

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC)	
COMMUNICATIONS COUNCIL,)	
)	
Complainant,)	PUBLIC UTILITY
)	COMMISSION OF OREGON
v.)	STAFF'S REPLY TO QWEST'S
)	CROSS-MOTION FOR
QWEST CORPORATION,)	SUMMARY JUDGMENT
)	
Defendant)	

INTRODUCTION

The Public Utility Commission of Oregon Staff (“Staff”) takes this opportunity to comment on the cross-motions of the Northwest Public Communications Council (“NPCC”) and Qwest Corporation (“Qwest”) that have been filed in this docket. At this time, Staff’s comments are limited to a discussion of its understanding of the interplay of this docket with the Oregon Court of Appeals decision to reverse and remand the Public Utility Commission of Oregon’s (“Commission”) UT 125 rate design order determination that Qwest’s payphone access line (“PAL”) rates are compliant with the new services test as outlined by federal law. While Staff does not presently take a position on the merits of the cross-motions for summary judgment, Staff reserves the right to comment on the parties’ positions as this docket proceeds.

DISCUSSION

1. The Court of Appeals remand of the Commission’s order in UT 125.

On November 10, 2004, the Oregon Court of Appeals reversed and remanded the portion of the Commission’s Order No. 01-810, the final order issued in Docket UT 125, which determined that Qwest’s PAL rates were consistent with the federal new services test. The Court, in brief, determined that the Commission-approved PAL rates were not consistent with the federal new services test.

Based upon the Oregon Court of Appeal's decision, the matter is currently again before the Commission to determine PAL rates consistent with the federal new services test and the Court's remand. However, it is Staff's understanding that the ultimate determination as to the appropriate PAL rates is independent and separate from the issues presented in the parties cross-motions for summary judgment and does not, and should not, be considered as part of this particular proceeding.

The UT 125 remand will establish a PAL rate that is consistent with the federal new services test. That determination, however, is independent of this proceeding. If, and only if, the Commission were to determine that Qwest was subject to refund liability for its PAL rates in this proceeding would the UT 125 remand be pertinent. Furthermore, the UT 125 remand decision would only be pertinent to the calculation of the *amount* of refunds. However, if it turns out that there is refund liability and thus a refund amount, Staff's expectation is that it would be determined, at a later time, in this proceeding and not the UT 125 remand proceeding. The UT 125 proceeding is separate and distinct from the issues presented in this docket and unnecessary for resolution of this proceeding.

2. The parties' cross-motions for summary judgment only request a determination of refund liability and not a refund calculation.

The NPCC has made clear that it is only requesting summary judgment on Qwest's liability to refund money to NPCC members and not the refund amount. *See* NPCC's Motion for Summary Judgment at 2-3. Thus, calculation of possible damages is not in front the Commission at this time.

Of course, if the Commission determines there is refund liability, there may be issues related to what is the correct refund amount. For example, as Qwest as pointed out the NPCC members have received refunds for rates charged during a portion of the time period for which it they currently seek a refund. *See* Qwest's Summary Judgment Opening Memorandum at 24-25. As mentioned above, Staff's expectation is that if the Commission were to determine that Qwest had refund liability, the amount of refunds

would be determined, at a future time, in this docket (as opposed to the UT 125 remand proceeding). Staff reserves the right, if refund liability is determined, to participate in determining the appropriate amount of refunds.

3. At this time, Staff does not have a position of the issue of refund liability.

The current issue presented appears to revolve around a Federal Communications Commission (“FCC”) Waiver Order and, specifically, whether Qwest relied on the Waiver Order. As noted throughout both parties’ motions, the issue of refund liability is based entirely upon FCC orders. At the heart of this dispute is the issue of whether Qwest relied on the Waiver Order. This is not an issue that Staff participated in at the time, nor does Staff have any specialized information or documentation as to whether Qwest relied on the Waiver Order.

According to the parties, the Waiver Order and its component refund provisions were a result of an agreement that the FCC made with the RBOC Coalition, of which Qwest was a member. While both the parties seemingly accept that this issue is within the jurisdiction of the Oregon Commission, Staff is uncertain as to why the issue would not be more appropriately decided by the FCC, the agency that issued the Waiver Order and is familiar with the particular facts and circumstances surrounding the Waiver Order. Staff would be interested in hearing from the parties on why the FCC is not a more appropriate forum and reserves the right to comment on whether the Oregon Commission is the appropriate jurisdictional forum for this dispute.

In sum, Staff views the current issue in this proceeding as whether Qwest relied on the Waiver Order and, if so, what reliance on the Waiver Order means regarding refund liability. Staff does not have a position of the merits of that issue, as it currently understands it. Staff, however, reserves the right to comment as appropriate and as issues arise.¹

¹ For example, Qwest raises this issue of the filed rate doctrine. *See* Qwest’s Summary Judgment Opening Memorandum at 20. However, Qwest seems to agree that the Waiver Order creates an exception to the filed rate doctrine, if it had relied on the Waiver Order. *See* *Id.* at 9. Thus, Qwest’s reliance on the filed

CONCLUSION

Staff takes this opportunity to comment on its view of the interplay between this proceeding and the proceeding related to the Oregon Court of Appeals remand of the Commissions final order in UT 125. Staff's understanding is that the current issue before the Commission is limited to whether Qwest has any refund liability for PAL rates. Whether or not Qwest has refund liability for PAL rates revolves around whether it relied on the FCC Waiver Order (and what obligations such reliance would create). While Staff does not have comments on the merits of that issue, it wonders why the FCC, which issued the Waiver Order, is not the more appropriate forum for this dispute. Staff also reserves its rights to comment on issues that may develop in this proceeding.

DATED this _____ day of January 2005.

Respectfully submitted,

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rate doctrine seems to be limited to potential relief based upon Oregon law, other than the Waiver Order. In the current posture of the case, Staff does not believe that the filed rate doctrine under Oregon law is ripe for extended discussion. If the filed rate doctrine under Oregon law becomes the issue, Staff would contemplate participating in that discussion.

