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January 27, 2010

Public Utility Commission of Oregon
Attn: Filing Center
550 Capitol St. NE, Ste. 215
PO Box 2148
Salem, OR 97308-2148

To: Hon. Allan Arlow
Public Utility Commission of Oregon

RE: NORTHWEST PUBLIC COMMUNICATIONS COUNCIL V. QWEST CORP.
Docket DR 26/UC600
Consolidated Motions to Enforce Orders and Bifurcate Proceedings

Dear Judge Arlow,

Please find enclosed consolidated motions for the enforcement of the outstanding unsatisfied Orders of the Commission. This motion can be acted upon without reference to either the Amended Complaint or the Federal Complaint. The authority for the Motions stand alone. I have however attached the Federal complaint as I indicated at the time of our phone conference I would provide you.

Also please find attached the Excerpts from the relevant Exhibits, primarily Commission Orders and Stipulations which are relevant to the motion and referenced in the Memorandum. I will be providing those excerpts in hard copy as I understand the rules. As a courtesy to all parties and your office, I have included, only in electronic format, the full text from which the Excerpts have been extracted. It took some sufficient effort to get all the full text assembled as they are not all on line electronically.

Given your further consideration of the pending motions, I thought it might be helpful to file this motion now. You may find the materials of assistance in your consideration of the motion against the Amended Complaint. The orders are especially helpful in understand why the claim for Custom Net (aka Fraud Protection) should not be precluded at this stage.

If you would like to schedule a conference call in regard to further scheduling and oral argument please advise.

Sincerely,

/s/

Frank G. Patrick
Attorney at Law

Cc: Lawrence Reichman (email; US Mail) reicl@perkinscoie.com
Jason W. Jones (email; US Mail) Jason.w.jones@state.or.us
Alex M. Duarte (email; US Mail) alex.duarte@qwest.com

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc Complainants, v. QWEST CORPORATION, Defendant.	DOCKET NO. DR 26/UC 600 CONSOLIDATED MOTIONS TO ENFORCE ORDERS AND TO BIFURCATE AND PARTIALLY ABATE PROCEEDINGS

TO: Oregon Public Utility Commission

AND TO: All Parties

Complainants, MOVE the Commission to enforce the Orders of the Oregon Public Utilities Commission (the PUC) in the proceedings of UT 125 and related to it and to issue refunds to the Complainants to which they are entitled and the subject of their Complaint and as Amended and to Bifurcate and Partially Abate the proceedings to allow for judicial economy in this case and the Complaint of the Complainants filed in the United States District Court of Oregon under case No. CV 09 1351 BR. This Motion should result in this proceeding to be bifurcated into two segments:

1. The First Segment of the case should be restricted to the claims and remedies encompassed within Count Four of the Second Amended Complaint such claims are referred to herein as the Oregon Refund Claims. The Oregon Refund Claims have two components.

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a. One component is based on enforcement of Complainants' right to refunds under Oregon statutes as alleged in Count Four of the Second Amended Complaint.

b. The second component is a claim for refund based on orders issued in dockets UT 80 and UT 125 and, although encompassed within Count Four, is independent of the Second Amended Complaint.

It is enforcement of these orders that is requested as part of the Complainants' current motion.

2. The Second segment consists of all the other claims, which should be held in abeyance for the reasons set forth in the supporting memorandum.

AUTHORITY FOR MOTION

Pursuant to OAR 860-011-000(3) and 53B of the Oregon Rules of Civil Procedure, the PUC clearly has the authority to bifurcate the case and address the Oregon Refund Claims alleged in Count Four of the Second Amended Complaint while holding for a separate trial all the other claims that require clarification in terms of interpretations of applicable law and/or the authority of the PUC to address either the claim or provide the requested remedy. *See e.g. Berg v. Berg*, 211 Ore. App. 703, 156 P.3d 171 (Ore. App. 2007), *Black, et al v. Arizala, et al*, 182 Ore. App. 16, 48 P.3d 843 (Ore. App. 2002) and *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 209 Ore. App. 441, 149 P.3d 173 (Ore. App. 2006) all stating the trial court has, within its discretion, the authority to bifurcate issues and try them separately.

STATEMENT OF REQUEST

This case was filed in May 2001 as a precautionary matter, pending the proceedings of PUC Docket UT 125 (the Rate Case). Those proceedings extended from late 1995 until concluded in November 2007. During that time, and as a precaution to maintain it right to claim refunds, when that claim should become ripe, this case was filed by the NPCC in 2001. The "ripeness" of the claims arose finally in November 2007, when the UT 125 proceedings were concluded to result in "effective" rates under the regulation of the Commission with its Order No. 07-497, that were compliant with the Telecommunications Act of 1996 (the Act).

The Commission's Order 07-497 and its companion Orders No. 00-190, 00-191, 01-810, 02-009 and 06-515 make clear that Qwest currently has not complied with the Orders of the Commission to calculate and pay refunds of overcharges as established by the Commission proceedings in UT 125 and the related proceedings.

Complainants hereby move the Commission to enforce its prior orders for Qwest to calculate and pay the refunds already ordered by the PUC to Complainants; to bifurcate the remaining Oregon Refund Claims alleged

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in Count Four of the Amended Complaint from the rest of the claims in the Second Amended Complaint; and to Order the Oregon Refund Claims down for immediate calculation and payment consistent with its prior orders and holding in abeyance all other claims asserted in the Second Amended Complaint. There is no reason the Motion should not be granted in all respects.

Dated: January 27th, 2010

/S/

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Attorney for Complainants

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CERTIFICATE OF SERVICE

I, the undersigned below, hereby certify that I served the foregoing CONSOLIDATED MOTIONS TO ENFORCE ORDERS AND TO BIFURCATE AND PARTIALLY ABATE PROCEEDINGS and DECLARATION OF FRANK G. PATRICK AND MEMORANDUM IN SUPPORT on:

Lawrence Reichman
Perkins Coie
1120 N.W. Couch Street, 10th Floor
Portland, Oregon 97209-4128
reicl@perkinscoie.com

Jason W. Jones
Department of Justice
1162 Court Street NE
Salem, Oregon 97301
Jason.w.jones@state.or.us

Alex M. Duarte
Qwest Corporation
421 SW Oak St., Suite 810
Portland, Oregon 97204
alex.duarte@qwest.com

by the following indicated method or methods:

____X_____by **mailing & emailing** (if indicated above) a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon, and by electronic mail on the date set forth below;

_________by sending full, true and correct copies thereof via **overnight courier** in sealed, prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, on the date set forth below;

_________by handing/delivering true and correct copies thereof to the attorney or one of the clerks at the above address, on the date set forth below;

And Certify that I did electronically file same with the PUC Filing Center, with a hard copy to PUC, Filing Center, 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR 97308-2148.

DATED this __27th_ day of January, 2010

/S/
Frank G. Patrick, OSB 76022

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BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc Complainants, v. QWEST CORPORATION, Defendant.	DOCKET NO. DR 26/UC 600 MEMORANDUM IN SUPPORT OF CONSOLIDATED MOTIONS TO ENFORCE ORDERS AND TO BIFURCATE AND PARTIALLY ABATE PROCEEDINGS

TO: Oregon Public Utility Commission

AND TO: All Parties

This memorandum of law is submitted on behalf of all the Complainants, in support of their Consolidated Motions to enforce the Orders of the Oregon Public Utilities Commission (the PUC) to issue refunds to the Complainants and to Bifurcate and Partially Abate the proceedings. References to the Complaint are to the Second Amended Complaint unless specifically referencing the two prior filings.

One segment of the case should be restricted to the claims and remedies encompassed within Count Four of the Second Amended Complaint (such claims are referred to herein as the Oregon Refund Claims). The Oregon Refund Claims have two components. One component is based on enforcement of Complainants' right to refunds under Oregon statutes as alleged in Count Four of the Second Amended Complaint. The second component is a claim for refund based on orders issued in dockets UT 80 and UT 125 and, although encompassed within Count Four, is independent of the Second Amended Complaint. It is enforcement of these orders that is requested as part

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of the Complainants' current motion. The Oregon Refund Claims rely solely on Oregon law, subject only to the requirement that the intrastate payphone rates comply with the federal new services test and other federal requirements. Compliance of such rates is now a matter of a stipulation of the adversarial parties herein and a resulting PUC Order. That Order and its predecessors are now ripe for enforcement and should be heard and resolved immediately. All the other claims should be encompassed within the second segment of the case and held in abeyance for the reasons set forth in this memorandum.

STATEMENT OF FACTS

This case was filed in May 2001 as a precautionary matter, now a matter of record in the history hereof. This case could not be resolved until the Qwest Corporation (Qwest) general rate case filed under Docket UT 125 (the Rate Case) was concluded as discussed below. To fully appreciate the reasons why bifurcation and immediate enforcement of existing PUC orders is the most efficient way in which to proceed, it is critical that the history of the rate review and determination in the Rate Case be presented. This history goes back almost 20 years and involves dockets UT 80 and UT 125.

In 1991, in docket UT 80, the PUC adopted Order No. 91-1598 which permitted Qwest to operate under an alternative form of regulation (AFOR). A copy of that Order (without attachments other than the stipulation referenced in such Order) is attached to the affidavit of Frank G. Patrick, Esq. as Patrick Exhibit 1. The AFOR fixed the rates for what were defined as essential services for the five-year period of the AFOR Plan and those rates could not be modified without PUC approval. Non essential services were price listed and those prices could be changed without PUC approval. See Order No. 91-1598 at p. 10. The provisions of the AFOR that are of particular relevance to the case at bar relate to the early termination of the AFOR and how rates are treated after a termination of the AFOR Plan.

Qwest and the PUC staff (the Staff) entered into an agreement reduced to stipulation in UT 80 and 85 and recommended that the PUC adopt, the AFOR. The PUC adopted the stipulation as modified in Order No. 91-1598. One of the modifications they made related to early termination of that AFOR pursuant to paragraph 10 of the stipulation. Paragraph 10 of the stipulation was modified by adding a new subparagraph (f) that made clear that on termination of the AFOR all authorized rates going forward would be interim subject to refund. The Order's new subparagraph 10(f) to revise the **stipulation** states in relevant part as follows:

> "(3) Unless otherwise ordered by the Commission, rates authorized under (2) of this paragraph after the plan has been terminated *shall be considered interim rates subject to refund.* The amount

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1 subject to refund with interest shall be that portion of the USWC's earnings which the Commission finds have exceeded a reasonable rate of return, *commencing with the date of the*
2 *order terminating the plan and ending with the date that permanent rates are set and are in effect*." (Emphasis added) Order No. 91-1598 at pp. 27-28 at (3). Patrick Exhibit 1 at pp. 27-28.

3 The Commission out of an abundance of caution to establish clarity of its intent, then went on to explain

4 the revisions to the stipulation and the resulting **Order**:

5 "Subparagraph (3) specifies that the rates in effect from the date the [AFOR] plan is terminated until the date the new permanent rates are set *shall be interim rates subject to refund*. A refund
6 will take place only where USWC is determined to have been overearning. (Note: Fn 24 of the Order set out below not as a footnote herein.) *The amount of any refund will equal the difference*
7 *between the amount USWC is actually earning and the amount subsequently found to be reasonable.* Any refunds will accrue interest at USWC's authorized rate of return on rate base.
8 (Emphasis added) Order No. 91-1598 pp. 28-29. Patrick Exhibit 1 at pp. 28-29.

9 Because the impact on both the utility as well as the public was of concern to the Commission Footnote

10 24 goes on to explain how both are protected by its language:

11 "24 If USWC seeks to terminate the Plan [AFOR] because it is underearning, the company would file proposed tariff rates at the time that it requests authority to terminate the Plan. *If the Commission terminates the Plan, the proposed rates would then go into effect on an interim basis.*
12 *In that case, USWC would be liable for a refund only if the permanent rate level established by the Commission are less than the interim rates. The only way that USWC could be harmed under*
13 *such a scenario is if the interim rates filed by the company are not compensatory*." (Emphasis added) Order No. 91-1598 at p. 28 at fn 24. Patrick Exhibit 1 at p. 28 at fn 24.

14

15 The Commission recognized in this Order the long-term impacts of the AFOR and its termination by

16 either side by their own volition. The Commission recognized that if Qwest had determined it was "underearning"

17 then it would come back to correct that problem. The Commission therefore took the position that its duty was to

18 protect the public from overcharges by making the termination of the AFOR also conditioned on the refunds so that

19 the Public was also protected. That resulted in a logical quid pro quo; Qwest could ask for more and get it under the

20 process, but if the Commission were to terminate the AFOR, as actually did happen, (Order No. 96-107 in UT 80)

21 then Qwest could ask for a modification of the AFOR or its rates, but **Qwest would always be liable to pay**

22 **refunds in the event of overcharges regardless of how long it would take to determine**. The long term nature of

23 that public protective provision was intentional on the part of the Commission and pervasive, never changing from

24 the issuance of Order No. 91-1598 clear through to the final effective rates in Order No. 07-497 even though it is

25 clear that no one contemplated it would take 11 years for the overcharges to be determined.

26 Under the terms of the Order, nine months prior to the end of the five-year term of the AFOR Plan

ending December 31, 1996, Qwest was to submit a general rate filing under ORS 759.180 (ultimately resulting in

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docket UT 125). These rates were to take effect upon the expiration of the AFOR Plan unless the AFOR Plan was extended. Importantly, the Order in revising the stipulation with Qwest stated the following with respect to such rates:

> "The Commission finds that this provision of the stipulation should be revised as follows:
>
> > 'Nine months prior to the end of the term of the plan, [AFOR] USWC shall submit a general rate filing under ORS 759.180. The purpose of the filing shall be to propose a schedule of rates which will be effective upon expiration of the plan. USWC may, at the same time, apply for an extension of the plan or submit a revised plan for Commission consideration.'
> >
> > 'In the event the Commission does not complete its review of USWCs proposed rates prior to the end of the term of the Plan, the Commission may allow the proposed rates to take effect *subject to the refund provisions set forth in paragraph 10(f)*.' (Emphasis added)
>
> "The modified language reverses the procedure now contemplated by the stipulation. Rather than require the Commission to request a general rate filing, the company has the obligation to make a rate filing based on updated results of operations. In our opinion, such a filing is necessary regardless of whether USWC seeks an extension of the Plan or a return to traditional regulation. The nine month period provides the Commission with time to process the rate filing and to consider an extension of the Plan or a new Plan. ***The provision allowing USWC to file proposed rates subject to refund protects both the company and ratepayers in the unlikely event that it takes longer than nine months to make a final determination.*** (Emphasis added) Order No. 91-1598 at p. 29. Patrick Exhibit 1 at p. 29.

The wisdom of the Commission's futuristic and long term view has been rewarded by this action which was the very reason for its diligence; to protect the public; in this case the PSPs and their very public customers. The Commission made provision for the delay starting with the terms of the AFOR and its termination regardless of how initiated. The conditions of Order No. 91-1598 were not imposed on Qwest over its objection but rather by its active solicitation and adoption. As Order No. 91-1598 makes clear, if Qwest chose not to proceed under the terms of the AFOR as finally ordered by the PUC, including the modifications to the stipulation of Qwest and the Staff, it could do so and continue to be regulated under the terms of its historical rate of return form of regulation. Order No. 91-1598 at pp.1 & 29. Patrick Exhibit 1 at pp. 1 & 29**.** Qwest ***chose*** to have the Order adopted. Thus, Qwest successfully applied for, agreed to, and received, the form of AFOR it sought. Qwest avoided other consequences by its adoption of the AFOR. In fact, Qwest's actions constitute not only the basis for estoppel but, because this was in a proceeding before the PUC that resulted in Qwest successfully seeking and obtaining the benefits of the PUC order, is also the basis for judicial estoppel discussed below.

In December 1995, Qwest made the general rate filing pursuant to Order No. 91-1598 and the PUC

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1 opened a general rate case under Docket UT 125. In February 1996, the Telecommunications Act of 1996 was
2 adopted and pursuant to Section 276 thereof, **all** intrastate payphone tariffs were required to comply with the non-
3 discrimination and non-preferential treatment requirements of the Telecommunications Act as amended (the Act).
4 Through a series of orders commencing with the first payphone order and the order on reconsideration,
5 implementing the non discrimination and non preferential treatment requirements of the Act, it was made clear that
6 all intrastate payphone tariffs had to comply with the new services test (NST).

7 One condition of the AFOR was that Qwest maintain the quality of its service to its customers. After
8 the adoption of the AFOR, Qwest service became a continuing concern to the PUC and its Staff. During the period
9 the AFOR was in place, Qwest did not meet the applicable service standards. Qwest was cited for several service
10 violations. As a result, PUC Staff initiated a settlement conference in accordance with the terms of Order No. 91-
11 1598. As a result of that conference, Qwest, TRACER, Telnet Internet Services, Citizens Utility Board and the Staff
12 entered into a stipulation that provided for the termination of the AFOR effective May 1, 1996. The stipulation
further provided that Qwest's then current rates became **interim** subject to refund with interest at 11.2% per annum.

13 On April 24, 1996, the PUC issued Order Number 96-107 in Docket Number UT 80 terminating the
14 AFOR effective May 1, 1996 and adopting the recommendations of the Staff and the stipulation in its entirety. The
15 Order provided with respect to rates as follows:

16 > "In making this decision, the Commission acknowledges that, pursuant to the terms of the AFOR, U.S. WEST has filed numerous price listings with the Commission. Upon the termination of the
17 > AFOR, US WEST need not re-file these listings as tariffs. Rather, the Commission will consider *any price list filing with an effective date of May 1, 1996, as a fully regulated tariff, subject to all suspension and investigation procedures set forth in ORS 759.180 to 759.190.*" (Emphasis added)
18 > Order No. 96-107 at p. 4. Patrick Exhibit 5 at p. 4.

19 After issuance of Order No. 96-107, Qwest sought a clarification that the refund would be calculated
20 based on the actual earnings of Qwest rather than estimated earnings. In Order No. 96-183, (echoing and reiterating
21 its earlier language in Order No. 91-1598) the PUC ordered that refunds would be:

22 > "… equal to the difference between the permanent 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." Order No. 96-183 at p. 5. Patrick Exhibit 6 at p. 5.

23
24 The PUC provided that the refund procedure would be similar to that used in ORS 757.215(4) and ORS
25 759.185(4). Ultimately the procedure Ordered was embodied in Order No. 01-810, which was made final and never
appealed with respect to the refund procedure by any party.
26

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The price list tariffs established under the AFOR were to be reviewed and permanent tariffs established as part of the general rate case that was in process under Docket UT 125. The PUC divided Qwest's new tariff proposal into two phases. The first part was the revenue requirement phase (Phase I). Qwest had requested an increase of $28 million in its revenue requirement. The second part was the design phase (Phase II). The design phase was postponed because the PUC wanted to incorporate into the design phase, the conclusions it was developing in two other pending matters, Docket Nos. UM 351 and UM 773. The revenue requirement phase of the case culminated in Order No. 97-171, which ordered a refund of $97.4 million for the period May 1, 1996 to April 30, 1997 and a reduced revenue requirement going forward of $102 million.

Order No. 97-171 stated that additional refunds would be ordered to cover the period between April 30, 1997 and the effective date of the rates set in the design phase of the case. Qwest appealed Order No. 97-171 establishing the refund, to the Marion County Circuit Court. Qwest also appealed Order No. 96-183 that established the refund methodology (i.e. difference between lower final rate and higher interim rate). The Circuit Court reversed and modified Order 97-171 and the PUC appealed. The Circuit Court affirmed Order No. 96-183 and Qwest appealed. (See Order No. 00-190 at pp. 1-2). Patrick Exhibit 7 at pp. 1-2.

Qwest and the PUC reached a settlement of the two appeals in progress based on a stipulation (the Settlement Stipulation) between Qwest and the Staff reflected in Order No. 00-190 dated April 14, 2000. This order modified Order No. 97-171 and rescinded Order No. 96-183 and other related orders and re-adopted them as modified in Order No. 00-190 and a companion Order No. 00-191. Order No. 00-190 at pp. 17-18, Patrick Exhibit 7 at pp. 17-18. The total refund Qwest and Staff agreed to, was to vary between $227.2 and $272.8 million based on the timing of the refund. Since these Orders are based on a Settlement Stipulation entered into by Qwest and were sought by it, Qwest is judicially estopped from now challenging its own stipulation and the Orders based thereon. Further the Settlement Stipulation and the resulting Orders are now the authority for Qwest's obligation to pay the refunds claimed by the Complainants.

Under Order No. 00-190, the original refund of $97.4 million for the period May 1, 1996 to April 30, 1997 was reduced to $53 million. The revenue requirement reduction, which had been $102 million, was reduced to $63 million per year. The total refund of between $227.2 and $272.8 million arose because of the substantial time delay from the original refund order to the date of Order No. 00-190 during which time the refund grew because of the ongoing accrual of overcharges, exactly as Complainants herein have suffered. Qwest agreed to a temporary bill

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1 credit equal to a $63 million revenue reduction each year going forward based on local billing units as of August 31, 1997 and common line charges from six (6) months before to six (6) months after the August 31, 1997 date. The refund was separate from the bill credits. By stipulation of Qwest, this refund was payable immediately **even if** Order No. 00-190 or a subsequent implementing Order was appealed; but there was no appeal. The Settlement Stipulation was designed to settle the future refund obligation that would exist if the refund was not paid at the time of the settlement. The Settlement Stipulation was not only to the benefit of the ratepayers but also Qwest, to mitigate not only the refunds due, but also the accrual of interest on the refunds. Once again there arises the basis for judicial estoppel, barring any challenge by Qwest of its liability to pay the refunds sought by Complainants. The billing credits were a going forward reduction in revenue pending finalization of the design phase of the rate case. (Order No. 00-190 at p. 4). Patrick Exhibit 7 at p. 4.

There were a number of opponents to the proposed Settlement Stipulation who claimed they were entitled to a larger refund. ***Qwest and the Staff both took the position that until the design phase of the case was concluded no individual customer could prematurely claim it had over paid and was entitled to a refund.*** (Order No. 00-190 at pp. 9 and 12). Patrick Exhibit 7 at pp. 9 and 12. The PUC, in approving the settlement, specifically referenced with approval the retention of the refund mechanism set forth in Order No. 97-171 (the difference between the final lower rate and any higher interim rate) stipulated to by Qwest and the Staff. Order No. 00-190 at p. 13. Patrick Exhibit 7 at p. 13. The reference and incorporation in a *Stipulation by Qwest,* reveals the continuation of the authority of the provisions of 97-171 for not only the accrual of the refunds claimed but also of the interest due and the basis for the calculation of the refunds accruing since ***May 1, 1996*** under the commencement of UT 125.

