 **established in the Commission Order.**

21 Qwest argues that the Commission should reopen the case under ORS 756.568 to hear
22 additional evidence. As support for its position, Qwest cites to a ruling issued on August 31,
23 2004, in DR 10/UE 88/UM 989 that reopened the Trojan remand case to hear additional
24 information regarding revenue requirement. *See* Qwest's Opening Brief at 8. As discussed
25 above in Section 1, the Trojan remand case is a revenue requirement case; whereas, the
26 payphone cases are not. Furthermore, the August 31, 2004, ruling does not support Qwest's

1 position that the Commission has authority to alter the prices caps established in the Commission
2 Order.

3 In that ruling, which was affirmed by the Commission in Order No. 04-597, the record
4 was reopened to consider additional evidence regarding the appropriate revenue requirement for
5 Portland General Electric Company. The Commission has not made any determination that
6 would retroactively alter PGE rates.¹ Nonetheless, in this proceeding the issue is whether
7 Qwest's approved price caps were the effective and lawful rates and not whether there should be
8 a retroactive refund. If Qwest's price caps were the effective and lawful rates, which they are
9 under ORS 759.205, Qwest cannot retroactively change those price caps. Furthermore, Qwest
10 cannot prospectively change those price caps because of SB 622. Therefore, Qwest's voluntary
11 election to price cap regulation means that they gave up its opportunity to prospectively raise
12 rates for non-basic services above the price caps established in the Commission's Order.

13 **CONCLUSION**

14 For each of the foregoing reasons, Staff respectfully requests that Qwest's proposal be
15 denied.

16 DATED this 23rd day of June 2006.

17 Respectfully submitted,

18 HARDY MYERS
19 Attorney General

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21 Jason W. Jones, #00059
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23 Of Attorneys for Staff of the Public Utility
24 Commission of Oregon

25 ¹ If Qwest is suggesting that Judge Lipscomb's rulings in the Trojan case mean that retroactive ratemaking is lawful,
26 Staff disagrees. The position of the Commission is that the filed rate doctrine is applicable in Oregon. While Judge
Lipscomb's rulings are the law of the case, they are not the law. As such, Staff believes that this proceeding should
follow the Commission's position that the filed rate doctrine is applicable in Oregon until there is a ruling from a
court of record.

1 **CERTIFICATE OF SERVICE**

2
3 I certify that on June 23, 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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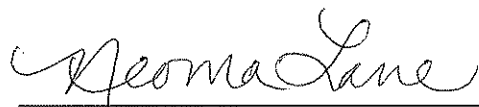
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