

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

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4
5 **UT 125**

6 In the Matter of

7 QWEST CORPORATION, fka
8 U S WEST COMMUNICAITON, INC.,

9 Application for Increase in Revenues.

10 STAFF RESPONSE TO NPCC'S
11 OPENING BRIEF

12 Pursuant to the Administrative Law Judge (ALJ) Mellgren's November 30, 2023
13 Prehearing Conference Memorandum, Staff of the Public Utility Commission of Oregon (Staff)
14 submits this response to Northwest Public Communication Council's (NPCC) opening brief.
15 Staff will not address the merits of NPCC's arguments but would offer the following
16 clarifications for the record regarding the Commission's authority on remand and content of the
17 'new services test' (NST).

18 **I. Scope of Commission Authority on Remand**

19 NPCC asserts that the Commission is preclude from determining what NST-compliant
20 rates would have been during the period from 1996-2003, because such a determination would
21 constitute retroactive ratemaking.¹ Oregon Supreme Court rejected a similar mischaracterization
22 of the prohibition on retroactive ratemaking in *Gearhart v. Pub. Util. Comm'n of Oregon*.² While

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24 ¹ See NPCC Opening Brief p. 21-24. ("...the PUC must necessarily hold that the NST rates
25 approved in 07-497 serve as the NST rates for all times after May 1, 1996") ("The only
26 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
junction...").

² See generally, *Gearhart v. Pub. Util. Comm'n of Oregon*, 255 Or. App. 58, 299 P.3d 533
(2013), aff'd, 356 Or. 216, 339 P.3d 904 (2014).

1 Oregon law generally prohibits retroactive ratemaking, it does not prevent the Commission from
2 reevaluating past rates or determining that a refund is warranted when the Commission is
3 evaluating a rate on remand. The prohibition against retroactive ratemaking “prohibit[s] a public
4 utility commission from setting future rates to allow a utility to recoup past losses or to refund to
5 consumers excess utility profits.”³ Of particular relevance here, the Court of Appeals decision
6 clarified that that in order not to implicate the rule against retroactive ratemaking, the PUC’s
7 determination “(1) must be based only on the information in existence at the time of the initial
8 rate order; (2) must not be based on an evaluation of the utility's actual expenses or revenues; and
9 (3) must not be effectuated by offsetting future rates.”⁴

11 The question before the Appeals Court in *Gearhart* was whether, after the lower court
12 determined that the Oregon Public Utility Commissions (PUC or Commission) had erroneously
13 allowed utility to recover a return on its investment, the Commission’s action in reevaluating the
14 entire rate structure for the period in question was within its authority on remand. The petitioners
15 argued that the Commission’s reevaluation and recalculation of the rates violated the prohibition
16 on retroactive ratemaking. Ultimately, the Court of Appeals found the Commission did not
17 engage in impermissible retroactive ratemaking by reexamining rates from previous period to
18 determine whether to order refund of rates paid in subsequent period. Instead, it determined that
19 the Commission properly utilized ratemaking principles to calculate rates that it would have
20 authorized.
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23 ³ See *Gearhart v. Pub. Util. Comm'n of Oregon*, 356 Or. 216, 237, 339 P.3d 904, 917 (2014),
24 citing Stefan Krieger, *The Ghost of Regulation Past: Current Applications of the Rule Against*
25 *Retroactive Ratemaking in Public Utility Proceedings*, 1991 U ILL L REV 983, 984 (1991); and
26 *Dreyer v. PGE*, 341 Or. at 270 n. 10, 142 P.3d 1010 (2006) (explaining that, under the rule,
“approved utility rates may be modified only prospectively” and “utilities cannot provide
retrospective relief from such rates”).

⁴ *Gearhart*, 255 Or. App. 58, at 99.

1 Similar to the Petitioners in *Gearheart*, NPCC’s opening brief seeks to preclude the
2 Commission from evaluating what rates it might have approved for Public Access Lines (PAL)
3 or CustomNet during the 1996-2003 period had it applied the new services test. As demonstrated
4 in that case, the prohibition against retroactive ratemaking does not limit the Commission’s
5 authority to reevaluate rates for NST-compliance as part of this remand.

6 **II. The New Services Test**

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8 As outlined in the Testimony of Staff Witness John Reynolds, Exhibit 1, application of
9 the new services test (NST), requires consideration of six criteria.⁵ Staff notes that the first
10 criterion permits inclusion of “just and reasonable portion of the carrier’s overhead costs” in
11 rates.⁶ Based on the inclusion of this criterion in calculation of NST-compliant rates, it is clear
12 that NST-compliant rates are not one specific dollar amount, but rather a permissible range. In
13 Order 07-497 the Commission determined that specific rates, those included in the stipulation,
14 were NST-compliant but did not articulate the permissible range of rates which would comply
15 with the new services test.⁷
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24 ⁵ Staff/1, Reynolds/2-3, *Direct Testimony of Staff Witness John Reynolds in Support of the*
25 *Stipulation*, Docket No. UT 125, Oct. 15, 2007; provided in Staff’s Request to Supplement the
26 Record, Dec. 14, 2023.

⁶ Staff/1, Reynolds/2, *citing* FCC Order No. DA 00-374 [The Wisconsin Order], March 1, 2000.

⁷ *See generally* Order No 07-497, Docket No. UT 125, *In the Matter of Qwest Corporation*
Application for Increase in Revenues, Stipulation Adopted, Nov. 15, 2007.

DATED this 29 day of February 2024.

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Respectfully submitted,

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