In 1999, Oregon passed new legislation establishing a price cap method of regulation for the utilities industry. This new legislation is reflected in ORS 759.400 et seq. The price cap regulation was an option that a utility could select in lieu of rate of return regulation. Qwest selected this option on November 30, 1999 effective December 30, 1999. Section 759.410 permits maximum and minimum price caps for nonessential services. Qwest's rates then in effect constituted the price caps for Qwest for all rates including the Public Access Line (PAL) and CustomNet charges. Under the new legislation, the investigation, which resulted in the issuance of the rate design phase of the case, was to be the PUC's only opportunity to adjust Qwest's price caps. Order 01-810 at p. 3. Patrick Exhibit 8 at p. 3.

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1 In May 2001, due to an interim rate reduction in PAL rates, NPCC, as a precautionary matter, filed a
2 complaint in this docket seeking a refund (the Refund Case). No application was made for refund with respect to
3 CustomNet rates, at the time, because no rate reduction had occurred, nor would until completion of UT 125 and
4 issuance of Order 07-497, with respect to such rates. A final effective rate and the determination of a rate reduction
5 was the predicate to any refund claim. Since the refund sought was dependent on the final determination of rates in
6 the design phase of the Rate Case, at the joint request of Qwest and NPCC, this present action was held in abeyance,
7 by order entered June 21, 2001, pending a final resolution of docket UT 125. This action was consistent with the
8 positions both Qwest and Staff took in arguing in support of the PUC adopting the settlement to the effect that no
9 party could claim a refund prior to the final and effective rate being established. (Order No. 00-190 at pp. 9 and 12).
10 Patrick Exhibit 7 at pp. 9 and 12. For the PSPs, the final, effective rates were not determined until November 15,
2007.

11 The rate design phase of UT-125 culminated in the issuance of Order No. 01-810. This Order
12 established the rate design for the case. With respect to PAL services, the total revenue requirement reduction
13 proposed was $13,000, annually. Order No. 01-810 at pp. 48-49. Patrick Exhibit 8 at pp. 48-49. No revenue
14 requirement reduction was allotted to CustomNet because no change in the rate was proposed. Order No. 01-810 at
15 p. 51. Patrick Exhibit 8 at p. 51. NPCC opposed the proposed rates for PAL and CustomNet services as too high
16 and not NST compliant. Qwest maintained that the payphone services rates complied with all federal requirements
17 and that the PAL rates specifically complied with the new services test. Order No. 01-810 at p. 52. Patrick Exhibit
18 8 at p. 52. The PUC rejected NPCC's arguments and adopted the rates proposed by Qwest and essentially approved
19 by the Staff. This order effectively finalized the refund calculation and the revenue requirement reduction going
20 forward (except as to the payphone tariffs due to the appeal) as neither the refund nor the revenue requirement
21 reduction were to be delayed due to any appeal per the terms of Order Nos. 00-190 and 00-191 and the Settlement
Stipulation on which they were based.

22 The NPCC moved for reconsideration of Order No. 01-810, which was denied by Order No. 02-009
23 dated January 2, 2002. NPCC appealed Order Nos. 01-810 and 02-009 to the Marion County Circuit Court. By
24 order dated October 1, 2002, the Marion County Circuit Court affirmed the orders of the PUC. NPCC appealed this
25 decision to the Oregon Court of Appeals. By decision and order dated November 10, 2004, the Oregon Court of
26 Appeals reversed the decisions of the Marion County Circuit Court and the PUC and remanded the case for further

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1 proceedings in accordance with the decision of the Court of Appeals. The Court of Appeals specifically found that
2 the PAL rates established by the PUC were not NST compliant and new NST compliant rates had to be determined.
3 With respect to CustomNet, the Court held that insufficient cost data was available to determine whether such rates
4 were NST compliant and directed the PUC to take additional evidence to determine compliance.

5 After the issuance of Order Nos. 01-810 and 02-009, on March 22, 2002, the ALJ in the Refund Case,
6 sua sponte, issued Order No. 02-181 dismissing as moot the Refund Case. NPCC appealed this action to the Marion
7 County Circuit Court. By order dated March 1, 2004, the Marion County Circuit Court remanded the matter to the
8 PUC with instructions to take further evidence in the case to determine whether the Refund Case was moot. A copy
9 of this Order is attached as Patrick Exhibit 2. The Marion County Court then stayed its proceedings pending further
action by the PUC.

10 The decision of the Oregon Court of Appeals sustaining the NPCC position and reversing the PUC
11 decision in Order No. 01-810 (as confirmed by Order No. 02-009) as it related to payphone service rates made clear
12 that the Refund Case was not moot. As a result of the reversal of PUC Order No. 01-810, there arose some question
13 as to the interplay of the Refund Case and the Rate Case where the NST compliant payphone rates had to be
14 determined. In the PUC response on the NPCC motion and Qwest cross motion for summary judgment filed in the
15 Refund Case, the Staff took the position that the calculation of the amount of any refund would be determined in the
16 UT 125 proceeding. However, the refund liability and the amount thereof would be determined in the Refund Case;
17 this case. See page 2 of the Staff response. A copy of the Staff's response is attached at Patrick Exhibit 3.

18 The reversal and remand from the Oregon Court of Appeals meant that the payphone rates would be
19 substantially lower than was reflected in Order No. 01-810 issued in September 2001. In accordance with Order No.
20 01-810 (as confirmed by Order No. 02-009), Qwest had made the refund ordered and reduced their revenue
21 requirement through temporary bill credits but based on incorrect and ultimately unlawful rates. After the remand
22 and new calculations by the PUC, Qwest knew that it would have to pay PSPs, such as Complainants, higher refunds
23 than had been determined for the period May 1, 1996 through the date final NST compliant PAL and CustomNet
24 rates were determined and made effective. Even though Qwest had unilaterally reduced its payphone rates based on
25 other proceedings, even prior to the reversal and remand from the Oregon Court of Appeals, *it did not pay any additional refund, which such reduction clearly mandated*.

26

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In a March conference call and by letter in April 2006, Qwest requested that the PUC determine, as a threshold matter, whether it could increase other customer rates to offset the lost revenues resulting from the lower payphone tariffs and higher refunds that were required as a result of the Oregon Court of Appeals remand and the ensuing rate reduction under UT-125. Order 06-515 at pp. 2-3. Patrick Exhibit 9 at pp. 2-3. In its brief in support of its new position, Qwest sought to reopen the entire Rate Case to re-balance rates so that Qwest would recover all of its lost revenue. The PUC rejected Qwest's arguments finding that under the terms of the Settlement Stipulation, pursuant to which Order Nos. 00-190 and 00-191 were issued, *Qwest was obligated to pay the higher refund and* ***suffer the revenue reduction*** required by the Oregon Court of Appeals decision ***without any offsetting rate increases.*** Order No. 06-515 at p. 10. Patrick Exhibit 9 at p. 10. The fact that the request was based on the Qwest position that it needed to offset the refunds is an admission of its knowledge that it still owes the refunds now claimed.

After the entry of Order No. 06-515, Qwest, NPCC and Staff entered into a stipulation adopting rates that were NST compliant. A copy of that Stipulation is at Patrick Exhibit 10. The Commission adopted the Stipulation and NST compliant PAL and *CustomNet* rates after independently determining that the proposed stipulated PAL and CustomNet rates were NST compliant and complied with all other federal requirements. Order No. 07-497 at pp. 3-4. Patrick Exhibit 11 at pp. 3-4. ***Such stipulated rates were made final and effective on November 15, 2007 by Order No. 07-497***. A copy of Order No. 07-497 is at Patrick Exhibit 11. Within a reasonable period of time after the entry of Order No. 07-497 and expiration of the time to move to reconsider and appeal the Order had expired, Qwest should have by now issued refunds to PSPs such as Complainants. Despite due demand as reflected in this Refund Case, Qwest has failed and refused to pay the refunds to be calculated based on Order No. 07-947 and ordered to be paid by the PUC in Order Nos. 00-190, 00-191 and 01-810 as modified by the Oregon Court of Appeals decision and remand. The basis for calculating such ordered refunds has been made final and is now well beyond any right of reconsideration or Court review.

In summary, the status of refunds ordered by the PUC is as follows. In the Rate Case, the amount of the refund was determined in Order Nos. 00-190 and 00-191 and ordered to be paid. The refund to any individual customer was to have been determined once the rate design phase of the case was completed. The refund to individual ratepayers was to be equal to the difference between a lower final rate and any higher interim rate. Order No. 00-190 at p. 13. Patrick Exhibit 7 at p. 13. The Orders also provided temporary bill credits to begin the

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revenue requirement reduction determined in the two Orders. The temporary bill credits effectively established an interim rate design that remained in effect until the Commission entered Order Nos. 01-810 and 02-009, establishing permanent rates in Phase II of this docket. Order No. 06-515 at p. 7. Patrick Exhibit 9 at p. 7.

The rate design phase of the case concluded with the issuance of Order No. 01-810 and 02-009. These orders finalized the refund and revenue reductions established in Order Nos. 00-190 and 00-191 subject to the interim nature of the payphone rates with respect to which appeal was taken. The Oregon Court of Appeals reversed the payphone rates established in the foregoing Orders and effectively reduced such rates but did not alter the refund calculation methodology. As a result of that decision, the refunds and the rate reductions reflected in the temporary bill credits established in Order Nos. 00-190, 00-191, 01-810 and 02-009 due to PSPs, including Complainants, had to be increased ultimately.

The amount to be refunded to Complainants and other PSPs was the difference between the final NST compliant payphone rates for PAL *and CustomNet* established by the PUC and any higher interim rates to which they had been subject during the period May 1, 1996 to November 15, 2007. Refunds for the period beginning May 1, 1996 to sometime in 2000 had already been ***ordered and paid, but inaccurately, based on the non-NST compliant rates established in 01-810 rather than the correct final effective compliant rates*** *established November 15, 2007 in Order No. 07-497.*

The refund calculation would be the difference between the final NST compliant rates for PAL *and CustomNet* and the higher interim rates charged during the period May 1, 1996 to November 15, 2007 less refunds and temporary bill credits previously paid. Once the final rates were established, the only action that remained to be taken was for Qwest to calculate and pay the refunds that had already been ordered some six to seven years earlier. *That has never been done.*

That enforcement of orders is the substance of the Oregon Refund pled in the Fourth Count of the Second Amended Complaint. The PUC has a duty to enforce its own orders, Nos. 00-190, 00-191 and 01-810 as corrected by 07-497 under UT-125. Failure of the PUC to do so, any longer, allows Qwest to ignore the already final Orders of the PUC and the basis of all of its regulatory proceedings in UT-125, its numerous Orders, and at least two appeals, several stipulations and exhaustive proceedings all designed to make the Complainants whole from the overcharging of Qwest. Further, it would be in violation of the Oregon Court of Appeals Remand and the

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Federal Telecommunications Act of 1996. Regardless of how or why the enforcement has been delayed, confusion or error on the part of prior counsel or the PUC, the time has come for the refunds to be paid.

The other claims asserted in the Second Amended Complaint rest on a different legal basis from the Oregon Refund Claims pled in Count Four of the Second Amended Complaint. The other claims asserted in the Second Amended Complaint are either (1) claims under the Act based on federal law, or (2) arise out of state law claims under Oregon common law and various statutes under Chapter 759 of the Oregon Revised Statutes, which could not be brought until final rates were established in Order 07-497 on November 15, 2007.

The original PUC complaint focused on the liability under the Act and the refund ordered by the Waiver Order issued by the FCC on April 15, 1997, which was prior to the rates being established under the Act, but not to the exclusion of Oregon law or the outstanding Orders of the PUC. As the ALJ noted, the original claim involved determining the rights of the Complainants to the benefits of the FCC Waiver Order and whether under a series of orders issued by the FCC to develop regulations to implement Section 276 of the Act (collectively referred to as the Payphone Orders), PSPs such as Complainants, were entitled to a refund under the FCC's Payphone Orders. This did not alter the application of Oregon law and the PUC regulatory processes except to impose the duty to have rates compliant with the Federal Law.

Requests for interpretation of these orders and particularly the Waiver Order had been referred to the FCC by a number of courts and state commissions. The ALJ ruled that the case should be held in abeyance pending resolution of the various petitions before the FCC seeking interpretation of the Payphone Orders, so that could be learned for application by the Oregon PUC to the claims before it. Since that has not occurred and is unlikely any time soon, the Complainants have taken the initiative by filing those claims and a declaratory judgment action in US District Court for an Order interpreting the Federal law. However, there is no longer a Federal question to be resolved in that portion denominated the Oregon Refund claim. Refund liability and the refund mechanism have been established under Oregon law and the PUC in its proceedings in UT 125.

The PUC affirmed the ALJ's decision to hold the case in abeyance in Order No. 05-208. Although the case was reactivated in 2009, none of the Federal issues that led the ALJ and the PUC to hold the case in abeyance have changed. In fact, the frustration with the FCC's failure to act led to premature reactivation of the case for application of Federal law. To date, the FCC has still not acted on the various petitions before it requesting interpretation of the Payphone Orders. However, the independent claim of the Oregon Refund is not so hampered.

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Shortly prior to the filing of the Second Amended Complaint in this action, on November 13, 2009, Complainants filed an action in the U.S. District Court for the District of Oregon (the Federal Action) seeking declaratory relief as well as asserting claims under the Act and claims cognizable under Oregon law, including those that may or may not be within the jurisdiction of the PUC as discussed below. A copy of the now amended complaint filed in the Federal Action is attached as Patrick Exhibit 4. The declaratory relief sought thereby includes the same issues that have been referred to the FCC but not addressed by that agency for the past five or more years and which are outside of the PUC. A motion will be filed shortly to request that the court defer consideration of the Oregon Refund and the Oregon Common Law claims until the need for that court's intervention is mandated by action at the state. That Motion will make clear, that this motion is pending seeking enforcement of Orders by this forum to the exclusion of any relief requested therein. The Complainants are not seeking a double recovery nor consideration by two tribunes of the same issue. The point of the motion to bifurcate is to preclude that but the time constraints required that the cases be brought timely in the Federal court after languishing in the State process.

RECENT DEVELOPMENTS IN OREGON LAW

Over the years, there has been significant confusion and some inconsistent decisions from the PUC concerning the scope of its jurisdictional authority. In Order No. 08-487 issued in the case of *In the Matter of the Application of Portland General Electric Company for an Investigation the Least Cost Plan Retirement*, et al, PUC Docket No. DR 10, UE 88 & UM 989 dated September 30, 2008, the PUC discussed in depth the scope of its authority in various areas. These issues had also been the subject of legal opinions discussed in that Order. The PUC clarified a number of matters, including prior inconsistent orders and rulings of the PUC. That Order is presently on appeal.

In light of the uncertainty surrounding the scope of the PUC's authority to address or provide a remedy for some of the claims included in the Second Amended Complaint, other than the Oregon Refund claims, Complainants believe it appropriate to seek declaratory rulings with respect to various state law claims contained in the Second Amended Complaint filed in the present Refund case. The Oregon Refund Claims are based on law that is not in dispute and PUC Orders that are still open but not yet enforced, which is the reason for this motion. Consequently, contemporaneously with the filing of this motion, Complainants will be filing an Amended Complaint in the Marion County Circuit Court seeking declaratory relief as well as asserting claims under Oregon

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state law and a motion to abate that case in whole or in part until action at the PUC and the US District court mandates further action in that tribune. A copy of that Amended Complaint and motion will be provided when filed.

The goal of the Complainants in making these filings is straightforward. Complainants pray for the court in the Federal Action to interpret the Act and the Payphone Orders so that either the PUC can make a ruling on the refund due under the Waiver Order, or the court in the Federal Action will make the determination and either direct or take action under its authority. Complainants' pleadings in the Marion County Circuit Court are for that court to determine whether the state law claims can be heard in the PUC or must be heard in the Marion County Circuit Court. Those claims that can be heard in the PUC should then be allowed to proceed in the PUC. With respect to all other claims found to be outside the jurisdiction of the PUC, Complainants would move as indicated above, the Marion County Circuit Court to allow such claims to proceed in the Federal Action so as many claims as possible can be tried in a single tribunal. Since the court in the Federal Action is the only court that has jurisdiction of the claims under the Act, and virtually all of the state law claims arise from tariffs that had to comply with federal laws governing payphone tariffs and payphone services, that is the only tribunal that has the ability to hear all claims not within the exclusive purview of the PUC.

THE PUC MUST ENFORCE ITS ORDERS FOR QWEST TO PAY THE REFUNDS

Order Nos. 00-190 and 00-191 dated April 14, 2000 ordered Qwest to pay the refunds set forth therein. These Orders were based upon a stipulation of settlement (and as modified by the Orders) entered into between Qwest and the Staff settling a dispute between Qwest and the PUC as to the amount of the refund to be paid, the calculation of the refund to be paid, the revenue requirement reduction and the method and timing of implementing the revenue requirement reduction. Both the Staff and Qwest also agreed, and so argued to the PUC in urging issuance of Order Nos. 00-190 and 00-191, that no individual ratepayer could claim that they had overpaid until the rate design phase of the rate case had concluded. Order No. 00-190 at pp. 9 and 12. Patrick Exhibit 7 at pp. 9 and 12. Since the refund due any ratepayer would be equal to the difference between the final tariff determined in the Design Phase of the Rate Case and any higher interim tariff, that position was correct until the final rates were effective.

When Order No. 01-810 was issued, it concluded the design phase of the case and all the rates therein established were final *except for the payphone rates*, the subject of the NPCC appeal. The Settlement Stipulation executed by Qwest anticipated the possibility of an appeal and a reversal of Order Nos. 00-190 and 00-191 or a

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subsequent order implementing Orders such as Order No. 01-810, that could result in one or more categories of ratepayers being owed a higher refund and a higher bill credit than was reflected in Order No. 01-810. Qwest, as part of the Settlement Stipulation, agreed that in such event, it would suffer the revenue loss occasioned by the payment of the higher refund and bill credit but would only be able to offset such higher refunds and bill credits by the amounts of refunds and bill credits previously paid.

Based on the Settlement Stipulation as adopted by Order Nos. 00-190, 00-191 and the final determination of rates (except for those rates subject to appeal) in Order 01-810, Qwest paid the refunds ordered by the PUC and implemented temporary bill credits to create the revenue reduction required by the Settlement Stipulation and Order Nos. 00-190 and 00-191. The temporary bill credits were effectively an interim rate design subject to adjustment when the final rates were set in Order No. 01-810. Thus, all the relevant refunds and bill credits ordered by the PUC, albeit based on the incorrect payphone tariffs, were distributed to ratepayers prior to the decision of the Oregon Court of Appeals.

The effect of that decision and remand, was to require that additional refunds would have to be paid to PSPs with respect to PAL tariffs because the refunds and bill credits for PAL rates ordered by the PUC pursuant to Order Nos. 00-190, 00-191 and 01-810 were too low. The exact amount of those additional refunds would be determined once NST compliant PAL tariffs were established by the PUC in accordance with the Court of Appeals remand. Whether refunds were due with respect to CustomNet tariffs could not be determined until the PUC completed its investigation to determine NST compliant CustomNet tariffs.

When the PUC determined the final NST compliant PAL and CustomNet tariffs in Order No. 07-497, the correct refunds to PSPs for PAL and CustomNet tariffs could then be calculated. The payment of these refunds had already been ordered by the PUC in 2000 in Order Nos. 00-190 and 00-191 and temporary bill credits required going forward to avoid or minimize any additional refund obligations arising thereafter until permanent rates were set. Since Qwest had sought the settlement reflected in those orders and stipulated to the payment of the refunds and the method of calculating same, it is judicially estopped from contesting its obligation to pay these already ordered refunds (see discussion below on judicial estoppel).

Qwest effectively admitted Complainants' position herein and its obligation to pay the higher refunds to PSPs, when it sought to re-balance rates to recover the additional amounts due to the Complainant PSPs. The history of Qwest's effort in UT 125 is recounted by the Order denying its request to rebalance the rates.

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1 "Procedural History

"On April 14, 2000, the Public Utility Commission of Oregon (Commission)
2 *entered Order No. 00-190, adopting a Stipulation between U S WEST Communications,*
Inc. (now Qwest Corporation) (Qwest or the Company), and the Public Utility Commission
3 *Staff (Staff) in the revenue requirement phase (Phase I) of this docket.* Among other
things, the Stipulation obligated Qwest to implement customer refunds of approximately
$240 million and a going-forward rate reduction of approximately $63 million annually.
4

"On September 14, 2001, the Commission entered Order No. 01-810,
5 *establishing a rate design for the stipulated revenue requirement approved in Order*
No. 00-190.2 As part of Order No. 01-810, the Commission approved revised rates for public
6 access lines (PAL) and CustomNet service, adopting rate recommendations
proposed by Qwest and agreed to by Staff. The Northwest Payphone Association
7 (now, the Northwest Public Communications Council or "NPCC") opposed the PAL
and CustomNet rates adopted by the Commission, arguing that the rates were not
8 developed in compliance with Section 276 of the Telecommunications Act of 1996.

9 "On November 13, 2001, NPCC filed an application for reconsideration
of Order No. 01-810. On January 8, 2002, the Commission entered Order No. 02-009
10 denying NPCC's application for reconsideration.

11 "NPCC appealed Order Nos. 01-810 and 02-009 (hereafter also, "the rate
design orders") to Marion County Circuit Court. On October 1, 2002, the Court entered a
judgment affirming the Commission's orders. NPCC thereafter filed an appeal with the
12 Oregon Court of Appeals.

13 *"On November 10, 2004, the Court of Appeals entered a decision reversing*
and remanding Order Nos. 01-810 and 02-009. The Court determined that the rate design
14 orders were unlawful in that: (1) the Commission's rates for PAL did not comply with
certain federal requirements, and (2) the Commission did not adequately consider
15 whether Qwest's proposed rates for CustomNet were subject to the same federal
requirements.4

16 "On March 13, 2006, the presiding Administrative Law Judge (ALJ)
17 convened a telephone conference to establish procedures necessary to comply with the
Court's remand. During the conference, *Qwest indicated that it would file proposed PAL*
and Fraud Protection (formerly CustomNet) rates (jointly "payphone service rates") to
18 *comply with the Court's decision*. *Qwest also indicated that it would seek to adjust other*
Qwest rates because of the recalculation of payphone service rates.
19

"On March 31, 2006, Qwest filed its *proposed PAL and Fraud Protection*
20 *rates.* It alleges that the lower payphone service rates reduce Qwest's revenues by
approximately $1 million per year. To offset the reduction, Qwest proposes to increase
21 the rate for residential Caller ID service by $0.60 per month. (Footnote omitted)

22 "On April 25, 2006, Qwest filed a letter on behalf of the parties requesting
that the Commission decide, as a threshold matter, *whether Qwest may raise any*
customer rates to offset reduced revenues resulting from a Commission decision
23 *approving lower payphone service rates.* On May 1, 2006, the ALJ issued a Ruling
adopting the parties' procedural proposal." (Emphasis added) Order No. 06-515 at pp. 1-3.
24 Patrick Exhibit 9 at pp 1-3.

