

August 23, 2023

Lawrence H. Reichman
Partner

LReichman@perkinscoie.com

D. +1.503.727.2019

F. +1.503.346.2019

VIA EMAIL

Nolan Moser
Chief Administrative Law Judge
Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301-3398

Re: Docket UT 125

Dear Judge Moser:

On behalf of Qwest Corporation (“Qwest”), I am responding to the letter from Northwest Public Communications Council (“NPCC”) dated August 8, 2023, and filed with the Commission on August 14, 2023.

As the Commission knows, in 2018, NPCC filed a motion in UT 125 seeking an additional refund from Qwest under the Refund Orders issued in this docket on the ground that Qwest’s 1996-2003 payphone rates were not NST-compliant. The Court of Appeals’ recent opinion disagreed with the sufficiency of the Commission’s factual findings regarding Advice No. 1668 and Order No. 07-497 in denying NPCC’s motion. *Northwest Public Communications Council v. Qwest Corporation*, 323 Or. App. 151, 163-64, 527 P.3d 30 (2022). The Court remanded the matter for further proceedings regarding NPCC’s motion.

NPCC’s latest assertions—that Qwest is now “in contempt” because the Court’s remand order “require[s]” a refund—are clear misrepresentations of that order. The Court was explicit that it was not requiring a refund: “[W]e cannot say whether state and federal law require the PUC to order the requested refunds.” *Id.* at 153. In fact, NPCC has never established that its members are entitled to a refund—and, as Qwest will show, threshold defects preclude any refund.

To conserve Commission resources and streamline the proceeding, the Commission should establish a briefing schedule to address threshold issues in NPCC’s motion, including but not limited to claim and issue preclusion based on NPCC’s serial lawsuits concerning Qwest’s 1996-2003 payphone rates. NPCC’s letter also raises serious questions about the current standing of NPCC members. NPCC must first establish that its members have the right to receive an additional refund before the Commission may consider what remedy, if any, is available and appropriate.

A. NPCC Has Never Established the Right to a Refund.

In over 22 years of litigation, neither NPCC nor its members has *ever* established that they are entitled to the refund they claim. That has not occurred in the four other cases they litigated before the Commission and in state and federal court, nor has that happened in this case.

In this case, the Commission denied NPCC's motions, deciding Qwest has no further refund liability. On review, the Court of Appeals stated: "We conclude that the PUC's prior orders in this docket *neither require nor preclude the requested refunds* and that, *on this record, we cannot say whether state or federal law require the PUC to order the requested refunds.*" *Qwest*, 323 Or. App. at 153 (emphasis added).

While the Court remanded the case to the Commission for further proceedings, it expressly did not decide that Qwest is required to make *any* refund to NPCC's members. That decision is still before the Commission on remand, and Qwest is confident the Commission will again deny NPCC's motions after fully considering all of the relevant facts and law.

NPCC's narrow claim is that the Refund Orders the Commission issued in this rate case require Qwest to make additional refunds to "true up" the rates charged while the rate case was pending to the final rates the Commission approved.¹ NPCC's arguments were based on a grossly incorrect description of the refund the Commission ordered. Fully knowledgeable about what its orders required, the Commission correctly found that "Qwest has no remaining refund liability" and declined to initiate an enforcement proceeding or to amend its order. Order 17-473 at 6. Although the Court of Appeals has remanded for further proceedings, those proceedings will confirm that the Commission's decision not to require an additional refund was and remains correct.

B. The Commission Should Address Certain Threshold Issues First.

There are several legal defects that preclude NPCC from obtaining any refund for its members. The Commission already ruled in Qwest's favor on certain procedural issues including waiver (Order 17-473 at 4) which were not reviewed on appeal, and those still bar NPCC's request. The Commission will need to address these and other issues on remand, and should do so at the outset.

For example, as the Commission noted in Order 17-473 (at 5), Qwest argued before that NPCC's claims are barred by issue preclusion and claim preclusion because NPCC has already filed and

¹ This proceeding is still based upon the motions NPCC originally filed. At this time, Qwest will not address the "draft motion" NPCC presented to the Commission because that has neither been proffered by NPCC nor accepted by the Commission.

lost four separate lawsuits seeking refunds for the same period. The Commission, however, did not reach that issue, nor did the Court of Appeals address it.

When the Commission resumes proceedings on remand, the Commission will have to consider—among many other things—whether and to what extent NPCC’s claim is barred by claim preclusion and issue preclusion based on its long history of prior litigation. NPCC and its members have already tried and failed to establish their right to a refund in cases before the Commission and in court. The claim they brought here is barred not only because it *could have been made* in these other cases, but also because the claim actually *was made, unsuccessfully*, in those other cases, including in *State of Oregon, ex rel. Northwest Public Communications Council v. Qwest Corp.*, 877 F. Supp. 2d 1004 (D. Or. 2012), *aff’d* 563 Fed. Appx. 547 (9th Cir. 2014) (“*NPCC III*”) and *Communication Management Services, LLC, et al. v. Qwest Corporation*, 67 F. Supp. 3d 1159 (D. Or. 2014), *aff’d in part, rev’d in part*, 726 Fed. Appx. 538 (9th Cir. 2018) (“*NPCC IV*”). Indeed, just as *NPCC III* was found to have preclusive effect on *NPCC IV*, both *NPCC III* and *NPCC IV* have preclusive effect on NPCC’s motion here.

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Qwest therefore requests that the Commission establish a briefing schedule to consider threshold matters regarding NPCC’s motion.

Thank you for your attention to this matter.

Sincerely yours,



Lawrence Reichman

LHR:rsr