25 This effort was denied by the PUC in what this writer can singularly characterize as the most categorical

26 and unequivocal endorsement of a client's position by a tribune he has ever experienced. Quoting the Order further

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would have to be so extensive as to offend. The Order must be read in its entirety to do it and this pending motion the justice they deserve as to its breadth and depth of authority. The Complainants' position herein with respect to the effect of all the prior PUC orders is summarized in the thirteen (13) pages of the Order. Further the Order itself summarizes the quintessential nature of the effect of the PUC Order Nos. 00-190; 00-191; 01-810; 02-009:

> "6. Summary. The Commission concludes that the Stipulation in this docket does not permit Qwest's rate rebalancing proposal. Under the terms of that agreement, Qwest specifically agreed to accept the risk that subsequent appeals of the Commission's order implementing the Stipulation might result in a situation where Qwest was required to make refunds or rate reductions in addition to those set forth in the Stipulation. The language of the agreement demonstrates that the Company was fully cognizant of the potential consequences of its decision when it executed the Stipulation. *Qwest cannot now be heard to complain that it is somehow prejudiced by having to reduce rates in response to a judicial determination without a corresponding offset, especially when that scenario is specifically provided for in the agreement. The simple fact is that Qwest took a calculated risk that did not turn out as expected. Relieving Qwest of the consequences of its agreement by raising other customer rates would contravene the terms of the Stipulation.* (Emphasis added) Order No. 06-515 at p. 11. Patrick Exhibit 9 at p. 11.

> "Qwest's assertion that the Court's remand obligates the Commission to revisit all of the Company's rates necessarily presumes that the non-payphone service rates approved in Order No. 01-810 are not final and may therefore be revised. We disagree. *ORS 756.565 provides that all rates and orders issued by the Commission "shall be in force and shall be prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose under ORS 756.610*." (Emphasis added) Order No. 06-515 at p. 12. Patrick Exhibit 9 at p. 12.

The PUC recites as authority Qwest's Settlement Stipulation established by Order No. 00-190, that it would absorb any appeal determination that required it to pay higher refunds than those ordered by the PUC. The PUC by its action in Order 06-515 has stated the authority and its obligation under its own orders, consistent with the position of Complainants in this motion. Given the foregoing undisputed facts, and the fact that the higher refunds have not been paid; the PUC is obligated to enforce its orders against Qwest; to force it to comply with the prior orders discussed above and to calculate and pay to Complainants the amounts due them. The PUC and Qwest have to develop a mechanism to identify and pay the additional refunds due to the Complainants and the "unidentified" PSPs who overpaid rates based on non-NST compliant PAL and CustomNet tariffs during the same time period.

QWEST IS JUDICIALLY ESTOPPED FROM DENYING THE REFUND OBLIGATION

Qwest has benefited from its prior positions in UT-125. It owes refunds to PSPs based on the positions it advanced and to which it stipulated. Qwest is judicially estopped now from disputing its obligation to pay such refunds based on the correct final rates to the Complainants, to wit, by calculating the difference between final rates

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and higher interim rates. In the Settlement Stipulation adopted by the PUC in Orders Nos. 00-190 and 00-191, Qwest requested that the PUC accept the terms of the settlement it had negotiated with the Staff. This settlement provided substantial benefits to Qwest, including a reduction of close to $50 million in reduced refunds for the period May 1, 1996 to April 30, 1997 and a $63 million revenue requirement reduction rather than the $102 million revenue requirement reduction originally ordered by the PUC in Order No. 97-171, over $110 million in benefit to Qwest.

As part of the Settlement Stipulation that was adopted in Order Nos. 00-190 and 00-191, Qwest agreed to pay refunds totaling $272 million, agreed that refunds would be calculated based on the difference between final lower tariffs and higher interim tariffs and agreed that if, on appeal, higher refunds or bill credits were ordered for any category of ratepayer, those higher refunds would be paid subject only to Qwest's right to a de minimus credit for refunds and bill credits previously paid. Having taken these positions and benefited from them, Qwest is now judicially estopped from taking any inconsistent position that it is not obligated to pay the higher refunds effectively ordered by the Oregon Court of Appeals and PUC orders 00-190, 00-191 and 07-497.

Judicial estoppel is a common law doctrine designed to protect the courts from litigants playing fast and loose with the court by changing their positions and causing the court to contradict its own earlier rulings. *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 609-610, 892 P.2d 683 (1995) citing *Fleck v. KDI Sylvan Pools, Inc*., 981 F.2d 107, 12122 (3d Cir.1992). In order to establish judicial estoppel in Oregon, the following three elements must be present: (i) benefit in the earlier proceeding, (ii) different judicial proceedings, and (iii) inconsistent positions. *Glover v. Bank of New York*, 208 Or.App. 545, 147 P.3d 336 (Or.App. 2006) citing *Hampton Tree, supra*. The court in *Glover, supra*, specifically rejected the argument that the tribunal in the prior proceeding had to rely on the position taken by the person to be estopped. In the instant case, this standard (reliance) would also be met if it were applicable.

Applying these standards to the instant case, it is clear that Qwest is judicially estopped from contesting its obligation to pay the proper refunds to Complainants. It clearly benefited to the tune of over $100 million from the Settlement Stipulation and the Orders adopting it and subsequent thereto but clearly determined to be controlled by its authority. The Settlement Stipulation and the Orders adopting it occurred in docket UT 125, a different proceeding from the one at bar. In the Settlement Stipulation, Qwest not only agreed to pay the refunds but also

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agreed to pay any higher refund required by any appeal court decision. See discussion in Order No. 06-515 at p. 9. Patrick Exhibit 9 at p. 9.

It is wholly inconsistent with that earlier position for Qwest to now take the position that it is not obligated to pay the very higher refunds ordered by the Court of Appeals that it had previously agreed to pay in docket UT 125. On the authority of *Hampton Tree, supra,* and *Glover, supra*, Qwest is judicially estopped from arguing that it is not obligated to pay the refunds claimed by Claimants and ordered by the PUC in Orders 00-190, 00-191, 01-810 as modified by the remand decision of the Oregon Court of Appeals and Order No. 07-497.

THE PUC HAS THE AUTHORITY TO BIFURCATE AND HOLD IN ABEYANCE THE CLAIMS OTHER THAN THE OREGON REFUND CLAIMS AS REQUESTED BY COMPLAINANTS

Administrative Rule 860-011-000(3) states that the general rules of practice and procedure before the PUC are governed, in all cases, by the Oregon Rules of Civil Procedure except as modified by the Administrative Rules, by order of the Commission or a ruling by an ALJ. Rule 53B of the Oregon Rules of Civil Procedure (ORCP) provides as follows:

> "B Separate trials. The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order a separate trial of any claim, cross-claim, counterclaim, or of any separate issue or of any number of claims, cross-claims, counterclaims, or issues, always preserving inviolate the right of trial by jury as declared by the Oregon Constitution or as given by statute."

Under ORCP 53B, the PUC clearly has the authority to bifurcate the case and address the Oregon Refund Claims alleged in Count Four of the Second Amended Complaint while holding for a separate trial all the other claims that require clarification in terms of interpretations of applicable law and/or the authority of the PUC to address either the claim or provide the requested remedy. *See e.g. Berg v. Berg*, 211 Ore. App. 703, 156 P.3d 171 (Ore. App. 2007), *Black, et al v. Arizala, et al*, 182 Ore. App. 16, 48 P.3d 843 (Ore. App. 2002) and *McDowell Welding & Pipefitting, Inc. v. United States Gypsum Co.*, 209 Ore. App. 441, 149 P.3d 173 (Ore. App. 2006) all stating the trial court has, within its discretion, the authority to bifurcate issues and try them separately.

The PUC has already exercised its authority to hold matters in abeyance pending action by other courts or agencies that are better situated to address areas of the law within their special competence. For all the same reasons the ALJ and the PUC previously held the case in abeyance, the PUC should hold in abeyance all the claims asserted in the Second Amended Complaint other than the Oregon Refund Claims.

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By taking this approach, the PUC can devote its resources to addressing the one claim of which it unquestionably has authority, enforcing its own orders. This approach avoids spending both PUC resources and those of the litigants on issues which the PUC may well lack the authority to address or of which any decision made by the PUC would just be the beginning of a further line of appeals and more litigation. This was the very concern that led the ALJ and the PUC to hold the case in abeyance in the first place. That rationale remains equally cogent today and should be followed.

SUMMARY AND CONCLUSION

Opposing counsel has intimated that the filing of the Second Amended Complaint was somehow a defiant act of the authority of this Commission and its earlier order regarding the amendment to the Complaint. Counsel herein has not filed any thing in this case that he not only researched first but considered in the context of the Federal Payphone Orders, the Oregon Law and the rules of procedure before the Commission and the voluminous proceedings in UT 125 et al. The undertaking has been substantial given that this counsel did not have the benefit of the involvement of opposing counsel who appears to have had his hand in the proceedings of UT 125 and the related proceedings for their entire extent. Qwest has certainly been well represented in the process and every nit that could be picked has been thoroughly picked. However, there comes a time when the gavel of justice must render its decision. That gavel was sounded years ago in serial fashion as the above record reflects.

Qwest has had its day before this Commission and the courts through appeals. It has labored to make sure that it paid not one farthing more than the law or this Commission could order. The delays achieved by this effort have in truth driven the majority of the payphones out of existence by starving the owner operators from revenues and profits through overcharges and by delaying the payment of refunds, while taking the millions in dial around commissions based on representations and commitments ultimately to the FCC.

The avoidance of paying the refunds of overcharges which, given their size, can only be characterized as a "calculated" miscalculation on the part of a business and company which is one of the most experienced at accounting for its costs and passing them on to the public. This Commission should be shocked at the enormity of the wrong and the damage done to the miniscule businesses that operate payphones. Such businesses can only be compensated by the calculation of the refunds and interest thereon due since the termination of its AFOR thirteen and one half years ago due to Qwest's service failures. Once this record has been reviewed and is understood, this Commission will realize the extent of the wrongful conduct and the false justifications by Qwest. If sanctions and

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exemplary damages are ever warranted, it is in this case against this monolith, which seems still to be "hell bent" to disobey both the Federal Government as well as the Orders of this Commission.

For the reasons set forth above, Complainants hereby move the Commission to enforce its prior orders for Qwest to pay the refunds already ordered by the PUC to Complainants; to bifurcate the remaining Oregon Refund Claims alleged in Count Four of the Amended Complaint from the rest of the claims in the Second Amended Complaint; and to Order the Oregon Refund Claims down for immediate calculation and payment consistent with its prior orders and holding in abeyance all other claims asserted in the Second Amended Complaint. There is no reason the Motion should not be granted in all respects.

Dated: January 27th, 2010

/S/

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Attorney for Complainants

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1 CERTIFICATE OF SERVICE

I, the undersigned below, hereby certify that I served the foregoing MEMORANDUM IN SUPPORT OF CONSOLIDATED MOTIONS TO ENFORCE ORDERS AND TO BIFURCATE AND PARTIALLY ABATE PROCEEDINGS on:

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1120 N.W. Couch Street, 10th Floor
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reicl@perkinscoie.com

Jason W. Jones
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Salem, Oregon 97301
Jason.w.jones@state.or.us

Alex M. Duarte
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Portland, Oregon 97204
alex.duarte@qwest.com

by the following indicated method or methods:

____X_____by **mailing & emailing** (if indicated above) a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon, and by electronic mail on the date set forth below;

_________by sending full, true and correct copies thereof via **overnight courier** in sealed, prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, on the date set forth below;

_________by handing/delivering true and correct copies thereof to the attorney or one of the clerks at the above address, on the date set forth below;

And Certify that I did electronically file same with the PUC Filing Center, with a hard copy to PUC, Filing Center, 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR 97308-2148.

DATED this __27th_ day of January, 2010

/S/______________________________
Frank G. Patrick, OSB 76022

2 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25 26

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3
4 BEFORE THE PUBLIC UTILITY COMMISSION
5 OF OREGON
6

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc Complainants, v. QWEST CORPORATION, Defendant.	DOCKET NO. DR 26/UC 600 DECLARATION OF COUNSEL IN SUPPORT OF CONSOLIDATED MOTIONS TO ENFORCE ORDERS AND TO BIFURCATE AND PARTIALLY ABATE PROCEEDINGS

16 I Frank G. Patrick, do declare and say:

17 1. I am counsel for the Complainants in the pending matter.

18 2. Below is a listing of the Exhibits Attached hereto and referenced in the Consolidated Motions and
19 supporting Memorandum which are being filed and served herewith. Each Exhibit is identified and is to the best of
20 my information and belief a copy of the original on file as indicated:

Exhibit List

Exhibit #	Description	No. of Pages
Exhibit 1	PUC Order No. 91-1598; (Less attachments except stipulation	6
Exhibit 2	Marion County Circuit Court Order Granting NPCC's Motion to Present Additional Evidence	2
Exhibit 3	PUC Staff's Reply to Qwest's Cross-Motion for Summary Judgment in DR26/UC 600	5
Exhibit 4	NPCC's US District Court First Amended Complaint for Declaratory Relief and Damages	58
Exhibit 5	PUC Order No. 96-107; (Less attachments)	6
Exhibit 6	PUC Order No. 96-183	6
Exhibit 7	PUC Order No. 00-190; (Less attachments)	8

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Exhibit 8	PUC Order No. 01-810	6
Exhibit 9	PUC Order No. 06-515	8
Exhibit 10	UT 125 Final Stipulation Oct. 15, 2007	6
Exhibit 11	PUC Order No. 07-497 Nov. 15, 2007	4

3. I have reviewed the Exhibits and the Orders of the PUC since the AFOR termination in 1996 and prior, and represent that to the best of my knowledge and belief that they have been accurately recited in the Motion and the Memorandum once the meticulous reading of each is tracked from May 1, 1996 through November 15, 2007, and on information and belief have arrived at the conclusion that such Orders are factually currently capable of enforcement by the Complainants herein.

4. The quoted sections have been to the best of my ability highlighted as quoted in the originals both electronically and in the printed copies.

"I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in a PUC (court) proceeding and is subject to penalty for perjury."

Dated: January 27th, 2010

/S/

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1
CERTIFICATE OF SERVICE

I, the undersigned below, hereby certify that I served the foregoing DECLARATION OF FRANK G. PATRICK AND EXHIBITS on:

2

3 Lawrence Reichman
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by the following indicated method or methods:

12

13 ____X_____by **mailing & emailing** (if indicated above) a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Portland, Oregon, and by electronic mail on the date set forth below;

14

15 _________by sending full, true and correct copies thereof via **overnight courier** in sealed, prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, on the date set forth below;

16

17 _________by handing/delivering true and correct copies thereof to the attorney or one of the clerks at the above address, on the date set forth below;

18

And Certify that I did electronically file same with the PUC Filing Center, with a hard copy to PUC, Filing Center, 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR 97308-2148.

19

20 DATED this __27th_ day of January, 2010

21

/S/______________________________
22 Frank G. Patrick, OSB 76022

23

24

25

26

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Exhibit 7	PUC Order No. 00-190; less attachments	24
Exhibit 8	PUC Order No. 01-810	65
Exhibit 9	PUC Order No. 06-515	13
Exhibit 10	UT 125 Final Stipulation Oct. 15, 2007	12
Exhibit 11	PUC Order No. 07-497	4

ORDER NO. 91-1598

ENTERED NOV 25 1991

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 80

In the Matter of the Petition of U S WEST COMMUNICATIONS, INC., to Price-List Telecommunications Services Other than Essential Local Exchange Services.	))))	ORDER

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SUMMARY

In this order the Commission approves an alternative plan of regulation for U S WEST Communications, Inc. (USWC), pursuant to ORS 759.195. The new regulatory framework will provide USWC with the pricing flexibility necessary to respond to dramatic changes in the telecommunications industry which have resulted from the breakup of the Bell Telephone System, the emergence of competition, and rapid technological advancement. The Commission is persuaded that the incentive-based regulatory approach adopted in this order should motivate USWC to improve efficiency, modernize its infrastructure, and provide services which meet the challenges of the changing telecommunications environment. These benefits will be achieved without sacrificing regulatory oversight or the quality of service that Oregonians have come to rely on. Indeed, the new regulatory framework will benefit customers by providing rate stability for essential services, the potential for revenue sharing, improved service quality, and continued access to state-of-the-art telecommunications services.

The regulatory framework approved by the Commission in this order incorporates the principal elements of a stipulation submitted in this proceeding on June 24, 1991. The order does not, however, adopt the stipulation in its entirety. The Commission finds that a number of changes and additions are required in order for the new regulatory plan to meet statutory requirements.

The main features of the alternative plan of regulation approved in this order are:

--A five-year rate freeze for all essential services except switched access service.

--Price-listing of all non-essential services subject to a maximum price cap.

--Revenue sharing on a 50/50 basis between customers and USWC for all revenues above a predetermined target level.

USWC is not required to accept the modifications to the stipulation set forth in this order. If USWC elects not to implement the alternative regulatory framework the Commission has approved, no change will be made in the manner in which USWC is regulated. However, in accordance with Order No. 91-576 issued in docket UT 102, permanent and temporary rate reductions totalling $43.8 million shall take effect within 15 days from the date of this order.

If USWC decides to accept the modifications to the stipulation proposed by the Commission and no other substantive objections are raised, the new regulatory framework will become effective January 1, 1992. In that event, USWC will reduce rates by $43.8 million as required in Order No. 91-576. In addition, USWC will withdraw its pending appeal of the Commission-authorized rate decrease in docket UT 85, and reduce rates by an additional $24.06 million as required by Order No. 89-1807. USWC will also refund to customers the accumulated amount of the docket UT 85 decrease, currently estimated at approximately $56 million.[1]

INTRODUCTION

Background

Historically, Oregon and most other regulatory jurisdictions have relied on cost-of-service regulation as the basis for setting utility rates. This approach, also known as rate base/rate of return regulation, is designed to protect utility customers from abuses arising from the exercise of monopoly power by permitting utility stockholders to earn a reasonable return on investment in exchange for a commitment to provide adequate service at just and reasonable rates. The process contemplates that utility investments and expenses will be scrutinized on a continuing basis and that proceedings will be convened periodically to determine if rate levels should be adjusted. The primary objective of this form of regulation is to simulate the operation of a competitive market by enabling a utility to earn revenues that match the costs of an efficiently run firm.

The past decade has witnessed fundamental changes in the structure of the telecommunications industry in the United States. Developments such as the dismantling of the Bell Telephone system, the rapid pace of technological change, and the emergence of competition have caused many observers to question the continued effectiveness of traditional regulatory methods. Proponents of alternative ratemaking approaches contend that traditional rate of return regulation is not well-suited to an industry characterized by both monopoly and competitive elements, and that fundamental changes are necessary to enable local exchange carriers (LECs) to respond to emerging competition in the provision of telecommunications services.

A frequent criticism of rate of return regulation is that it does not create adequate incentives for utilities to provide services in an efficient and productive manner. Because utilities are not permitted to keep earnings above an authorized rate of return,

[1]The rate decrease in Order No. 89-1807 was scheduled to take effect January 1, 1990, but was stayed by court order pending the outcome of USWC's appeal. The $56 million refund is estimated as of December 1, 1991, and includes interest at USWC's authorized rate of return.

management is perceived to have little incentive to operate efficiently or to implement effective cost containment measures. Moreover, any cost reductions which result from increased productivity or better management are captured in the ratesetting process and returned to ratepayers. Because the only opportunity for shareholders to profit from such improvements is during the interim between rate cases (*i.e.*, regulatory lag), economic incentives to improve efficiency are suppressed.

Advocates of regulatory reform also argue that the traditional ratemaking formula creates perverse incentives because utility profits are linked to the level of investment, or ratebase. Thus, when the authorized rate of return is equal to or greater than the market return, there is an incentive to make unnecessary investments in order to maximize profit. The opposite is also true; utility managers are discouraged from making necessary investments when market returns exceed the authorized rate of return.

Another alleged shortcoming of traditional regulation relates to the task of determining the reasonableness of utility expenditures. While scrutiny of utility operations clearly produces benefits for ratepayers, such hindsight reviews are extremely resource intensive and require considerable second-guessing on the part of regulators. These problems are compounded in an environment where competitive alternatives exist. As noted in a recent decision by the California Public Utilities Commission:

> Managers may be unwilling to make innovative decisions and take reasonable business risks for fear that the Commission might later second-guess such actions and penalize the utility. Further, the inevitable delay involved in receiving regulatory relief may stifle innovation. It has also become harder to make reasonable forecasts of expenses and revenues based on historical levels, particularly for competitive services. Under traditional ratemaking, we have also found ourselves making difficult decisions regarding the reasonableness of a utility's competitive strategies (e.g., marketing expenses).[2]

In response to these concerns, several jurisdictions have reexamined the need to implement alternatives to traditional rate base/rate of return regulation. Major regulatory changes have been adopted by the Federal Communications Commission and a number of state utility commissions. While the specifics of these plans differ, most incorporate the elements similar to those included in the proposal pending before the Commission.

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[2] *In the Matter of Alternative Regulatory Frameworks for Local Exchange Carriers, et. al.*, Decision 89-10-031 at 166. (October 12, 1989).

Oregon Legislation

Oregon has also recognized that changes in the telecommunications industry may require a regulatory approach different from traditional rate base/rate of return methods. In 1985, the Oregon Legislature enacted House Bill 2200 in order to encourage a "balanced program of regulation and competition" in telecommunications. That legislation, now codified as ORS 759.030, authorizes the Commission to deregulate or "price-list" competitive telecommunications services under certain conditions.

In 1987, the Legislature provided the Commission with additional regulatory flexibility by enacting House Bill 2686. That legislation, now codified primarily in ORS 759.195, authorizes the Commission to adopt an alternative form of regulation for telecommunications utilities providing local exchange service. Under the statute, the Commission is required to designate essential local exchange services, the rates for which may be set by means of an automatic adjustment clause which reflects the "particular costs incurred by the utility." ORS 759.195 also permits price-listing of toll and non-essential telecommunications services where the Commission finds that such action:

(a) Is reasonably necessary to enable the utility to respond to current and future competitive conditions for any or all telecommunications services;

(b) Will maintain the appropriate balance between the need for price flexibility and the protection of consumers;

(c) Is likely to benefit the consumers of fixed rated services; and

(d) Is unlikely to cause any undue harm to any customer class.

ORS 759.195 also empowers the Commission to prescribe conditions on an order authorizing a local exchange company to price-list services. Such conditions may include (a) maximum prices for price-listed services and intra-LATA toll services on noncompetitive routes; (b) sharing of utility revenues; and (c) subsidizing essential services with revenues from other regulated services. The rates established for a telecommunications service under the statute may not be less than the long run incremental cost (LRIC) of providing the service.

USWC's Petition

In 1988, the Commission convened a series of public meetings to consider alternative methods of regulating local exchange telecommunications companies. Telecommunications utilities, customer groups and other interested persons were invited

to discuss their views regarding various proposals made by local exchange carriers. Participants were encouraged to use non-adversarial procedures to develop new regulatory mechanisms compatible with the needs of Oregon customers and the changing telecommunications environment.

On July 1, 1988, Pacific Northwest Bell Telephone Company, dba U S WEST Communications,[3] filed a petition pursuant to ORS 759.195 to implement an alternative form of regulation. The petition was designated by the Commission as docket UT 80.

The alternative plan of regulation proposed in USWC's petition had three major elements. First, essential service rates would be frozen for one year and adjusted annually thereafter based on a cost indexing formula. Second, all non-essential services, including intra-LATA toll, would be price-listed. Under this part of the plan, USWC proposed to implement statewide average toll rates and cap access revenue requirements. Finally, USWC proposed to share revenues generated in excess of a specified revenue requirement on a 50/50 basis between shareholders and ratepayers.

Public hearings to consider USWC's proposal were held in Portland, Bend and Eugene, Oregon, in April and May, 1989. Evidentiary hearings were held in Salem, Oregon, in July and August, 1989. On August 9, 1989, USWC and the Commission staff (staff) entered into a stipulation in this proceeding. Although the parties were able to reach consensus on several matters, many issues were left unresolved. Post-hearing briefs were filed in November and December, 1989.

The parties to this proceeding are listed in Appendix "A" of this order.

Related Commission Proceedings

Docket UT 85. In the process of reviewing USWC's petition to implement an alternative form of regulation, the staff recommended that the Commission initiate a separate investigation to examine USWC's revenue requirement and rate structure. At a public meeting held December 6, 1988, the Commission approved the staff recommendation and commenced docket UT 85. Evidentiary hearings in docket UT 85 were held in June 1989.

---

[3]During the course of this proceeding, Pacific Northwest Bell Telephone Company merged with Mountain Bell Telephone Company and Northwestern Bell Telephone Company to become U S WEST Communications, Inc.

On December 29, 1989, the Commission issued Order No. 89-1807 in docket UT 85, reducing USWC's Oregon intrastate rates by $24.06 million on an annual basis. The rate reduction was scheduled to take effect on January 1, 1990.

On January 19, 1990, USWC filed an appeal of Order No. 89-1807 in Multnomah County Circuit Court.[4] By order dated April 24, 1990, the Court granted a stay of the rate reduction pending the outcome of USWC's appeal.

On June 27, 1990, the Commission issued Order No. 90-920, resolving the rate structure issues raised in docket UT 85. The rate structure determinations announced in that order have been suspended pending the outcome of USWC's appeal of Order No. 89-1807.

On March 8, 1991, the Circuit Court issued an Opinion and Order affirming Order No. 89-1807 in all respects. USWC filed an appeal of that decision with the Oregon Court of Appeals on March 29, 1991. Oral Argument on USWC's appeal is pending.

Docket UT 102. On May 1, 1991, the Commission issued Order No. 91-576, approving a staff recommendation to reduce USWC's rates by $35.693 million on a permanent basis and $8.149 million on a temporary basis. The rate reduction, which was unopposed, is part of the continuing review of USWC's rates in connection with the company's petition for an alternative form of regulation.

The $43.8 million rate reduction authorized in Order No. 91-576 shall go into effect no later than 15 days after the issuance of this order. The reduction shall take place regardless of whether USWC decides to implement an alternative form of regulation in accordance with the terms of this order. USWC has submitted tariffs in compliance with Order No. 91-576.[5]

THE STIPULATION

Because the issues in this proceeding deal largely with matters of regulatory policy, they are not well-suited to the formal adjudicatory procedures typically used in rate cases. For that reason, the Commission encouraged participants to resolve outstanding issues through informal dispute resolution procedures.

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[4]*Pacific Northwest Bell v. Eachus, et. al.*, Multnomah County Circuit Court No. A90-01-00435.

[5]Rate spread/rate design issues raised by Order No. 91-576 were decided by the Commission at a public meeting held August 6, 1991. USWC has filed tariffs in compliance with that decision.

After the issuance of Order No. 90-920 in docket UT 85, the Commission convened a conference in September 1990, to determine if the outstanding issues in this case could be resolved informally. Subsequent to that conference, USWC and staff entered into a series of discussions regarding issues that were not resolved by the August 9, 1989 stipulation. Settlement conferences involving all interested parties were thereafter held from January through April, 1991.

On May 28, 1991, a conference was held to ascertain the status of settlement discussions and to discuss the procedures necessary to conclude this proceeding. At the conference, a stipulation and supporting testimony was presented for consideration by the Commission. The agreement, which both supplemented and superseded portions of the August 9, 1989 stipulation, is designed to resolve all remaining issues. The signatories to the stipulation are USWC, MCI Telecommunications, Inc. (MCI), Telephone Ratepayers for Cost Based and Equitable Rates (TRACER), and the staff.

At the conference, the parties declined the opportunity to present evidence in opposition to the stipulation or to cross-examine witnesses supporting the stipulation. A hearing was scheduled to provide the Commission with an opportunity to ask clarifying questions regarding the proposal. The signatories to the stipulation were directed to prepare a single document incorporating all of the provisions in the stipulation. The integrated document, hereafter referred to as the stipulation, was filed with the Commission on June 24, 1991, and is attached to this order as Appendix "B".

On June 18, 1991, a hearing was held in Salem, Oregon. At the hearing, the parties were provided with a list of clarifying questions regarding the stipulation. Written responses to the clarifying questions were filed with the Commission on July 22, 1991. On August 2, 1991, another hearing was held to receive testimony and exhibits regarding the stipulation and to allow further inquiry by the Commission. Supplemental briefs regarding the stipulation were filed by the Citizens Utility Board (CUB) and USWC.

The principal features of the alternative form of regulation proposed in the stipulation (hereafter also referred to as "the Plan") are as follows:

--The duration of the Plan is five years.

--From an earnings standpoint, the Plan will remain in effect as long as USWC's return on equity (ROE) is not more than five percentage points above or below the 13.53 percent ROE authorized in docket UT 85.

--Rates for all essential services, except switched access service, are effectively frozen for the duration of the Plan.

--All revenues received in excess of a target revenue level will be shared by USWC and its customers on a 50/50 basis.

--All non-essential services provided by USWC, including intra-LATA message toll service, will be price-listed,.

--All non-essential services are classified into seven product groups and are subject to a maximum price cap.

--Statewide average pricing will continue for intra-LATA message toll service.

--USWC will comply with any Commission decision requiring the "unbundling" of tariff rates.

--Revenue neutral rate design filings may be made with the approval of the Commission. Any rate design filings made by USWC during the term of the Plan will be consistent with Commission pricing policy to move rates gradually toward cost.

--USWC will implement a more comprehensive service quality plan.

The stipulation also includes provisions relating to (a) pending litigation; (b) events which may result in premature modification or termination; (c) dispute resolution procedures, and (d) administrative and monitoring provisions to insure compliance with the Plan. The details of the Plan are addressed more fully below.

Paragraph Nos. 1, 2, 13 and 16--Pending Litigation

If the Commission adopts the Plan or approves another Plan acceptable to USWC, the company will dismiss its pending appeal of Order No. 89-1807 in docket UT 85. USWC also agrees to temporarily withdraw its challenge to the authority of the Commission to continue to use Yellow Pages directory advertising revenues for the benefit of ratepayers. Specifically, the stipulation provides:

a. USWC will dismiss its appeal of Order No. 89-1807 in UT 85. Any judicial decisions concerning the Commission's jurisdiction over Yellow Pages revenues or authority to impute those revenues rendered while the Plan is in effect will not affect the Plan. USWC also waives any claim it may have under any judicial decision concerning the Commission's jurisdiction over Yellow Pages revenues for five years after the end of the Plan, except as it may pertain to the methodology and amount of imputation.

b. USWC will no longer contest the rate decrease authorized in docket UT 85, and will refund, with interest, the difference in rates retroactive from January 1, 1990--the date the Order No. 89-1807 became effective.

c. USWC will not challenge, through legislation or litigation, the Commission's authority to impute Yellow Pages revenues for ratemaking purposes. This agreement is binding for the five-year term of the Plan and for five years after the end of the Plan. However, USWC is not prohibited from challenging the methodology and amount of imputation after the term of the Plan has expired. USWC may also continue to pursue its pending appeal of Order No. 89-1044 in docket UI 54.

In addition to the appeal filed by USWC, Order No. 89-1807 has also been appealed by the Utility Reform Project (URP) and CUB. Paragraph 13 of the stipulation provides that, if either URP or CUB should prevail, the rate levels and earnings test in the Plan shall be modified to comply with any judicial and agency decisions on remand.

The Commission has no objection to the proposed method of resolving the litigation relating to Order No. 89-1807 in docket UT 85. As a practical matter, it was necessary for the stipulating parties to resolve those issues before an alternative form of regulation could be implemented. The starting point rate levels for the Plan are based upon the revenue requirement established in docket UT 102. The docket UT 102 rate levels are based on the monitoring provisions in the stipulation which, in turn, incorporate the ratemaking adjustments authorized in docket UT 85.

USWC's customers will benefit from the agreement to dismiss the appeal of Order No. 89-1807. The agreement removes any uncertainty that the rate reduction authorized by the Commission may not be sustained on appeal. In addition, it means that the rate reduction--which has been stayed pending the outcome of USWC's appeal--will be implemented without further delay. USWC will also refund to customers the accumulated amount of the rate decrease, plus interest, an amount now approximating $56 million. On the other hand, if USWC were to continue its appeal, the rate decrease might be postponed for another 1-2 years until the appellate process is completed.

Customers should also derive benefits from that portion of the agreement relating to the Commission's jurisdiction over revenues from Yellow Pages directory advertising. Although the appeal of Order No. 89-1807 will be dismissed, the jurisdictional arguments raised in that order remain at issue in USWC's appeal of Order No. 89-1044 in docket UI 54. The Commission anticipates that the Court of Appeals will reaffirm the regulatory jurisdiction of this agency to continue using revenues from Yellow Pages advertising for the benefit of ratepayers. However, even if the Court decides otherwise, the stipulation protects customers by ensuring that USWC will not challenge

the Commission's jurisdiction over Yellow Page revenues for the duration of the Plan plus five years.

Paragraphs 4 and 5--Essential Services.

ORS 759.195 divides telecommunications services into two categories; essential and non-essential services. Under the statute, essential service rates may not be changed without prior approval from the Commission. The only exception to this requirement is if the Commission authorizes an automatic adjustment clause which reflects changes in "particular costs incurred by the utility." Non-essential services, on the other hand, may be price-listed under ORS 759.195. Price listing enables a utility to change prices without prior Commission approval.

In its original petition, USWC recommended that the Commission approve an automatic adjustment clause--known as the "Adjustment Formula"--to determine rates for essential services. Under the Adjustment Formula, essential service rates would be based on the lower of the annual percentage change in the Gross National Product-Price Index (GNP-PI) or the Telephone Input Price Index (TIPI), minus an offset for productivity.[6] Essential service rates would be determined by whichever of the following equations results in the lowest price:

New Price= Old Price x (1 + GNP-PI - Productivity Offset)

New Price= Old Price x (1 + TIPI - Productivity Offset)

The stipulation retains the Adjustment Formula but provides that the productivity offset shall equal the annual change in the TIPI and the GNP-PI. The net effect is to freeze essential service rates at existing levels over the five year life of the Plan.

The agreement to freeze essential service rates at existing levels eliminates the dispute among the parties concerning the reasonableness of the TIPI as a device to accurately measure the costs incurred by USWC to provide essential services. The method used to develop the TIPI relies on extremely detailed cost information, complex

[6]The Adjustment Formula included in USWC's original petition used the Portland Consumer Price Index as a measure of inflation. USWC subsequently agreed to use the GNP-PI, a general measure of the change in input prices. The TIPI, on the other hand, is an index developed by USWC to measure changes in prices for goods and services purchased by the company. In response to concerns raised by the staff, USWC substituted a simplified version of the TIPI. See Attachments "A" and "B" of the stipulation.

sampling techniques and statistical manipulations.[7] The TIPI was also criticized for other shortcomings. For example, MCI and TRACER argued that (a) the input data used to calculate the TIPI is under the direct control of USWC and therefore not accurately measurable or readily available; (b) the TIPI overstates capital costs; (c) the TIPI does not distinguish between costs to provide essential and non-essential services, and (d) there is no industry-specific point of reference against which to evaluate the reasonableness of the TIPI. The Commission shares many of these concerns regarding the operation of the TIPI. However, since the TIPI will not be used to determine essential service rates under the stipulation, it is no longer necessary to address the merits of these arguments.[8]

The stipulation also resolves the controversy relating to calculation of an appropriate productivity offset for USWC. Productivity estimates developed by the parties ranged from 2.1 to 7.0 percent and were a major point of contention in this proceeding. The proposed changes in the Adjustment Formula yield a productivity factor equal to the anticipated annual rate of inflation over the term of the Plan.[9] More importantly, freezing essential service rates at existing levels eliminates the risk posed by USWC's initial proposal that cost increases would exceed the productivity offset and result in annual rate hikes for essential service customers.

Switched Access Service. There is no change in the regulatory treatment of switched access under the Plan. Unlike other essential services, switched access charges are not frozen, but will continue to be determined in accordance with Parts 36, 64 and 69 of the Federal Communication Commission regulations, except as modified by Attachment "F" of the stipulation or other order of the Commission. Any changes in switched access charges authorized by the Commission during the term of the Plan will be implemented on a revenue-neutral basis.

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[7]Nearly seventy pages of the stipulation are devoted to describing how the "simplified" TIPI functions. See Attachments "A" through "D" of the stipulation.

[8]The only other use of the TIPI under the proposed Plan is for purposes of determining the maximum price cap for price-listed services. In that context, however, the "automatic adjustment clause" requirements specified in ORS 759.195(6), do not apply. Moreover, the use of the TIPI in the maximum price cap calculation can only benefit customers since the productivity factor is subtracted from the lesser of the annual change in the TIPI or GNP-PI.

[9]Staff projects that inflation will average 4.9 percent annually during the term of the Plan. If the estimate proves accurate, the implicit productivity offset incorporated in the stipulation will approximate the productivity offset recommended by staff.

Public and Semi-Public Telephone Service. Public and semi-public telephone service (coin telephone service) is also treated separately from the other essential services under the stipulation. Paragraph 2 provides that the $.25 charge for coin telephone calls will remain fixed for the duration of the Plan. This treatment was recommended by staff to ensure uniform rates statewide and to avoid customer confusion.[10]

Paragraph 6--Revenue Sharing.

The revenue sharing concept proposed in the stipulation differs from the approach taken by most of the other jurisdictions that have implemented incentive regulation plans to date. Instead of sharing utility profits, the stipulation provides for sharing based on the intrastate revenues generated by USWC. Specifically, the stipulation provides that USWC will share intrastate revenues received in excess of a predetermined level with customers on a 50/50 basis.

The mechanics of the revenue sharing proposal are as follows: A starting point, expressed in terms of revenue per access line, is computed using the 1990 test year revenue requirement and access line total authorized in docket UT 102. The starting point revenue per access line is then reduced by an annual revenue credit to reflect annual productivity, stipulated at four percent.[11] The resulting amount is then adjusted for inflation using the GNP-PI to produce a target revenue per access line.

The stipulation allows USWC to keep all booked revenues up to the target revenue per access line. If actual revenue per access line exceeds the target revenue per access line, the difference is shared with customers on a 50/50 basis. In each successive year of the Plan, a new target revenue per access line is computed and compared with the current year's actual revenue per access line to ascertain the amount of revenue to be shared.[12]

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[10]As a practical matter, coin telephone service is treated the same as other essential services since those rates are also frozen under the Plan. The only difference is that, with essential services, the Commission will have the flexibility to make revenue-neutral rate design adjustments during the term of the Plan.

[11]The stipulation specifies a 4 percent productivity offset for purposes of the revenue sharing formula and the maximum price cap for price-listed services. While this number is somewhat less than the 4.9 percent productivity assumption implicit in the rate freeze for essential services (See Footnote 9), it is well within the range of reasonable results given the evidence presented on this issue. *See, e.g.,* USWC Exhibit 5 at 9-13; USWC Exhibit 6 at 12-52; TRACER Exhibit 1 at 59-66; Staff Exhibit 7 at 10-25.

[12]Mathematically, the target revenue per access line is multiplied times USWC's average annual access lines to produce a target revenue level. That amount is then compared with actual USWC revenues. If the target revenues exceed actual revenues, no sharing occurs. Conversely, if target revenues are less than

Revenues will be continue to shared under the Plan as long as USWC's ROE remains within 5 percentage points of the 13.53 percent ROE authorized in docket UT 85. If USWC's earned ROE is less than 8.53 percent or exceeds 18.53 percent, the Commission or USWC can seek to terminate the Plan under Paragraph 10 of the stipulation.

In docket UT 102, USWC agreed to credit customers with $8.149 million in revenue sharing regardless of whether an alternative form of regulation is authorized by the Commission in this proceeding. If the Plan proposed by the Commission in this order is accepted by USWC, $8.149 million in revenue sharing will be credited to customer bills beginning in the first month of the Plan. On the other hand, if USWC rejects the Plan approved in this order, the $8.149 million reduction will be included in the $43.8 million rate reduction that will be implemented pursuant to Order No. 91-576. Appendix "C" of this order illustrates the derivation of the $8.149 million revenue sharing credit.

If USWC elects to implement the Plan authorized in this order, the procedures for calculating the revenue sharing credit will be governed by Attachment "G" of the stipulation. Ninety days before the start of the second year of the Plan, USWC will estimate the amount of revenue sharing for that year. Staff will review the filing and report to the Commission. The Commission will then determine the amount of revenue sharing that will take place.

Revenue sharing for the second year will begin in first month of that year and continue for 12 months. After the end of the second year, USWC will make a filing comparing the revenues shared with customers based on the forecast with the amount that should have been shared based on actual results of operations during the second year. If there is an over or under payment, a true-up adjustment will be made during the last half of the following year. This process is repeated in succeeding years of the Plan.

After the end of the fifth year, USWC will make a filing specifying the final sharing amount based on actual results of operations in the fifth year. That filing will also true-up any over or under payment that was made during the fifth year on an estimated basis. The final sharing amount, net of any true-up, will be credited to customers during the following year. Thus, the stipulation provides an opportunity for six years of revenue sharing.

The stipulation also provides that the Commission will determine the manner in which shared revenues shall be allocated among USWC's various customer classes. Paragraph 6(e) specifies that ratepayers and other interested persons shall be

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actual revenues, the difference is subject to sharing.

notified when revenue sharing is forecasted and shall have a reasonable opportunity to comment on the manner in which shared revenues are allocated.

Paragraph 7--Price-Listed Services.

All non-essential services provided by USWC are subject to price-listing under the Plan. Services eligible for price-listing are classified into seven Product Groups depicted in Attachment "H" of the stipulation.

Services Priced Below LRIC. Pursuant to ORS 759.195(4), a telecommunications service may not be price-listed if it is priced below LRIC. Non-essential services eligible for price-listing but currently priced below LRIC, will remain as tariffed services under the stipulation, and increased to LRIC in three equal annual installments. This approach was recommended by staff as a means of reducing customer rate shock and eliminating the potential for cross-subsidization. Once the price of a service is equal to or greater than LRIC, it may be price-listed by USWC. The additional revenues generated--estimated at $127,000 annually--are subject to revenue sharing.

Services Priced Above LRIC. Non-essential services priced above LRIC will be price-listed under the stipulation and are subject to a maximum price cap. The price cap mechanism works as follows:

a. The price of a service within a Product Group may increase by up to 10 percent per year. Prices are weighted by quantity sold.

b. Over the life of the Plan, the weighted average price increase for each of the seven Product Groups cannot be more than 10 percent greater than the prices established in dockets UT 85 and UT 102. The 10 percent maximum price cap assumes that no services are removed from the price cap (see below) and does not include annual increases that may result from the applying the Adjustment Formula to the maximum price for the previous year. The Adjustment Formula is the same as that used for essential services; *i.e.*, the lesser of the annual percentage change in the TIPI or GNP-PI, minus productivity. The productivity factor is stipulated at four percent. The Adjustment Formula is applied only to the weighted average price for each Product Group; it does not apply to individual services within a Product Group.

c. Individual services may be removed from the maximum price cap if USWC demonstrates that it lacks "market power" for the service. The presence or absence of market power will be determined by a "general market analysis" which evaluates the availability of alternatives, market share, price elasticity of demand, minimum viable scale, barriers to market entry, and economies of scale.

Removing a service from the price cap is not the same as deregulating a service. When a service is deregulated, the revenues and expenses associated with that service are no longer considered to be associated with the provision of utility service for ratemaking purposes. Under the Plan, however, revenues from price-listed services removed from the price-cap will still be included in the revenue sharing calculation. Also, the expenses associated with those services will be included in the annual earnings review process, not allocated separately as in the case of deregulated services.

d. If services are removed from the maximum price cap, the maximum increase for the remaining Product Groups over the life of the Plan cannot exceed 115 percent of the price established in dockets UT 85 and UT 102. Again, the price cap is exclusive of any annual increase that may result from application of the Adjustment Formula. Also, the amount of the increase for the remaining Product Groups will depend on the revenues associated with the services removed from the price cap.[13]

On September 1 of each year that the Plan is effect, USWC will file a list of price-listed services specifying billing determinants, current rates, and current annual revenue. USWC will also file new LRIC estimates for price-listed services to the extent those estimates differ from cost data previously filed with the Commission. In the case of service packages that include essential and non-essential services, the price charged by USWC must be no less than the tariff price of the essential service plus the LRIC of the non-essential service. Services for which no LRIC estimates are available will be treated as essential services.

Whenever USWC seeks to change the price of a price-listed service, it will file with the Commission revised price schedules, an LRIC study (or statement that the LRIC is already on file), projected billing determinants, and expected annual revenue. Staff will review changes in price-listed services only to ensure that the new price is at or above LRIC and does not exceed the maximum price cap.

In addition to the filing requirements noted above, USWC will also provide a minimum of 30 days notice to affected customers of price increases for recurring services. Price increases for nonrecurring services will be effective ten days after filing with the Commission. Price decreases will be effective upon filing with the Commission.

Intra-LATA Toll. As noted above, intra-LATA toll services will be price-listed and subject to the maximum price cap. In addition, the stipulation provides that

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[13]Attachment "I" of the stipulation illustrates how the 115 percent price cap functions. Under the formula, the 115 percent cap would be reached only if USWC shows that it lacks market power on services generating at least $50 million in revenue.

intra-LATA toll shall continue to be offered on the basis of statewide average prices. Toll pricing decisions are generally driven from urban areas of the state where there is greater competition for telecommunications services. Uniform statewide toll prices will ensure that price reductions due to competition will continue to benefit customers in less populous areas where fewer competitive alternatives exist. In effect, the prices charged on the most competitive routes will serve as a price cap on the least competitive routes in the state.

New Services. Any new services introduced by USWC during the term of the Plan will be price-listed. A "new service" is defined as one which offers features or performance elements not previously available. Under this definition, (a) repackaging of existing services, (b) enhancements of existing services, (c) services provided without charge that are subsequently "unbundled", and (d) services which incorporate essential services, do not qualify as new services.

Before offering a new service to customers, USWC must obtain regulatory approval from the Commission. USWC will submit a filing for this purpose 45 days in advance of the scheduled date for introducing the service. The filing made will include a description of the service, terms and conditions of the service, proposed prices, estimated annual revenue and an LRIC estimate with supporting workpapers. Staff will review the filing to ensure that the proposed price exceeds LRIC and that the offering qualifies as a new service.[14]

The parties to the stipulation contemplate that any disagreements regarding new services will be resolved pursuant to the dispute resolution procedures outlined in Paragraph 19 of the stipulation. If the dispute cannot be resolved informally, any affected person may file a complaint or petition the Commission to investigate the matter pursuant to ORS 759.195(7) and ORS 756.500.

Special Contracts. USWC retains the right under the Plan to contract with customers to provide telecommunications services. Contracts to supply essential services will continue to be subject to the requirements of ORS 759.210. Contracts to provide both essential and price-listed services will be made pursuant to the statute unless the portion of the contract relating to price-listed services can be segregated from the remainder of the contract.

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[14]Presumably, the Commission will also have to determine the appropriate product group for each new service.

Contracts to provide price-listed services will also be filed with the Commission. Regulatory review, however, will be limited to ensuring that the price charged under the contract is at or above LRIC and that the service is available on equal terms to other similarly situated customers. The stipulation does not preclude customers from voluntarily paying more than the maximum price cap for price-listed services. For example, a customer may be willing to pay more than the maximum price in exchange for a commitment from USWC to provide the contracted service for a extended term. The reasonableness of such arrangements will be determined by the Commission on a case-by-case basis.

Paragraph 8--Telecommunications Cost Study Proceeding

Order No. 90-920 issued in docket UT 85 required the staff to conduct a series of workshops for the purpose of developing a methodology to estimate the LRIC of telecommunications services. That proceeding has since been designated by the Commission as docket UM 351.

Paragraph 8 of the stipulation provides that any costing methodology and cost estimates adopted in docket UM 351 shall, to the extent ordered by the Commission, be integrated by USWC into the Plan to establish price floors for both essential and non-essential services. This provision acknowledges that if the Commission adopts a "building block" approach to measure the cost of telecommunications services in docket UM 351,[15] that approach may be incorporated into the Plan. In that event, services will be redefined, priced, tariffed, or price-listed consistent with the building blocks approved by the Commission. Except for those services designated by the Commission for different treatment, all essential and non-essential services will be priced at or above approved cost levels and in accordance with Commission-ordered pricing and imputation standards.

If USWC must increase rates for price-listed services as a result of new LRIC estimates adopted in docket UM 351 or any related docket, it will reduce its rates on other services so that the overall rate changes are revenue neutral. Although the parties have not agreed upon any specific procedures for implementing such changes, staff and USWC suggest that the company could conform to an order in docket UM 351 by raising the price of any price-listed services that are priced below the new LRIC estimates. At the same time, USWC would lower prices on other price-listed services so that overall revenues generated by price-listed services would not change. Inasmuch as possible, the maximum price caps of the product groups whose services are affected by a

[15] *See* Order No. 90-920 at 19-20.

decision in docket UM 351 would be adjusted so that the degree of pricing flexibility for each product group is unchanged.

TRACER contends that the approach suggested by staff and USWC is inadequate to achieve revenue neutrality. It emphasizes that maximum prices for services and product groups are based on prices established in dockets UT 85 and UT 102, and that any price changes resulting from docket UM 351 should be viewed as corrections to those base prices. To insure that rate increases for price-listed services are revenue neutral, TRACER recommends the following:

a) USWC should lower the price of another price-listed service in the same product group. The price decrease must be such that the average weighted price for all the services in the product group remain the same; *i.e.*, the price cap for the product group must not change.

b) Where it is not possible to offset a price increase by decreasing the prices of other services in the same product group because those services are priced too close to LRIC, the price of a service in another product group could be decreased. In that situation, however, the price cap of the product group must also be lowered.

c) In the alternative, USWC could offset an increase in a price-listed service by decreasing the price of an essential service. If this option is chosen, however, the decrease should be applied to a service purchased by the class of customers that will experience the rate increase in the price-listed service.

The Commission finds that it is unnecessary to resolve the concerns raised by TRACER at this time. A better approach is to wait and see what revenue-neutral rate changes are proposed by USWC at the conclusion of docket UM 351. The stipulation requires that USWC must submit all revenue-neutral filings for Commission approval. Interested parties will have an opportunity at that time to comment on those recommendations.

Paragraph 9--Cost-Based Rate Filings

In addition to revenue-neutral rate changes in price-listed services mentioned above, the stipulation also contemplates that USWC may be required to make other revenue-neutral rate changes during the term of the Plan. Paragraph 5(a) permits USWC to make revenue neutral adjustments in response to Commission-authorized rate design changes in essential services. Likewise, Paragraph 5(b) specifies that any changes in switched access charges authorized by the Commission shall be revenue neutral.

Further, in Paragraph 9 of the stipulation, USWC agrees not to propose or support any revenue neutral rate filings made under ORS 759.180 - ORS 759.190 that are inconsistent with the statement in Order No. 90-920 that "[r]ates for telecommunications services should be adjusted gradually over time to reflect the cost of supplying those services." This provision is designed to ensure that rate design decisions made during the life of the Plan coincide with the Commission pricing policy announced in docket UT 85.

CUB argues that, because the Plan allows for revenue-neutral rate design changes in essential services, it is misleading to characterize essential service rates as "frozen." It recommends that the Plan be rejected because there is no guarantee that essential service rates will remain unchanged over the five year life of the Plan.

CUB's argument is unpersuasive. First, it ignores the fact that any rate design changes made during the term of the Plan must be approved by the Commission. Second, CUB does not take into account that the Commission must have regulatory flexibility to make needed rate design adjustments during the Plan. Lastly, CUB's argument presumes that USWC will somehow benefit from such changes. In fact, USWC will not realize any additional revenues as a result of revenue-neutral changes to essential service rates.

Paragraph 10--Reconsideration or Termination of the Plan

Paragraph 10 of the stipulation provides that USWC or the Commission may seek reconsideration or termination of the Plan if any of the following conditions exist:

a) If USWC's earned ROE in the prior calendar year is more than 5 percentage points higher or lower than the 13.53 percent ROE authorized in docket UT 85.

b) If the Commission or USWC demonstrates that exogenous events will move USWC's ROE outside the 8.53-18.53 percent range of return within which the Plan will operate. "Exogenous events" are defined as acts of governmental or quasi-governmental agencies. The financial impact of exogenous events will be measured by pro forma adjustments to USWC's books.

c) If USWC fails to provide the Commission with access to its financial records or supply any other relevant information as required by Paragraph 18 of the stipulation. USWC has a reasonable opportunity to cure any non-compliance.

d) If USWC fails to comply with any term of the stipulation (*e.g.*, quality of service agreements). Again, USWC has a reasonable opportunity to cure any non-compliance.

If any of the above conditions are alleged to exist, a settlement conference will be held within two months after notification by USWC or staff. If the dispute cannot be resolved informally, either party may petition the Commission for appropriate remedies, including an earnings review or modification or termination of the Plan.

Staff will monitor USWC's earnings by conducting an annual review of the company's results of operations. The review will be based on the capital structure and embedded debt cost approved in docket UT 85 and the CE-92 reports USWC now submits to the Commission. Adjustments to USWC's books will be based on ratemaking allowances and disallowances authorized in docket UT 85 and set forth in Attachment "J" of the stipulation.

Affiliated interest expenses are treated differently from USWC's other utility costs for monitoring purposes. To accommodate staff concerns regarding this expense category, the stipulation provides that annual growth of affiliated interest expense shall be limited by the Adjustment Formula. As described in Attachments "J" and "K," the annual increase in aggregate affiliated interest expense may not exceed the base level expense authorized in docket UT 85, adjusted for inflation and productivity.[16]

Paragraph 14--Dispute Resolution

Paragraph 14 establishes procedures for resolving disagreements relating to the Plan. Any signatory to the stipulation may request a settlement conference to resolve disputes relating to compliance with, or interpretation of, the terms of the stipulation. The conference will be scheduled by staff and conducted within 60 days after notice is served. If the dispute cannot be resolved informally, any party may petition the Commission to commence a proceeding for that purpose. Similar procedures are envisioned to resolve matters not addressed by the stipulation or related agreements.

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[16]The formula used to adjust the affiliated interest expense level is the same as that used elsewhere in the stipulation, except that the TIPI is not used. Thus, aggregate affiliated expense for each successive year is determined by multiplying the previous years' base level by [1 + GNP-PI - P], where productivity (P) equals four percent.

Paragraph 15--Service Quality

Paragraph 15 of the stipulation incorporates a service quality agreement executed by staff and USWC in November, 1988 in conjunction with USWC's original proposal to implement an alternative form of regulation. The agreement establishes a comprehensive set of performance measurements that are indicative of the technical service quality delivered to customers. These include:

a) Monthly network reports designed to measure customer ability to originate and complete calls. Included in this category are network blockage reports, dial tone speed reports, and inter-office trunk transmission reports.

b) Quarterly sampling of customer lines to determine loop transmission loss and noise levels.

c) Monthly market perception studies to survey customer attitudes regarding service quality. Nine different customer groups will be sampled to determine the overall level of satisfaction with specific components of USWC's service, including provisioning, maintenance, and information/billing services.

d) Monthly trouble reports from each of USWC's central offices. These reports are correlated with historical data to compute an average report rate and standard deviation. The average report rate for any office should not increase beyond its probable statistical range with a 95 percent assurance level.

e) Monthly trouble reports received by USWC operators or detected by microprocessors located at the company's tandem switches. The reports indicate problems such as no ring, no answer, cut-off and noise/cross-talk.

f) Monthly emergency service reports indicating significant customer problems such as cut cables and weather-related outages. Each report indicates the time the problem is reported and the time the repair is completed.

A base line will be established for each central office serving area for each of the performance measurements listed above. As part of the service quality agreement, USWC pledges that adequate service quality levels will remain the same or improve. Where operating levels are inadequate, USWC will take whatever steps are necessary to improve and maintain service to adequate levels as defined in OAR 860-23-055.

Implementation of the Plan is contingent upon USWC's compliance with the quality of service standards as of April 1, 1991. Staff certified that USWC has satisfied that requirement. If the Commission finds that USWC is not in compliance with the quality of service standards once the Plan is in effect, the Commission may terminate the Plan after providing the company with notice and a reasonable opportunity to cure the deficiency.

Paragraph 17--Deregulation/New Legislation

This provision provides that the Plan shall govern all PUC-regulated products and services during the life of the Plan. However, USWC is not prohibited from petitioning the Commission to deregulate products and services under ORS 759.030(2) and (3).[17] Also, the Commission or USWC may terminate the Plan after notice and hearings, if "as a result of new Oregon legislation, the intent, operation, or results of the Plan will be materially affected and changed, or the Plan no longer meets the standards in ORS 759.195."

AMENDMENTS TO THE PLAN

Although the Commission agrees with the principal elements of the stipulation, we believe that a number of modifications are necessary to ensure that the Plan meets the statutory criteria set forth in ORS 759.195. These changes and additions are discussed below:

Paragraph 6--Revenue Sharing/Yellow Pages Revenue

Under the stipulation, revenues from Yellow Pages directory advertising are included in the revenue-sharing calculation. However, unlike other revenue sources, the contribution from Yellow Pages will not be based on actual revenue. Instead, Attachment "G" of the stipulation includes a formula which provides that Yellow Page revenues

[17]ORS 759.030 provides that the Commission may deregulate a telecommunications service in whole or in part if it finds that "price or service competition exists, or that such services . . . [are] subject to competition, or that the public interest no longer requires full regulation . . ." Prior to making such findings, the Commission must consider (a) the extent to which services are available from alternative providers in the relevant market, (b) the extent to which the services of alternative providers are functionally equivalent or substitutable at comparable rates, terms and conditions, (c) existing economic or regulatory barriers to entry, and (d) any other factors deemed relevant by the Commission.

will increase at the same annual rate as the increase in access lines.[18] The net effect is that the Yellow Pages revenue contribution per access line will remain constant throughout the life of the Plan.

The proposed method for computing Yellow Pages revenue is part of a compromise designed to resolve an outstanding dispute concerning imputation of Yellow Pages revenue. As mentioned above, USWC has challenged the authority of the Commission to impute revenue from Yellow Pages advertising for the benefit of ratepayers. It also disagrees with the method and amount of imputation authorized by the Commission in docket UT 85. By agreeing to the formula described above, the stipulating parties avoid the likelihood of annual disputes over the level of actual revenues derived from Yellow Pages advertising.

The Commission declines to adopt the proposed treatment of Yellow Pages revenue included in the stipulation. The evidence in this case shows that there is no correlation between growth in Yellow Pages revenue and growth in access lines. In fact, during the period 1983-1990, Yellow Pages revenues grew at an average annual rate of eight percent per year while access lines grew at only two percent per annum. If these trends continue, this difference will translate into approximately $25 million in revenues that will not be shared with customers over the life of the Plan.[19]

Furthermore, as we understand it, the Yellow Pages revenue figure derived from the formula in Attachment "G" would be also be used to calculate USWC's annual earnings for monitoring purposes under Paragraph 10 of the stipulation. This approach would have the effect of understating USWC's actual rate of return if Yellow Pages revenue continues to grow at a faster rate than access lines. Thus, it is quite possible that USWC's rate of return could exceed the 18.53 percent limit established in the Plan without being detected by the earnings review process.

The Commission believes that, to the extent possible, Yellow Pages revenues should be recognized and shared in the same manner as other revenues received by USWC. Therefore, the Commission finds that the Yellow Pages revenue

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[18]Page 1 of Attachment "G" provides that the Yellow Pages revenue contribution adopted in docket UT 102 will be used as a starting point. That amount is divided by 1990 access lines to determine Yellow Pages revenue per access line for Year 1 of the Plan. The total Yellow Pages revenue contribution for each succeeding year is determined by multiplying the initial contribution/access line by the average number of access lines.

[19]The $25 million amount was calculated by applying the historical growth rates for Yellow Pages revenue and access lines--8 percent and 2 percent, respectively--to the Yellow Pages revenue amount imputed in docket UT 102 over the five-year life of the Plan. The Plan was assumed to be in effect from 1992 through 1996. The total accumulated difference over the life of the Plan is approximately $50 million, of which $25 million would potentially go to customers under the revenue sharing formula.

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amount used for sharing purposes should be calculated by multiplying the 44.09 percent imputation ratio used in docket UT 102 times the actual Oregon Yellow Page revenues (before uncollectibles) as reported by U S WEST Direct, USWC's publishing affiliate. The same revenue amount should also be used for purposes of the earnings review process described in Paragraph 10 of the stipulation.

Paragraph 6--Revenue Sharing/Other Imputations

The stipulation does not contain any provision to deal with the sharing of other lawfully imputed revenues during the term of the Plan. For example, USWC may enter into transactions with affiliates or other firms for the provision of utility services whose revenues should properly be imputed to USWC. To take into account such a possibility, Paragraph 6 of the stipulation should be revised to include the following:

> For purposes of revenue sharing under this paragraph, revenues shall include all revenues earned by USWC and revenues which may be imputed to USWC. "Imputed revenues" means those revenues which may or may not be the product of regulated services, but which may be lawfully considered by the Commission in the exercise of its ratemaking jurisdiction.

In addition, Paragraph 10 of the stipulation should be modified to include the following provision:

> For purposes of monitoring under this paragraph, revenues shall include revenues earned by USWC and revenues which may be imputed to USWC under Paragraph 6 of this stipulation.

Paragraph 6--Revenue Sharing/Potential for Surcharge

As noted above, revenue sharing will be based on projections in Years 2-5 of the Plan. Once actual revenues are ascertained for each year, any excess or deficiency in sharing will be "trued-up" against the level of sharing projected for the next year of the Plan. For example, if revenue sharing is overestimated in Year 2, that amount will be deducted from the sharing that takes place in Year 3. The only problem with this approach occurs where there is over-sharing in one year and no sharing in the next. Such an situation, the parties acknowledge, could result in a surcharge against customer bills.

As a practical matter, it is unlikely that the implementation of the revenue sharing formula in the Plan will ever result in a surcharge. Both USWC and staff recognize that the potential for over-sharing in given year can be minimized by making

conservative projections of USWC's revenues. Moreover, if over-sharing does occur, a surcharge situation will not arise unless the amount of over-sharing exceeds the total amount of sharing that will take place in the succeeding year. Even then, a surcharge may be avoided by placing the balance in a reserve account and offsetting it against sharing which takes place in subsequent years of the Plan.

Although the Commission considers a surcharge unlikely, it is necessary to add a cautionary note. The final opportunity for revenue sharing will occur in the year following the end of the Plan. Because of the prohibition against retroactive ratemaking, the Commission doubts the legality of imposing a surcharge on customers after the Plan has ended to compensate USWC for a shortfall attributable to operations which took place while the Plan was in effect.[20] Even if it were legal to impose such a surcharge under such circumstances, the Commission would be disinclined do so as a matter of regulatory policy. Thus, USWC will not be entitled to recovery under such a scenario.

Paragraph 7--Price-Listing/Extended Area Service

Under the Plan, all non-essential services provided by USWC will be price-listed in accordance with the terms and conditions described above. CUB argues that Extended Area Service (EAS)[21] should not be price-listed because it will effectively allow USWC to increase essential service rates. For the reasons discussed below, the Commission finds that EAS should be price-listed, but on a different basis than USWC's other non-essential services.

In June, 1989, the Commission issued Order No. 89-815 in docket UM 189, a general investigation into the provision of EAS in Oregon. Among other things, Order No. 89-815 requires LECs operating in Oregon to provide both flat-rate and measured-

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[20]USWC agrees that ORS 759.200--which authorizes deferred accounting for utilities--does not encompass any over-sharing that may occur under the Plan.

[21]EAS is a form of telephone service which enables a subscriber in one exchange to call a neighboring or nearby exchange without being billed at long-distance (toll) rates. The Commission has recognized that EAS is a "hybrid" having characteristics of both local and toll service. On one hand, EAS has traditionally been provided by LECs as part of local exchange service, with seven-digit dialing and flat-rate, local service billing. Because of this, customers tend to view EAS as an extension of their local telephone service. On the other hand, EAS is an interexchange service which functions as a substitute for short-haul toll. In docket AR 188, the Commission concluded that EAS is not a "local exchange service" as that term is defined in ORS 759.005(3)(i). As a result, EAS was not included in the list of "essential" services, and remains subject to price-listing under ORS 759.195. *See* Order No. 89-815 at 6-7 and Order No. 88-1522 at 16.

rate EAS to customers on all authorized EAS routes. In reaching that decision, we noted that EAS effectively precludes the potential for competition:

> . . . [T]he sphere within which interexchange carriers can compete for toll traffic diminishes with every EAS expansion. If mandatory EAS is in place, all traffic previously carried over toll routes will be treated as EAS, either flat or measured. In a toll environment, interexchange carriers have the opportunity and the incentive to package their services so that they can compete effectively for high volume short-haul toll customers. When EAS is implemented, this opportunity is limited or eliminated.
>
> EAS is provided as a part of local service by the local telephone company. Although there is no legal prohibition against interexchange providers competing on EAS routes, there is little incentive for a customer to choose another interexchange provider. As a practical matter, conversion of a toll route to EAS severely limits, and in many cases may preclude altogether, the potential for interexchange competition.[22]

In Order No. 89-815 the Commission also observed that most customers are likely to continue to pay for EAS on a flat-rate basis notwithstanding the availability of a measured-rate alternative. Taken together, these facts lend credence to CUB's argument that a decision to permit upward pricing flexibility for EAS effectively enables USWC to increase basic service rates without any competitive constraints or prior regulatory review.

The potential for USWC to increase EAS rates under the price-listing authority in the stipulation could also complicate our recent decision in docket UM 261, establishing tariffs for the Portland EAS region.[23] As part of that decision, the Commission adopted an 30-month "tracking" procedure to monitor telephone company revenues within the region. The tracking procedure will examine a number of factors, including the percentage of USWC customers choosing the flat versus measured rate option. As data is obtained, the Commission will adjust flat and measured EAS rates as necessary to comply with the requirement of net revenue neutrality adopted in that proceeding. The Commission is concerned that increases in EAS rates resulting from upward pricing flexibility could distort the results obtained from the tracking procedure.

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[22] Order No. 89-815 also prohibits competitive providers from reselling telecommunications service within the boundaries of a designated EAS region. See Order No. 89-815 at 27-28, 38.

[23] *Re Investigation into the Portland Extended Area Service Region*, Order No. 91-1140, entered September 5, 1991.

Accordingly, the Commission finds that EAS should be treated differently from other price-listed services under the Plan in that USWC should have only downward pricing flexibility for EAS service. EAS rates will not be allowed to exceed current levels unless USWC demonstrates that a rate increase is justified under ORS 759.180, or as otherwise required under the tracking procedure in docket UM 261. EAS should also be removed from the product grouping in Attachment "H" of the stipulation so that pricing flexibility for other services in that product group will not be affected. For the time being, EAS should not be included in any product group.

Paragraph 10--Premature Termination of the Plan.

The stipulation does not include a provision that addresses the procedures to be followed or the rates to be charged by USWC in the event the Plan is terminated prematurely under the provisions of Paragraph 10. For example, one scenario might be where USWC is alleged to have exceeded the ROE limit established in the Plan. Since the parties have agreed upon the specific bases for calculating USWC's earnings, it should not not take much time to determine whether the earnings limit has been exceeded and the Plan should be terminated. On the other hand, it would probably require several months to ascertain the permanent rates which should be implemented after the Plan is discontinued.

The Commission finds that the stipulation should be modified to include a provision which protects USWC and its customers in the event the Plan is terminated prematurely due to one of the conditions specified in Paragraph 10(a). We propose that Paragraph 10 should be amended to include the following language which we have denominated as subparagraph (f):

> (1) Upon petition by staff or USWC under this paragraph and a showing that any of the conditions of subparagraph (a) have been met, the Commission may, by order, declare the plan terminated or may make such other modifications to the plan as the Commission deems appropriate.
>
> (2) If the Commission declares the plan terminated, it may also order USWC to refrain from making any further changes in rates or terms of price-listed services or may authorize USWC to file revised rate schedules. The Commission may also initiate an investigation to determine the rates and terms of service which should be placed in effect on a permanent basis.
>
> (3) Unless otherwise ordered by the Commission, rates authorized under (2) of this subparagraph after the plan has been terminated shall be considered interim rates subject to refund. The amount subject to refund with interest shall be that portion of USWC's earnings which the Commis-

sion finds have exceeded a reasonable rate of return, commencing with the date of the order terminating the plan and ending with the date that permanent rates are set and are in effect. For purposes of determining the amount of the refund, the Commission shall not be bound by the provisions of this paragraph or any other provision of the Plan.

(4) USWC may request a hearing within 15 days of any order terminating the Plan. A request for hearing will suspend the effective date of the order pending the outcome of the hearing, but shall not affect the commencement date of the refund obligation described in (3) of this subparagraph. The final decision of the Commission after hearing may be appealed under ORS 756.580 et. seq.

The amendments proposed by the Commission are intended to remove any uncertainty regarding the procedures to be followed in the event the Plan is prematurely modified or terminated. The changes will also prevent USWC from over or under earning while proceedings are held to establish new permanent rates. To clarify:

Subparagraph (1) authorizes the Commission to modify the plan rather than declare it terminated. Of course, if USWC does not agree with the modifications, the plan will be considered to be terminated. In such case, USWC may appeal the Commission order under the terms of subparagraph (4).

Subparagraph (2) provides that the Commission may freeze the rates charged by USWC at the levels in effect on the date the plan is terminated. The Commission would likely choose this option if the Plan is terminated because USWC's earnings have exceeded the upper limits established in the Plan. In the alternative, the Commission may authorize USWC to file revised tariffs under subparagraph (2). This option would likely be chosen if the Plan is terminated because USWC's earnings have fallen below the lower limits in the Plan. Lastly, subparagraph (2) permits the Commission to initiate a separate proceeding to determine the permanent rates to be charged.

Subparagraph (3) specifies that the rates in effect from the date the plan is terminated until the date new permanent rates are set shall be interim rates subject to refund. A refund will take place only where USWC is determined to have been overearning.[24] The amount of any refund will equal the difference between the amount

[24] If USWC seeks to terminate the Plan because it is underearning, the company would file proposed tariff rates at the time that it requests authority to terminate the Plan. If the Commission terminates the Plan, the proposed rates would then go into effect on an interim basis. In that case, USWC would be liable for a refund only if the permanent rate level established by the Commission are less than the interim rates. The only way that USWC could be harmed under such a scenario is if the interim rates filed by the company are not compensatory.

USWC is actually earning and the amount subsequently found to be reasonable. Any refunds will accrue interest at USWC's authorized rate of return on rate base.

Subparagraph (4) guarantees USWC a hearing after a Commission decision terminating the Plan. It also suspends the Commission order terminating the Plan pending the outcome of the hearing. However, if the decision to terminate is upheld after hearing, the refund obligation commences as of the date of the initial decision terminating the Plan. USWC's right to appeal a Commission decision terminating the Plan is preserved.

Paragraph 14--Rate Filing Prior to End Of Plan

Paragraph 14 of the stipulation provides that the Commission must notify USWC nine months prior to the end of the Plan if the Commission wants the company to make a general rate filing. Once USWC receives such notice, it would make the rate filing six months prior to the end of the Plan.

The Commission finds that this provision of the stipulation should be revised as follows:

> Nine months prior to the end of the term of the plan, USWC shall submit a general rate filing under ORS 759.180. The purpose of the filing shall be to propose a schedule of rates which will be effective upon expiration of the plan. USWC may, at the same time, apply for an extension of the plan or submit a revised plan for Commission consideration.
>
> In the event the Commission does not complete its review of USWC's proposed rates prior to the end of the term of the Plan, the Commission may allow the proposed rates to take effect subject to the refund provisions set forth in paragraph 10(f).

The modified language reverses the procedure now contemplated by the stipulation. Rather than require the Commission to request a general rate filing, the company has the obligation to make a rate filing based on updated results of operations. In our opinion, such a filing is necessary regardless of whether USWC seeks an extension of the Plan or a return to traditional regulation. The nine month period provides the Commission with time to process the rate filing and to consider an extension of the Plan or a new Plan. The provision allowing USWC to file proposed rates subject to refund protects both the company and ratepayers in the unlikely event that it takes longer than nine months to make a final determination.

Paragraph 15--Service Quality/Modernization

The Commission is persuaded that the provisions in the stipulation will prevent deterioration in the quality of service provided by USWC. Equally important, however, is the assurance that USWC will have adequate incentives under the Plan to make the capital investments necessary to update its network and provide customers with access to modern telecommunications technology.

USWC claims that the Plan offers a number of continuing incentives to modernize its system. Modernization will lead to (a) the development of new features for existing services or entirely new services, (b) improved service quality and delivery, and (c) reduced operating expenses, all of which will enhance USWC's revenues and profitability. In addition, increasing pressure from competitive suppliers will push the company to find better ways to improve its service offerings.

On the other hand, USWC acknowledges that the incentives in the Plan to increase efficiency and reduce costs may also produce a financial motivation to delay capital improvements in the short term. However, USWC maintains that a decision to pursue short-term profit maximization at the expense of system modernization would be short-sighted and inconsistent with corporate policy objectives. USWC also recognizes that continued regulatory approval of the Plan will depend, in large part, on whether the company makes the technological improvements necessary to provide up-to-date telecommunications service to its customers.

The Commission is satisfied with USWC's pledge that it will continue to modernize its network, make investments necessary to develop new services and employ new technology during the term of the Plan. USWC has demonstrated in the past that it is committed to providing quality service in Oregon. We do not believe that adoption of the Plan that will cause any change in corporate policy. Rather, we agree with the company that competitive pressure from other telecommunications providers and the opportunity for enhanced profits under the Plan will motivate the company to provide the latest technological advancements and services. To do otherwise would be to risk losing market share to competition and hasten a return to traditional methods of regulation.

While the Commission is persuaded the Plan embodies the incentives necessary to insure system modernization, we would be remiss in our statutory obligation if we did not make some provision to monitor USWC's progress in this area. Accordingly, the Commission will use its annual review of USWC's construction budget as an opportunity to ensure that planned investments are being made on schedule. We will also take that opportunity to inquire of the company regarding technological improvements and future investment plans.

Paragraph 17--Changed Circumstances

Paragraph 17 of the stipulation provides that "the Commission or USWC may terminate the Plan, upon notice and hearings, if the Commission finds that, as a result of new Oregon legislation, the intent, operation, or results of the Plan will be materially affected and changed, or the Plan no longer meets the standards in ORS 759.195."

From the language of Paragraph 17, it is unclear whether the stipulation is intended to encompass only legislative action or whether other circumstances would permit USWC or the Commission to seek termination of the Plan. We find that the language should be read broadly to take into account not only legislative changes which materially affect the Plan, but also other changed circumstances which could not have reasonably been anticipated at the time the Plan was implemented. Such an interpretation is more compatible with Commission's statutory obligation under ORS 756.040 to protect the interests of utility customers.

In proposing this modification, we do not intend to suggest that the Commission may seek to terminate the Plan because of circumstances that should have been contemplated under the proposed alternative form of regulation. While we anticipate that the Plan will generate significant benefits for both USWC and its customers, we also recognize and accept the fact that there is a chance that the rewards may be less than expected.

STATUTORY STANDARDS

ORS 759.195(3)(a)--Current and Future Competitive Conditions

ORS 759.195(3)(a) requires the Commission to find that pricing flexibility is "reasonably necessary to enable [USWC] to respond to current and future competitive conditions for any or all telecommunications services." As USWC, TRACER and others point out, subsection (3)(a) is a threshold inquiry which must be answered in the affirmative before *any* alternative form of regulation may be approved.

The degree of competition contemplated by the language of subsection (3)(a) was a source of controversy in this case. During the course of the proceeding, it was suggested that "effective" or "price-constraining" competition must exist in order to satisfy the statutory requirement. Such an interpretation, however, is contrary to the plain language of the statute, which requires only that "current or future competitive conditions" make it "reasonably necessary" to approve pricing flexibility. Had the legislature intended to apply a more stringent standard, it would have specified that "price and service competition exist" as it did previously when it promulgated

ORS 759.030 to govern the deregulation of telecommunications services. Instead, the legislature prescribed a different standard to govern the less dramatic regulatory changes envisioned by ORS 759.195.[25]

The evidence in this record establishes that USWC faces current or future competition for a number of the telecommunications services it provides. Competitive alternatives exist for the following services:

(a) **Intra-LATA Long Distance Service.** Interexchange carriers (IXCs), including facilities-based carriers (such as MCI and AT&T) and resellers of interexchange services, compete with USWC's intra-LATA Message Toll Service (MTS) and Wide Area Transport Service (WATS). A facilities-based IXC may compete by installing Points of Presence (POPs) in local exchange areas throughout USWC's service territory. Communications between POPs are transmitted by a variety of means, including fiber optic cable, copper cable, microwave or satellite. A customer location may be connected to an IXC's POP by purchasing switched or special access service from USWC. The ability of the IXC to compete depends on whether it can cover its costs, including its access cost, and still market its service at a price less than that offered by USWC for intra-LATA MTS or WATS service.

Resellers also compete with USWC's intra-LATA long distance service by leasing WATS lines or trunk lines in bulk and reselling the use of that service to customers whose individual usage does not justify leasing their own lines. Again, the ability to compete depends on whether the reseller can market the packaged service at a rate less than that charged by USWC.

To date, the Commission has not authorized intra-LATA presubscription, or "1+ dialing," for IXCs. As a result, IXC customers must dial 11 digits or more to complete intra-LATA long distance calls within USWC's service territory, an inconvenience which may inhibit competition. If circumstances were to change such that presubscription is made available to IXCs in the future, competition in the intra-LATA long distance market could increase substantially.[26]

(b) **Dedicated Services.** IXCs compete with USWC's switched access, special access and private line services by providing direct communication links between customer locations or between customer locations and IXC POPs. These dedicated

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[25]As USWC points out, the legislature, in promulgating ORS 759.195, contemplated the "continuing full jurisdiction of the Commission with all of its remedial powers." *USWC Op. Br.* @3.

[26]A decision to authorize presubscription might be a material change in circumstances that would warrant reexamining the Plan. The same would be true if, for example, the USWC is eventually authorized to begin providing inter-LATA toll service.

services enable customers to completely bypass USWC's network and switches. A number of IXCs currently provide dedicated facilities between specific locations within the Portland metropolitan area.

The pending application of Electric Lightwave, Inc. (ELI), in docket UM 381, is an example of the potential competition USWC faces from providers of dedicated services.[27] ELI seeks authority to use its fiber optic digital facilities to provide interexchange private line and dedicated special access service within USWC's service territory. The services would consist of point-to-point and point-to-multipoint, digital transmission services (1) connecting end users and interexchange carriers, (2) between interexchange carriers to facilitate interexchange communications, and (3) between end user premises located in different exchanges.

In addition to dedicated lines provided by IXCs, an increasing number of business customers formerly served by USWC are taking advantage of microwave and satellite communication links to establish networks that bypass USWC's system. USWC identified 57 Oregon companies that have installed private microwave systems and another 28 that have installed or plan to install satellite networks. Other large business customers, such as First Interstate Bank, use cable company facilities to supply branch offices with administrative services' information and to provide transmission links for automated consumer banking.

(c) **1FB, Key Telephone and Centrex-type Services.** USWC faces competition for 1FB, key telephone, and centrex-type services from PBX vendors. Large PBX units have the capacity to serve thousands of telephones or computer links, but are connected to USWC's switching system by a relatively few number of trunk lines. As such, PBXs displace local loops that would otherwise connect end users to USWC's network. Evidence presented by staff indicated that USWC lost 14,137 centrex lines to PBX-based systems between 1984-1988. Staff further concluded that remaining centrex systems, predominantly leased to large government or educational accounts, "are at competitive risk and [that] line losses will continue into the foreseeable future." Other centrex-type services, such as Corecom and Centraflex, are also subject to competition from PBX alternatives.

In a similar manner, Shared Tenant Service (STS) providers also use PBX units to provide telephone service to subscribers served by those systems. STS providers are authorized by statute in Oregon and compete with USWC's local access service by displacing loops that would otherwise be purchased from the utility.

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[27]Commission takes official notice ELI's application pursuant to OAR 860-14-050.

(d) **Custom Calling.** Custom calling includes features such as call waiting, call forwarding, speed calling, call hold, call pick-up, and conference calling. Electronic switching technology and the installation of digital central offices has made provision of these services more economical and attractive to customers.

With rates exceeding marginal costs by up to 2,000 percent, custom calling has been highly profitable for USWC. Staff predicts that revenues from this market will decline, however, as consumers become more aware of alternative suppliers selling similar features. To date, competition for custom calling features has come primarily from "smart premise" PBXs sold to business customers.

(e) **Operator Services.** USWC's operator service revenues are closely tied to growth in long distance revenues and access line growth. During the hearings in this matter, staff observed that USWC was facing nascent competition from six alternative operator services (AOS) and that revenue growth from these services was declining. Although staff was unable to determine the amount of revenue lost to competing AOS providers, it predicted that USWC would encounter increased competition in this area. Staff's predictions were correct. Currently, 30 AOS providers are authorized to provide service in Oregon.

Summary--ORS 759.195(3)(a)

Based on the evidence, the Commission concludes that USWC faces emerging competition for many of its products and services. This fact was acknowledged by most of the parties to this proceeding. Aside from the testimony presented by USWC and staff, AT&T and MCI observed that the competitive challenges of presented by an increasing number of unregulated suppliers of telecommunications services may necessitate changes in the regulatory process. Likewise, CUB presented testimony that essential service rates are already "driven" by competition.

Although the record suggests that competition is still limited to certain market niches and that USWC retains market dominance over most, if not all, of its services, it is nevertheless clear that significant competitive inroads have been made. USWC's customers have an increasing array of choices available to satisfy their telecommunications requirements. Technological improvements have made it economical for many large volume customers to purchase their own networks or to lease facilities which allow them to bypass USWC's switched network entirely. An even greater number of customers now have the opportunity to choose alternative service providers to satisfy at least a portion of their telecommunications needs.

Furthermore, USWC can reasonably expect to encounter increased competition for its services in the future. For the most part, competition in the telecom-

munications industry has been the product of technological and regulatory developments. There is every reason to believe that advances in technology will continue to provide expanded opportunities for competitors to develop new products and services and exploit existing market niches. Regulatory changes can also be expected to foster greater competition. Indeed, recent decisions authorizing imputation of access charges and unbundling of basic services have already laid the groundwork for increased competition by minimizing the potential for discriminatory pricing and cross-subsidization of services.

Having determined that USWC faces current and future competition for its services, the Commission must also consider whether the pricing flexibility in the proposed Plan is "reasonably necessary." In other words, we must decide whether short-comings in the current regulatory process impede USWC's ability to compete and warrant the broad pricing flexibility contemplated by the stipulation.

The Commission agrees with USWC and other proponents of increased pricing flexibility who argue that telecommunications utilities are disadvantaged by inability of traditional regulatory methods to adequately respond to changing conditions in competitive markets. Because the current regulatory framework was not designed to deal with services subject to competition, the process of introducing a new service or changing the price of an existing service can be too time-consuming to allow an effective competitive response. Before an offering may be submitted for regulatory approval, the utility must prepare and file proposed tariffs, cost support, revenue effects and customer impacts. In most cases, the offering does not take effect during the agency review process, delaying any customer benefits associated with the offering and providing competitors with an advance opportunity to examine information necessary to develop a counter strategy.

Significant opportunity costs result whenever regulatory lag prevents an LEC from responding to competition in a timely manner. These costs include (a) revenues that are unrealized because of delays in the introduction of products or services, and (b) revenues lost permanently when customers opt to abandon the network or take service from a different telecommunications provider. The cumulative effect of these losses can have a significant financial impact on the utility and its customers, particularly when large volume customers leave the utility system. Not only do share-holder profits suffer, but remaining customers must bear a greater share of the cost of the public switched network.

The price-listing provisions of the proposed Plan will permit USWC to change the price of non-essential services without incurring the delays associated with current regulatory procedures. Price changes will not be suspended, but rather will take effect after 10 days notice to customers. The Plan also allows USWC to introduce new products and services on an expedited basis. As noted above, the stipulation provides that USWC will seek Commission approval of any new service offering at least 45 days

before the date the service is scheduled to take effect. The 45-day period will enable the staff to review the offering to insure that it qualifies as a "new" service and that the proposed rate exceeds LRIC.

In evaluating the Plan, the Commission recognizes that USWC could request authority to price-list on a service-by-service basis under ORS 759.030. We do not, however, regard ORS 759.030 as a practical alternative to the pricing flexibility afforded by the Plan. Authorizing USWC to price-list on a service-by-service basis would do little to mitigate the problem of regulatory lag associated with the introduction of new services. Such a procedure would also be cumbersome from an administrative standpoint as more and more services become subject to competition. More importantly, service-by-service price-listing would not offer the incentives and protections that are incorporated in the Plan.

The Commission also consents to those provisions of the Plan that allow limited upward pricing flexibility for price-listed services. In this context, we accept USWC's argument that some degree of upward pricing flexibility may be required in the short-term to respond to changing market forces and competitive attacks. Also, as USWC witness Carl Inouye emphasizes, many of the company's product offerings are cross-elastic with other services and multi-dimensional in price. For example, USWC's toll services are comprised of 68 elements, each of which might be priced differently. Thus, it may be reasonably necessary to increase the price of certain service elements even though the overall price of that service declines in response to competition.

The pricing flexibility contemplated by the Plan will not adversely impact customers of price-listed services. As discussed elsewhere in this order, the stipulation contains several safeguards to insure that rates remain at reasonable levels. These include the maximum price cap, an expanded number of product groupings, statewide average toll rates, and annual filing requirements for all price-listed services. In addition, USWC's agreement to support "unbundling" of tariffed services and cost-based rate design will minimize the potential for cross-subsidization of services or discriminatory pricing. Finally, rates charged by USWC for price-listed services may be challenged at any time by affected customers or reviewed by the Commission pursuant to ORS 759.195(7) and ORS 756.500.

In view of the foregoing, the Commission concludes that the pricing flexibility included in the proposed Plan is reasonably necessary to enable USWC to respond to current and future competitive conditions.

ORS 759.195(3)(b)--Balance Between Pricing Flexibility and Consumer Protection

ORS 759.195(3)(b) requires a finding that the proposed alternative form of regulation "maintain the appropriate balance between the need for pricing flexibility and the protection of consumers." Based on the evidence presented, the Commission concludes that the Plan, together with the modifications we have recommended, satisfies this statutory requirement.

As noted above, USWC requires additional pricing flexibility in order to compete effectively with alternative suppliers of telecommunications services. The indirect costs of traditional regulation--the time-consuming process of introducing new services and changing tariff rates, and the litigious nature of the administrative process--forestall competitive responses and result in lost revenue-producing opportunities for the company.

Provisions in the Stipulation. The pricing flexibility afforded by the Plan will allow price-listing of non-essential services and the introduction of new services on an expedited basis. The Plan also includes a number of provisions designed to protect customers, summarized below:

--Essential service rates are effectively frozen for the life of the Plan, insulating customers from potential cost increases for five years. Since essential service prices cannot be raised to offset price decreases for price-listed services, the potential for cross-subsidization is eliminated.

--Switched Access charges will continue to be set under the FCC access rules. There is no change from current regulatory treatment.

--Public and semi-public telephone rates will remain unchanged for the duration of the Plan.

--All rate design changes ordered by the Commission will be made on a revenue-neutral basis.

--As long as USWC's ROE is within 8.53-18.53 percent, the company will share revenues above a predetermined level with customers on a 50/50 basis. As discussed below, it is likely that significant revenue sharing will occur under the Plan.

--All price-listed services will be subject to a maximum price cap unless USWC demonstrates that it lacks market power for the service.

--Price-listed services are separated into seven product groups. The maximum price cap is calculated using the weighted average prices of individual tariff services within a product group. The weighted average price of each product group cannot increase by more than 10 percent (adjusted for inflation and productivity) over the life of the Plan.

--Except as noted below, individual services within each product group cannot increase by more than 10 percent in any year. However, USWC's ability to increase prices for individual services is constrained by the 10 percent product group limitation. If USWC increases prices for certain services, it may have to lower prices for others services in the product group to insure that the total product group increase does not exceed 10 percent over the five-year life of the Plan.

--The only way that the weighted price for each product group can exceed the 10 percent limit is if services are removed from the price cap. Even in that event, the maximum increase is 115 percent of the base price level for all product groups.

--Intra-LATA toll customers are protected under the Plan in a number of ways. First, the presence of competitive providers will constrain USWC's ability to increase prices for intra-LATA service. Second, the maximum price cap will act as an additional restraint on the company's upward pricing flexibility. Third, statewide average toll pricing will guarantee that any price reductions resulting from competition in the more populous areas will be passed on to customers in rural parts of the state where there are fewer competitive alternatives. Finally, the minimum price on toll, *i.e.*, imputed access plus LRIC, will protect customers and competitors by eliminating the potential for cross-subsidization between services.

--New Services and Special Contracts will continue to be filed with the Commission for approval.

--Services may not be price-listed under the Plan unless they are priced above LRIC. Services subject to price-listing, which are currently priced below LRIC, will be increased to LRIC over a three-year period. This procedure prevents the possibility of cross-subsidization by ensuring that each service will cover its cost.

--The cost methodology adopted by the Commission in docket UM 351 will be incorporated in the Plan. If prices for price-listed services must increase as a result, USWC will reduce rates for other services so that the overall rate change is revenue neutral.

--Any rate filings made by USWC will be consistent with the pricing policy adopted in docket UT 85 that rates be gradually adjusted over time to reflect cost.

--The Commission will continue to monitor USWC's earnings on an annual basis. The Plan may be modified or terminated if USWC's earned ROE exceeds the ROE authorized in docket UT 85 by more than five percentage points.

--Quality of service standards required under the Plan are more stringent than those currently in effect and will be expanded to include dedicated services. The Plan may be terminated if USWC does not comply with those standards.

Additional Protections. In addition to the customer protections built into the stipulation, the Commission has proposed several modifications to the Plan that will provide additional protection for customers. These changes will insure that:

--Actual growth in Yellow Pages directory advertising revenue is included in the revenue sharing calculation;

--Revenues lawfully imputed to USWC are included in the revenue sharing calculation;

--Increases in Extended Area Service rates are subject to prior Commission approval;

--Customers and USWC are protected in the event the Plan is terminated prematurely;

--USWC will submit a true-up rate filing nine months prior to the end of the Plan;

--The Plan may be modified or terminated in the case of materially changed circumstances;

--System improvements and modernization are evaluated annually during the term of the Plan.

Summary--ORS 759.195(3)(b)

Based on the foregoing, the Commission finds that the customer protections included in the stipulation, when coupled with the modifications we have proposed, will provide an appropriate balance to the pricing flexibility incorporated in the Plan.

ORS 759.195(3)(c)--Benefits to Customers of Fixed Rate Services

Before a proposal to price-list services may be approved, the Commission must conclude that it is "likely to benefit the consumers of fixed rate services." There is sufficient evidence in the record to support a finding that fixed rate--or essential service--customers will be better off under the Plan than under continued rate of return regulation.

Rate Freeze. The proposed rate freeze for essential services--with its guarantee of rate stability over the life of the Plan--should provide a significant benefit for USWC's essential service customers. Under rate of return regulation, customers bear responsibility for capital investment and expenses related to the provision of utility service. By agreeing to a freeze, USWC relinquishes the right to seek rate relief for the duration of the Plan (except under limited conditions), and assumes the financial risk of cost increases which may occur during that period. Since essential services comprise roughly half of USWC's total revenue, the company is anticipating that the incentives created by the Plan will generate earnings that are sufficient to offset inflation and adverse economic conditions.

Aside from insulating ratepayers from the risks posed by high inflation and economic downturns, the proposed rate freeze also protects essential service customers from rate increases which may result from future reductions in toll revenue. Historically, revenues from toll services have been used to support local exchange rates.[28] Evidence presented by USWC during this proceeding indicates that toll contribution has declined since 1980. USWC maintains that increased competition for toll traffic will erode its share of the toll market and further reduce the level of contribution available to support basic services.[29] The proposed rate freeze will shield essential service customers from

[28] *See*, Order No. 90-920 at 2, 11.

[29] It is extremely difficult to predict the effect that changes in the telecommunications environment will have on toll contribution over the five year term of the Plan. Statistics presented by USWC show that toll revenue per access line declined from 1980-1986, followed by an slight increase from 1986-1987. USWC witness Inouye further testified that toll contribution has continued to decline since 1989 because of competitive pressures. On the other hand, there is also evidence which suggests that increased competi-

the possibility that declining toll contribution might translate into rate increases for essential service customers.

Another advantage of the proposed rate freeze is that it eliminates the possibility that essential service rates may be raised to offset decreases for price-listed services subject to competition. A criticism of the price-indexing mechanism originally recommended by USWC was that the company might attempt to cross-subsidize its price-listed offerings by manipulating essential service rates. Without implying that USWC would consider such action, the potential for cross-subsidization is nevertheless a legitimate matter of concern not only for essential service customers whose rates would increase, but also for competitive providers who would be unable to compete on an equal footing. Since the current Plan does not permit upward pricing flexibility for essential services, the possibility of cross-subsidization no longer exists.

In weighing the advantages of the proposed rate freeze, it is also necessary to consider USWC's recent results of operations. Since 1987, the Commission has authorized more than $100 million in rate reductions for USWC's Oregon customers.[30] On first impression, this experience suggests that the rate freeze may not be much of a bargain for essential service customers. However, while USWC's earnings have justified substantial rate reductions in the past few years, there is no guarantee that similar decreases will be forthcoming during the next five years. As USWC points out, a major portion of the recently-authorized reductions was attributable to events such as federal and state tax law changes, pension changes, amortization removals, and other events that are unlikely to recur during the term of the Plan. While it is conceivable that additional rate reductions may take place under continued rate of return regulation, there is simply no way to predict future results of operations with any degree of accuracy.

Revenue Sharing. The revenue sharing features of the Plan will also benefit all of USWC's customers. The evidence indicates that significant revenue sharing is likely to occur under the Plan. USWC witness Inouye calculated company revenues using normalizing adjustments to offset the effects of intervening regulatory changes that would otherwise distort year to year comparisons. His results show that, over the period 1986-1990, USWC's revenues and access lines grew at an average annual rate of 5.5 and 2.6 percent, respectively. During the period 1987-1990, revenues grew by 5.3 percent per year and access lines by 3.1 percent per year. After adjusting for inflation and produc-

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tion may not adversely affect the level of toll contribution. The record shows that the total toll market is expanding, creating the possibility that USWC's toll revenues could increase despite a declining market share. Likewise, forecasts prepared by USWC predict substantial growth in toll minutes of use over the next several years.

[30]*See*, Order No. 87-406, docket UT 43; Order No. 89-1807, docket UT 85; Order No. 91-576, docket UT 102.

tivity, revenue growth exceeded access line growth by 2.7 percent for 1986-1990 and by 1.9 percent for 1987-1990. Mr. Inouye predicts that revenue growth will continue to exceed access line growth during the term of the Plan.

If the historical relationship between USWC's revenues and access lines remains relatively constant, there is a high probability that significant revenue sharing will occur in each year of the Plan.[31] For example, USWC's intrastate revenues were approximately $450 million in docket UT 102. If the historical two percent differential (*i.e.*, revenue growth at five percent and access line growth at three percent) continues, then customers will receive approximately $140 million in revenue sharing over the life of the Plan.[32] This is in addition to the $8.149 million first year revenue sharing that will occur whether or not the Plan is adopted.

In addition to the likelihood that substantial sharing will occur under the Plan, the sharing formula eliminates customer risk. Since future costs and earned returns are irrelevant to whether revenue sharing takes place, all financial risk associated with the sharing process will be borne by USWC instead of its customers. In other words, as long as actual revenue per access line is greater than target revenue per access line, sharing will occur no matter how efficient or inefficient USWC becomes. Indeed, USWC may find itself in the position of having to share revenues even though its earnings are substantially less than the 13.53 percent ROE currently authorized for the company.

USWC's customers also benefit from the manner in which the revenue sharing formula operates. The sharing level is adjusted annually to account for changes in USWC's revenues and will occur whenever those revenues exceed the established target level. As discussed below, this process eliminates the lengthy delays and uncertain consequences now associated with traditional regulatory procedures.[33]

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[31]The amount of revenue sharing will also depend on the level of inflation experienced during the term of the Plan. Over the two time periods sampled by USWC witness Inouye, inflation averaged 4.2 percent and 4.4 percent, respectively.

[32]To derive this number, the historical growth rates for revenues and access lines--5 percent and 3 percent respectively--were applied to UT 102 revenues subject to sharing excluding Yellow Pages revenues and access charges. Yellow Pages revenue sharing was assumed to be $25 million (See Footnote 19). In addition, target revenue per access line was assumed to remain constant over the life of the Plan (*i.e.*, inflation was assumed to equal the 4 percent productivity factor).

[33]USWC points out that the sharing proposal also benefits customers from a timing standpoint because it is unlikely that an earnings investigation would be initiated the moment a utility exceeds its authorized rate of return. That argument is only partially correct. In all likelihood, the Commission would not initiate an earnings review until a utility exceeded its *current cost of capital* by some amount. However, if the cost of capital for that utility has declined, an earnings review might be initiated despite the fact that the utility is earning less than its previously authorized rate of return.

Finally, the revenue sharing proposal incorporated in the Plan is likely to reduce the number of disputes that might otherwise occur under a profit sharing plan. Profit sharing plans can give rise to annual disputes over investment costs and expenses incurred by the utility, particularly affiliated interest transactions. Little will be gained if the Commission is required to conduct a mini-rate case each year to ascertain the profit realized by the company. The sharing mechanism in the Plan is unlikely to generate major controversy because revenues are more readily ascertained.[34]

Regulatory Lag. Another benefit of the Plan is the elimination of regulatory lag. While traditional regulatory methods have produced significant rate decreases over the past few years, the ponderous nature of Commission-initiated earnings investigations routinely delays the receipt of customer benefits. Whenever such an investigation is begun, staff must conduct a preliminary earnings review, obtain permission to begin a formal investigation, engage in document discovery, audit the company's books, and prepare testimony in support of its position. Subsequently, the utility and other interested parties must be given an opportunity to respond, hearings must be held, briefs filed and an order issued by the Commission.

Until the investigation is complete and the Commission determines that a rate reduction is warranted, utility shareholders are entitled to keep any excess earnings realized by the company. Even then, there is no certainty that ratepayers will receive a rate reduction. Court appeals further prolong the process, and usually postpone Commission-authorized rate relief by an additional 2-3 years. The earnings investigation of USWC in Docket UT 85 is a good example of the delays associated with current regulatory procedures. The revenue requirement portion of that case alone took well over a year to complete. Although the process ultimately resulted in a $24 million rate reduction on January 1, 1990, the Commission order authorizing that decrease has been postponed indefinitely pending USWC's appeal.

Investigatory proceedings such as those described above will be unnecessary under the Plan. Monitoring USWC's results of operations will entail significantly less time, effort, and controversy than that associated with a comprehensive earnings investigation. The Commission will continue to audit USWC to insure that earnings remain within the parameters established by the Plan, but without the need for extensive rate-

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[34]Under the stipulation, USWC's earnings are relevant only for purposes of determining whether the company remains within the parameters of the Plan. The potential for disputes over the company's profit level therefore arise only when USWC's earnings are close to the upper or lower end of the 8.53-18.53 percent ROE range specified in the stipulation.

case type reviews or attendant regulatory lag.[35] Moreover, instead of the uncertainty associated with the current process, customers will be assured of no increase in essential service rates and will receive one-half of any revenues generated by USWC above the target revenue level.

Incentives. The Plan provides USWC with significant incentives and opportunities not present under rate of return regulation. Both customers and shareholders will benefit as a result.

Shareholders benefit from the Plan because any savings that USWC realizes from improved efficiency or other cost containment measures are not subject to sharing unless increased revenues are generated.[36] Affording USWC an opportunity to retain profits resulting from efficiency improvements will provide the company with an increased incentive to continually look for new ways to cut costs and streamline its operations.

The Plan also provides USWC's shareholders with the opportunity to retain one-half of the revenues generated by the company in excess of the threshold sharing level. The potential for revenue sharing will create a new set of incentives for USWC to develop new revenue-producing services, to market existing services more effectively, and to operate in a more cost effective manner. Those incentives are present only to a limited extent under rate of return regulation because all earnings generated by the company in excess of the authorized return are ultimately captured and returned to ratepayers. As noted above, the only motivation utilities now have to achieve greater returns is that offered by prospect of regulatory lag.

The increased efficiency and marketing incentives offered by the Plan will also benefit USWC's customers. Customers are advantaged by more cost efficient service, the development of new services, more innovative service packaging and usage pricing, and the potential for increased revenue sharing. When coupled with the other features of the stipulation, the Commission is persuaded that essential service customers will realize tangible benefits under the Plan.

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[35]Aside from the protracted nature of the proceedings themselves, basic resource limitations make it unlikely that the Commission could conduct a full audit of USWC's earnings during every year of the Plan.

[36]Thus, while USWC may have to share revenues when its ROE is below 13.53 percent, it is also possible for the company to earn more than that amount without sharing.

ORS 759.195(3)(d)--Potential for Undue Harm to Customer Classes

ORS 759.195(3)(d) states that the Commission may not approve an alternative form of regulation unless it finds that the pricing flexibility in the plan is "unlikely to result in undue harm to any customer class." The Commission concludes that none of USWC's customers will be unduly harmed by a Plan which meets the terms and conditions in this order. This finding is based upon the numerous customer benefits and protections described in this order and summarized below:

--Essential service customers are protected from undue harm by the five-year rate freeze and the likelihood of annual reductions as a result of revenue sharing.

--Switched access customers will not suffer any undue harm because there is no change from current regulatory treatment.

--Customers of price-listed services priced below LRIC will not suffer undue harm. The rates paid by those customers will be gradually increased to LRIC over three years. This procedure will minimize rate shock and eliminate the subsidy now received by these customers.

--Customers of price-listed services priced above LRIC are protected from undue harm by the limitations imposed by the product group maximum rate cap, the expanded number of product groupings, and the 115 percent maximum limitation. Additional protection is provided by ORS 759.195(7), which permits customers to file a complaint under ORS 756.500 challenging the reasonableness of any price-listed service.

--Customers are also protected from undue harm by the numerous other safeguards in the Plan. These include: the earnings limitation; the expanded service quality plan; the provisions to modify or terminate the Plan in the event of exogenous events; new legislation or materially changed circumstances; protections against cross-subsidization and discriminatory pricing; USWC's agreement to support "unbundling" of service elements and cost-based rates and; the provision requiring revenue-neutral rate design changes.

--Finally, customers are safeguarded from undue harm by the additional terms and conditions imposed by the Commission on the Plan. Those conditions are detailed on pages 22-31 of this order.

CONCLUSIONS

Based on the foregoing, the Commission concludes that the alternative form of regulation proposed in the stipulation submitted on June 24, 1991, together with the terms and conditions prescribed in this order, meet the statutory requirements of ORS 759.195, and should be approved.

USWC shall notify the Commission within 20 days of the date of this order whether the company will accept the alternative plan of regulation set forth in this order. If USWC accepts the terms of this order, the new regulatory framework will take effect January 1, 1992.

The rate reduction authorized in Order No. 91-576 shall take effect within 15 days of the date of this order regardless of whether the terms and conditions in this order are accepted by USWC.

ORDER

IT IS ORDERED that:

1. The alternative form of regulation set forth in the stipulation filed with the Commission on June 24, 1991, is rejected.

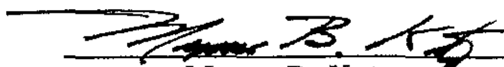
2. The Commission will approve an alternative form of regulation which corresponds to the terms and conditions set forth in this order.

3. USWC shall notify the Commission no later than December 16, 1991, whether the regulatory framework set forth in this order is acceptable. If USWC accepts the terms of this order, the regulatory framework authorized herein shall be implemented effective January 1, 1992.

4. Regardless of whether the terms and conditions of this order are accepted, the rate reduction authorized in Order No. 91-576 shall take effect no later than December 10, 1991.

Made, entered, and effective NOV 25 1991.

Ron Eachus
Chairman



Myron B. Katz
Commissioner

Joan H. Smith
Commissioner

Any party may petition for rehearing or reconsideration of this order pursuant to ORS 756.561. Any party may appeal this order pursuant to ORS 756.580.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 80
UT 85

JUN 1991
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OPUC
SALEM

In the Matter of the Application of PACIFIC NORTHWEST BELL TELEPHONE COMPANY, dba U S WEST COMMUNICATIONS to price list telecommunications services other than essential local exchange service.

In the Matter of the Investigation into the Revenue Requirement and Rate Structure of PACIFIC NORTHWEST BELL TELEPHONE COMPANY, dba U S WEST COMMUNICATIONS.

STIPULATION

WHEREAS on July 1, 1988, Pacific Northwest Bell Telephone Company, dba U S West Communications (USWC), filed an application for an Alternative Form of Regulation under ORS 757.850 (renumbered ORS 759.195); and

WHEREAS there are various issues in dispute between the Staff of the Oregon Public Utility Commission (Staff), Telephone Ratepayers Association for Cost-based and Equitable Rates (TRACER), MCI Telecommunications Corporation (MCI), and USWC; and

WHEREAS these parties and Staff are mutually desirous of resolving the revenue requirement issues in PUC docket UT 85 and all remaining issues in UT 80,

NOW, THEREFORE, for good and valuable consideration, these parties and Staff hereby stipulate and agree as follows:

1. USWC agrees not to challenge, through legislation or litigation, the Public Utility Commission of Oregon's (Commission's) authority to impute "Yellow Pages" telephone directory revenues for ratemaking purposes. This provision shall be binding on USWC during the term of the Alternative Form of Regulation Plan established in this Stipulation ("the Plan") and for five years after the end of the Plan. However, this provision does not prohibit USWC from contesting the methodology, or the amount of imputation, or from pursuing its appeal of PUC Order No. 89-1044. USWC further agrees that, if the Commission deregulates the provision of Yellow Pages directory advertising, the imputation of Yellow Pages revenues provided for in the Plan shall continue for the life of the Plan.

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USWC agrees to allow rates to go into effect according to the Commission's orders in docket UT 85. Furthermore, USWC agrees to return to its ratepayers, as the Commission directs, the difference in rates collected from the ratepayers on services rendered by USWC on and after January 1, 1990, and the interest (at the rate of 11.20% per annum) associated with the delay in implementing the UT 85 rate reductions from January 1, 1990. USWC further agrees that it will dismiss its appeal of the revenue requirement portions of the Commission's UT 85 order.

2. USWC agrees to dismiss its appeal of PUC Order 89-1807 (PUC docket UT-85). The parties agree that any judicial decisions concerning the Commission's jurisdiction over "Yellow Pages" telephone directory revenues, and the Commission's authority to impute such revenues, rendered while the Plan is in effect shall not affect the Plan. Further, USWC agrees to waive any claim it may have regarding the Commission's jurisdiction and authority over Yellow Pages directory revenues under any such judicial decision for five years after the end of the Plan, except as otherwise provided in Paragraph 1 above regarding the methodology and amount of imputation.

THE PLAN

3. The duration of the Plan shall be five (5) years, except as otherwise provided in this Stipulation. The Plan shall begin on the first day of the month following USWC's election to proceed with the Plan.

4. <u>The Annual Adjustment Formula</u>

The Annual Adjustment Formula shall be determined by whichever of the following equations results in the lower price:

Equation 1: New Price = Old Price * (1 + GNP-PI - P)
Equation 2: New Price = Old Price * (1 + TIPI - P)

Where: GNP-PI is the percentage change in the 75-day revision of the Gross National Product Price Index and is measured over the most recent four-quarter period ending at least four-and-one-half months before the Plan's anniversary date for application to rates beginning on the Plan's anniversary date. This sequence of events is to be repeated as long as the Plan is in effect. TIPI is the percentage change in the Simplified Telephone Input Price Index (TIPI) as described in Attachment 1 of Mr. Inouye's Verified Statement and further described in the document "The Oregon Telephone Input Price Index" as supplied by USWC in response to Staff Data Request #3, parts of which are attached to this Stipulation as Attachment A, and simplified in Exhibit CTI-19 of Mr. Inouye's rebuttal testimony of

May 15, 1989, and attached hereto as Attachment B, and as modified to reflect the recommendations of Ms. Fagenstrom's surrebuttal testimony of June 2, 1989, attached hereto as Attachment C, and as further modified by the recommendations of Dr. Arrington's surrebuttal testimony of June 2, 1989, attached hereto as Attachment D. P is the productivity offset.

Weight year 1988 shall be the base year for the TIPI and shall not be changed unless any single weight changes by more than five percent from the base year. Thus, weights shall be updated and a new base year established for purposes of rates if a particular base year weight changes in either direction by more than five percent. For example, if .4 changes to .43 this would trigger a weight change.

Equations 1 and 2 shall be applied independently as illustrated by the example in Exhibit CTI-1 of Mr. Inouye's rebuttal testimony of May 15, 1989, attached hereto as Attachment E.

Beginning on the first anniversary date of the Plan, and annually thereafter during the life of the Plan, the prices for essential services listed in the Second-Amended Appendix A to USWC's Petition in this docket (the Petition) shall be adjusted upward or downward by the Adjustment Formula.

The $.25 public coin and semi-public coin telephone price shall remain fixed during the life of the Plan unless the Commission orders imputation of the Public Access Line rate on all or a portion of USWC's public coin or semi-public coin telephone rates.

5. Rates for essential services

a. For essential services, except switched access charges, the productivity factor to be used in the Annual Adjustment Formula set forth in Paragraph 4 herein shall equal the percentage change in the GNPPI for Equation 1; and the percentage change in the TIPI for Equation 2. This shall become effective beginning with the implementation date of the Plan as may be ordered by the Commission in this docket, at the rate levels which the Commission established in its rate design order in docket UT 85, and as may be changed in docket UT 102, and be in effect for the duration of the Plan. This provision does not prohibit revenue-neutral essential service rate design changes during the term of the Plan.

b. Switched Access charges shall continue to be determined under the Federal Communications Commission's (FCC) rules, Parts 36, 64, and 69, as proposed by Staff witness Harris (Exhibit Staff/23, Harris/17-18), except as described in Attachment F to this Stipulation, or as may be ordered

otherwise by the Commission in docket UM 384 or other PUC dockets. Any changes in USWC's Switched Access charges ordered by the Commission in docket UM 384, or other PUC dockets, shall be revenue neutral to USWC.

6. Formula for revenue sharing

a. The productivity factor to be used for the revenue-sharing formula shall be four (4) percent, and the method of calculating the annual revenue credit shall be as described in Exhibit CTI-18 of Exhibit USWC/6.

b. The return on equity ("ROE") to be used to calculate the revenue-sharing benchmark shall be the 13.53 percent ROE which the Commission authorized in docket UT-85 (Order No. 89-1807).

c. The revenue requirement for developing the STARTING POINT, as referred to in Exhibit CTI-18 of USWC/6, for calculating revenue sharing shall be the revenue requirement resulting from the Commission's orders in dockets UT 85 and UT 102 (Order Nos. 89-1807 and 91-576).

d. For purposes of revenue sharing under the Plan, revenues from Yellow Pages shall be included in the revenue-sharing calculation and shall be calculated as a contribution per Oregon access line, as set forth in page one of Attachment G to this Stipulation.

e. For each year for which there are revenues forecasted to be shared with USWC's ratepayers under the Plan, the Commission, upon receiving notice of such situation from its Staff or USWC, shall afford USWC's ratepayers and other interested persons a reasonable opportunity to comment on how the shared revenues should be allocated among USWC's various customer classes.

f. As agreed to by USWC and Staff in PUC docket UT 102, in the event the Commission's order in UT 80 allows USWC to start an alternative form of regulation (AFOR), USWC agrees to credit to customers $8.1 million of revenue sharing for the first twelve months of the AFOR.

g. Excluding the revenue sharing provided for in PUC docket UT 102, revenue sharing for subsequent years, if any, shall be calculated using the formula described in Paragraph 6 herein, as amended in the framework described in Attachment G to this Stipulation.

7. USWC's price-listed services

a. Services that are subject to price listing and which are priced below Long Run Incremental Cost (LRIC) shall be adjusted to LRIC in three (3) equal annual adjustments as proposed by Staff witness Harris (Exhibit Staff/23, Harris/17-18).

b. All Price-Listed Services listed in Attachment H to this Stipulation that are priced above LRIC are subject to a maximum price cap until USWC demonstrates that it lacks "market power" for individual services. IntraLATA toll shall continue to be offered on the basis of statewide average prices as set forth in the First Amended Appendix D of the Petition.

c. The Price-Listed Services in Attachment H to this Stipulation, including intraLATA toll, are subject to a maximum price cap of 10 percent above the prices established by the Commission at the conclusion of docket UT 85, and as may be changed in docket UT 102. The 10 percent maximum price cap shall be adjusted annually by applying the Annual Adjustment Formula to the maximum price for the previous year. The parties agree that the maximum price for intraLATA toll is specifically intended to replace or supercede the maximum price for intraLATA toll established in PUC Order No. 89-221 in docket UT 47. The parties further agree that the minimum price for intraLATA toll shall continue to be imputed access plus long run incremental cost as described in Order No. 89-221 in docket UT 47.

d. The maximum price cap shall apply on the weighted average prices of the individual tariff items within the product groupings in Attachment H. Prices shall be weighted by the quantity sold. Within each product grouping, individual tariff elements cannot increase more than 10 percent per year.

e. The maximum price cap shall not be recalculated during the Plan unless a service is shown to be subject to competition. At the time of any such recalculation, the new maximum price cap shall be calculated using the method described in Exhibit Staff/21 and the following parameters. For the purpose of determining maximum price caps solely, the Return on Equity (ROE) shall be the UT 85 authorized ROE plus 2.27 percentage points. (See Attachment I to this Stipulation, page 1.) The rate base shall be based upon the most recent CE 92 report, subject to the provisions contained in Paragraph 10.b. The revenues shall be those derived from Price-Listed Services in the most recent 12 months ending June 30. (See Attachment I, page 2.)

f. "Market power," for the purpose of retaining/removing price caps on price-listed and new non-essential price-listed services, shall be determined through the "general market analysis" proposed by Staff (PUC docket UT 80 Tr. 7/25/89, p. 195). The "general market analysis" may include several measures such as: existence of alternative providers, market share, price elasticity of demand, minimum viable scale, barriers to market entry, and economies of scale. The relevant market for analysis may, but need not, be the total State of Oregon.

g. The product groupings, for the purpose of determining maximum price caps on individual tariff items shall be as shown in Attachment H to this Stipulation.

h. The productivity factor to be used in the Annual Adjustment Formula, as described in Paragraph 4 herein, for the purposes of indexing the maximum price caps shall equal four (4) percent.

i. In no event, during the term of this Stipulation, shall the removal of a service from the maximum price cap cause the 110 percent maximum price cap provided herein to exceed 115 percent of the service price that the Commission established in its rate design order in docket UT 85, and as may be changed in docket UT 102, or as may be required in PUC docket UM 351, or any other related dockets.

8. Incorporation of UM 351 Decision(s)

a. Any costing methodology and cost estimates adopted by the Commission in PUC docket UM 351 shall, to the extent ordered by the Commission, be integrated by USWC into the Plan to establish price floors for both essential and non-essential services. As may be required by the Commission, services will be redefined, priced, tariffed and/or price listed consistent with approved "building blocks." The intent of this Paragraph is to insure that the Commission has the ability to incorporate any ordered "building block" approach from UM 351 into the Plan and that each essential and non-essential service, except those specifically identified by the Commission for different treatment within the Plan, are priced at or above the approved cost standard and pursuant to the pricing standards and imputation standards ordered.

b. If, as a result of new long-run incremental cost (LRIC) estimates adopted by the Commission in UM 351 or any related docket, USWC is required to raise its rates for price-listed services, USWC shall reduce rates on other services so that the overall rate changes are revenue neutral.

9. Cost-based rates

USWC agrees that, during the life of the Plan, it will not propose or support revenue-neutral filings made under ORS 759.180 - 190 that are inconsistent with the following language in PUC Order No. 90-920, at page 13: "Rates for telecommunications services should be adjusted gradually over time to reflect the cost of supplying those services."

10. <u>Monitoring the plan for purposes of reconsideration</u>

a. The Commission and USWC shall have the right to seek reconsideration of the terms of the Commission's final order in this docket, UT 80, or to terminate the Plan, if any of the following conditions exist:

(1) In any year, USWC's earned return on common equity in the prior calendar year is greater than five percentage points higher or lower than its authorized return on common equity determined in Docket No. UT 85; or

(2) Exogenous events (*e.g.*, changes in tax rates, mandated changes in depreciation rates, FCC orders, court orders, and state or federal legislation) cause either party to anticipate a shift in USWC's return outside the range of five percentage points above or below its authorized return on common equity established by the Commission in PUC docket UT 85; or

(3) USWC fails to conform to the requirements of Paragraph 18 above after notice and reasonable opportunity to cure any such noncompliance; or

(4) USWC fails to comply with the provisions of this Stipulation after notice and reasonable opportunity to cure any such noncompliance.

b. With regard to condition (1) above, the bases for making this determination are the USWC reports <u>Commission Bases Results of Operations for the Oregon Intrastate Jurisdiction (CE-92, CE-92A, & CE-92B)</u>, hereafter referred to as the "books." USWC shall report its "books" in conformance with the Uniform System of Account as adopted by this Commission; Parts 36, 64, and 69 of the FCC Rules and Regulations; and PUC Rules and Regulations as adopted by this Commission. Adjustments to the "books" shall be limited to the rate-making disallowances and adjustments ordered in UT 85 as more fully described in Attachment J to this Stipulation. No additional disallowances or adjustments may be made with the exception of unapproved affiliated interest payments and exogenous events. USWC is entitled to include expenses for affiliated interest transactions (subject to the adjustments and limitations contained in Attachment J) that have been approved by the Commission. Attachment K to this Stipulation illustrates (by numerical example) the calculation of affiliated interest expense using the method provided in Attachment J.

If USWC's earned return on equity threshold is exceeded, or any of the other three conditions referenced in Paragraph 10.a. above exist, USWC and Staff shall set and conduct a settlements conference in an attempt to resolve issues, disallowances, adjustments, treatment of exogenous events or remedies for any of the conditions referenced in paragraph 10.a., before petitioning the Commission for remedies. Such settlements conference shall be held within two months of notification by either party. If, as a result of such settlements conference the parties are unable to resolve such issues, disallowances, adjustments, treatment of exogenous events or remedies for any of the conditions referenced in paragraph 10.a., either party may petition the Commission to commence a proceeding to formally review USWC's revenues and earnings, request a modification or termination of the plan, or order remedies for any condition referenced in paragraph 10.a. If such a proceeding is initiated, all parties retain the right to contest any revenue, expense or rate base item in the context of that proceeding.

c. With regard to condition (2) above, USWC's "books" developed to satisfy condition (1) shall serve as the starting point. The financial effects of exogenous events shall simply be pro forma adjustments to the "books" thus making the "books" appear as if the event had actually occurred. All pro forma adjustments shall be calculated using booked financial data. No adjustments for volume changes outside the reporting year shall be permitted for exogenous changes. Volume changes include, but are not limited to, changes in the level of USWC employes, increases or decreases in minutes of use or access lines, and increases or decreases in USWC rate base. Exogenous events are defined as events imposed by acts of governmental or quasi-governmental agencies.

(d) For purposes of monitoring, the parties agree that USWC will use the depreciation rates and amortization schedules for each class of plant which are implicitly or explicitly authorized in the Commission's final order in docket No. UT 85, or any subsequent relevant Commission order which supersedes these rates.

(e) For purposes of calculating USWC's earned return of equity, the parties agree to use the capital structure and embedded debt cost stipulated to by USWC and Staff in PUC docket UT 85.

11. Other administration and monitoring provisions of the plan are as contained in the testimony of Staff witness Harris (Exhibit Staff/23), and amended by Company witness Inouye in Section 8.2, rebuttal testimony, May 15, 1989.

12. All attachments, testimonies, and exhibits referred to in this Stipulation are, by this reference, incorporated herein.

13. If the Utility Reform Project (URP) or Citizens' Utility Board (CUB) ultimately prevails on appeal of the Commission's orders in PUC docket UT 85, the parties shall modify the rate levels and earnings test in this Stipulation to comply with the Court's decision(s) and the Commission's order(s) on remand, if any.

14. Six months prior to the end of the term of the Plan, USWC shall, at the Commission's request, submit a general rate filing under ORS 759.180. The purpose of this filing shall be to update and true-up USWC's rates. The Commission shall formally notify USWC of any such request at a public meeting at least nine months prior to the end of the term of this Plan.

15. The parties agree that implementation of this Stipulation is contingent on the Commission's determination that USWC is currently in compliance, as of April 1, 1991, with the quality of service agreements stipulated to by Staff and USWC on November 8, 1988. The parties further agree that the quality of service plan (Exhibit Staff/6, Birko/1-7) should be modified to include quality standards which apply to dedicated services, such as Private Line. The parties agree that they will work together in an informal process to agree upon standards to be presented to the Commission for modification of the present quality of service plan. If, as a result of such informal process, the parties are unable to resolve the dispute, any party may petition the Commission to commence a proceeding to resolve the dispute.

If a non-compliance determination is made by the Commission, USWC shall have 120 days to improve service and gain compliance; otherwise, the Plan becomes null and void. However USWC shall, subject to the provisions of Paragraph 16 of this Stipulation, comply with Paragraphs 1 and 2 of this Stipulation even if a non-compliance determination is made by the Commission. If, at any later date, the Commission finds that USWC is not in compliance with the aforementioned quality of service agreements, then the Commission, in its discretion, may terminate the Plan.

16. If the Commission offers USWC this Plan, USWC shall comply with Paragraphs 1 and 2 of the Stipulation irrespective of whether USWC decides to accept and implement this Plan.

If the Commission does not adopt this Stipulation but offers USWC another AFOR and USWC accepts that AFOR, USWC shall comply with Paragraphs 1 and 2 of this Stipulation.

17. This Plan shall govern all PUC-regulated products and services offered by USWC during the life of the Plan. However, this provision does not prohibit USWC from petitioning the Commission to deregulate products and services under ORS 759.030(2) and (3). The Commission or USWC may terminate the Plan, upon notice and hearings, if the Commission finds that, as a result of new Oregon legislation, the intent, operation, or results of the Plan will be materially affected and changed, or the Plan no longer meets the standards in ORS 759.195.

18. USWC shall provide to the Commission and its duly authorized representatives, upon request, all books of account, records, documents, and relevant information, including explanatory information, of USWC and its affiliates, as applicable under ORS 759.375 through 759.395, which pertain to USWC's operations under this Stipulation and any alternative form of regulation plan which may be approved by the Commission and accepted by USWC in this Docket, for the purposes of the Commission's monitoring, supervising, examination, auditing and regulation of said operations of USWC.

19. If any dispute concerning the compliance with the terms of the Plan, interpretation of the terms, or interpretation of this Stipulation or any other stipulation related to the Plan arises, any party to this Stipulation may request a settlement conference of all parties to this Stipulation. Staff shall schedule and conduct a settlement conference in an attempt to resolve the dispute. The settlement conference shall be held within 60 days of notification of the parties. If, as a result of such settlement conference, the parties are unable to resolve the dispute, any party may petition the Commission to commence a proceeding to resolve the dispute.

If any dispute arises between parties or Staff concerning the operation or results of the Plan but is not addressed by other provisions of this Stipulation, or other related agreements, Staff shall schedule and conduct a settlement conference in an attempt to resolve the dispute. The settlement conference shall be held within 60 days of notification of the parties. If, as a result of such settlement conference, the parties are unable to resolve the dispute, any party may petition the Commission to commence a proceeding to resolve the dispute. The Commission shall resolve the dispute in a way that is consistent with the intent of the Plan as manifested in this Stipulation, and in accordance with the standards in ORS 759.195.

20. TRACER agrees not to oppose this Stipulation or other elements of the Plan in the context of UT 80.

21. The parties recommend that the Commission adopt this stipulation in its entirety. The parties have negotiated this stipulation as an integrated document. Accordingly, if the Commission rejects all or any material part of this Stipulation or Plan, or adds elements to this Stipulation or Plan which are not contemplated in this Stipulation, each party reserves the right to withdraw from the Stipulation, upon written notice to the Commission and the other parties within fifteen (15) days of rejection, except as otherwise provided herein.

22. The parties agree that this Stipulation in no manner binds the Commission in ruling in these dockets. The Stipulation in no manner restricts the Commission's exercise of its discretion in this or any other proceeding.

OREGON PUBLIC UTILITY COMISSION STAFF (Staff)

By: W. Benny Won   Dated: June 10, 1991
W. BENNY WON
Assistant Attorney General
Attorney for Staff

PACIFIC NORTHWEST BELL TELEPHONE
COMPANY, dba U S WEST COMMUNICATIONS (USWC)

By: Charles L Best   Dated: 6/11/91
CHARLES L. BEST
Chief Counsel - Oregon
Attorney for USWC

MCI Telecommunications Corporation (MCI)

By: Sue E. Weiske   Dated: 6/19/91
SUE WEISKE
Attorney for MCI

Telephone Ratepayers Association for Cost-based and Equitable Rates (TRACER)

By: Mark P. Trinchero   Dated: 6/17/91
MARK P. TRINCHERO
Attorney for TRACER

By: ______________________   Dated: ____________

STATE OF OREGON
MARION COUNTY COURTS
MAR - 1 2004
FILED

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2
3
4 IN THE CIRCUIT COURT OF THE STATE OF OREGON
5 FOR THE COUNTY OF MARION

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, formerly known as THE NORTHWEST PAYPHONE ASSOCIATION, Plaintiff, v. PUBLIC UTILITY COMMISSION OF OREGON, Defendant, And QWEST CORPORATION, Intervenor-Defendant.	Case No. 02C14442 Judge Claudia Burton ORDER GRANTING PLAINTIFF'S MOTION TO PRESENT ADDITIONAL EVIDENCE

16 This matter came before the court for hearing on February 2, 2004, on the motion
17 of Plaintiff for an order remanding to the Oregon Public Utility Commission ("OPUC") or for an
18 order to the OPUC to take additional evidence with respect to Order No. 02-181, entered on
19 March 22, 2002, in docket DR 26/UC 600. The court has considered the Plaintiff's motion, the
20 response of Intervenor-Defendant Qwest in opposition to the motion, and the replies of the
21 Plaintiff and Defendant and has heard the arguments of all the parties. The court agrees that the
22 motion under ORS 756.600 is appropriate, finding as follows:

23 1. The motion satisfies the requirements of ORS 756.600.

24 2. The OPUC is instructed to take additional evidence as set forth in
25 ORS 756.600.

26

MILLER NASH LLP
ATTORNEYS AT LAW
TELEPHONE (206) 622-8484
4400 TWO UNION SQUARE
601 UNION STREET, SEATTLE, WASHINGTON 98101-2352

1 3. The court is not reversing the OPUC because it is not finding that the
2 Plaintiff's complaint to the OPUC was not moot, but is finding that there is nothing in the
3 record to support a finding of whether or not the case was moot.

4 4. Based on the court's ruling under ORS 756.600, the court does not need to
5 reach Plaintiff's arguments under ORS 756.598.

6 NOW, THEREFORE, the court GRANTS Plaintiff's motion and hereby
7 INSTRUCTS the OPUC to take additional evidence in Docket No. DR 26/UC 600 , including
8 entertaining such evidence, briefing, and argument as may be required by law or as the OPUC
9 may find appropriate and within the scope of its lawful exercise of discretion.

10 FURTHER, the court hereby STAYS this case pending the further OPUC
11 proceedings. The Plaintiff, with the concurrence of the other parties, shall file a joint status
12 report at such time as the matter is resolved by OPUC or, within one year of the date of this order
13 if not then resolved. If none of the parties files a report with the court within a year, this case
14 will be dismissed.

15

16 ENTERED this 1 day of ~~February~~ Mar, 2004.

17 /s/ Claudia Burton

18 The Honorable Claudia Burton

19 Presented by:

20 MILLER NASH LLP

21 [signature]

22 Brooks E. Harlow, OSB No. 03042

23 Attorneys Plaintiff

24

25

26

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

RECEIVED
JAN 2 5 2005
Public Utility Commission of Oregon
Administrative Hearings Division

DR 26/ UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL,	)	
Complainant,	)	PUBLIC UTILITY COMMISSION OF OREGON STAFF'S REPLY TO QWEST'S CROSS-MOTION FOR SUMMARY JUDGMENT
v.	)	
QWEST CORPORATION,	)	
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. **<u>The Court of Appeals remand of the Commission's order in UT 125.</u>**

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.

DOCKETED

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. **<u>The parties' cross-motions for summary judgment only request a determination of refund liability and not a refund calculation.</u>**

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. **<u>At this time, Staff does not have a position of the issue of refund liability.</u>**

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 of 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 the 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 25th day of January 2005.

Respectfully submitted,

HARDY MYERS
Attorney General

Jason W. Jones, #00059
Assistant Attorney General
Of Attorneys for Public Utility
Commission of Oregon Staff

---

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.

CERTIFICATE OF SERVICE

I certify that on January, 25, 2005, I served the foregoing DR 26/UC 600 PUBLIC UTILITY COMMISSION OF OREGON STAFF'S REPLY TO QWEST'S CROSS MOTION FOR SUMMARY JUDGMENT upon the parties hereto by sending a true, exact and full copy by regular mail, postage prepaid to:

Lawrence Reichman
Perkins Coie, LLP
1120 N.W. Couch Street, 10th Floor
Portland, OR 97209-4128

Brooks Harlow
Miller Nash, LLP
601 Union St STE 4400
Seattle, WA 98101-2352

DATED this 25th day of January 2005.

Respectfully submitted,

HARDY MYERS
Attorney General

Jason W. Jones, #00059
Assistant Attorney General
Of Attorneys for Public Utility
Commission of Oregon Staff,
State of Oregon, Defendant

Franklin G. Patrick
OSB ID Number 760228
fgplawpc@hotmail.com
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(503) 245-1448 (fax)
Attorney for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF OREGON

PORTLAND DIVISION

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, Unidentified PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.

Plaintiffs,

v.

QWEST CORPORATION, UNIDENTFIED CORPORATIONS I-X and JOHN DOES 1-10.

Defendants.

Case No: CV 09 1351 BR

FIRST AMENDED COMPLAINT FOR DECLARATORY RELIEF AND DAMAGES
DEMAND FOR JURY TRIAL

Frank G. Patrick attorney files this First Amended Complaint, there having been no

service on nor appearance by any Defendant and Counsel herein appearing for: The Northwest Public Communications Council ("NPCC") representative of those unidentified Payphone Service Providers A to Z; and the payphone service providers members of the NPCC formerly appearing by the NPCC and now appearing as the real party in interest individually to wit: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.; referred to herein collectively with NPCC as the "Plaintiffs"; which allege as follows:

PRELIMINARY STATEMENT OF CASE

The Communications Act of 1934 (the "TCA") governed the telecommunications industry as a protected monopoly until the historic breakup of AT&T that began in 1984 with the settlement of the government's antitrust case before US District Court Judge Harold H. Greene in 1982 effective January 1, 1984. During the process of the break up of AT&T into the "Baby Bells", or regional Bell operating companies, (RBOCs), the Federal Communications Commission (the "FCC") and Congress came to realize that the goal of creating a competitive marketplace in the very broad spectrum of services encompassed in that industry, required very precise and demanding rules and regulations. It was not until 1996 that Congress and the FCC finally reached the inequities that were in existence in the payphone segment of the telephone service industry. Congress passed the Telecommunications Act of 1996 (the "1996 Act") to modify the TCA to correct the financial hardships that were being visited upon a small group of businesses nation wide, that were seeking to

compete with the now regional giants, the RBOCs, in the offering of payphones to the public.

The small independent competitors had to compete to gain sites, to install their payphones, had to finance the acquisition of equipment, technology, marketing and servicing of their payphones in the face of the entrenched and well financed "Baby Bells" which retained their monopoly over public access lines ("PALs") (also known as the "dial tone") essential for the operation of their coin operated pay telephones from which they hoped to profit. The task of making a profit was made virtually impossible until the 1996 Act required that the revenues from the payphone initiated long distance calls be shared with the owners of the payphones from which those long distance calls were made by use of coins, credit cards or third party billings.

Prior to its breakup, and the passage of the 1996 Act, the long distance company (AT&T) was also the dominant owner of the public payphones and got the benefit of all payphone revenues. After the break up, however, the long distance revenues were valuable to the Baby Bells, which were then made competitors of the independent payphone operators in their regions. They too wanted a piece of the lucrative long distance business, some of which came through the use of the payphones of which the Baby Bells had become the largest owners nationally and in virtually every state and city. Prior to the 1996 Act neither the Baby Bells nor the new independent payphone operators got any revenue for the use of a payphone when used to place a long distance call unless the user paid with coins. Amazingly even to this day, every payphone is required to let any user dial an "800" number absolutely without charge, even when it is being used to place an "800" call to a competing "calling card provider."

With the passage of the 1996 Act, finally, the new independent PSPs were ordered to get a piece of the profit from the use of a payphone used to make a long distance call ("Dial Around

Commissions" or "DAC") which the once ever present payphone provided the means to generate. But these new businesses were soon to learn that the Baby Bells were tough competitors. Even when the RBOCs finally acknowledged the obligation to reduce their rates for the PALs, and after agreeing with the FCC to pay refunds of overcharges to the independent operators, as a quid pro quo for obtaining millions in DAC, under the "Waiver Order" (as defined below), and despite being ordered to reduce the cost of the telephone monthly rates for such PALs to their actual cost plus a small overhead charge, the RBOCs, including Qwest, maintained that their rates complied with the 1996 Act requirements, and litigated the issue repeatedly, including at the Oregon Public Utilities Commission (the "Oregon PUC"). Qwest, in this area, has litigated the extent of its obligation to their tiny competitors for the last eleven years, keeping the revenues of unlawfully charged rates. It is unquestionable that in Oregon, the PUC has now determined the rates Qwest charged its former PSP competitors during the period May 1, 1996 through November 15, 2007 were higher than the rates permitted by Oregon law, which lawful payphone rates were required to comply with the requirements of the 1996 Act. The determination of rates that complied with the 1996 Act was not finally made effective until November 15, 2007. The rates determined in November 2007 were dramatically lower than those charged by Qwest commencing May 1, 1996, thus creating a refund obligation for the difference.

The independent payphone operators have gradually contracted their businesses, prematurely because of the "too late" reduction in PAL rates, which caused a lack of profit and capital; sums of money that have been charged unlawfully and kept during this eleven year process in the bank accounts of Qwest. The starvation has gradually forced the independent operators to cease their "deployment" of payphones contrary to the purpose of the 1996 Act to facilitate the availability of

pay telephones to the general public. Today, it is almost impossible to find a payphone in any public location. What once was an ever present and convenient tool, the payphone, for every student who needed a ride, every lawyer who had to call an office during a trial from a courthouse or every inmate needing to reach a lawyer, is becoming extinct. It was described in one series of Bell advertisements by the definition of the word: "u·biq·ui·tous adj: present everywhere at once, or seeming to be…."

The spirit and the intent, as well as the letter, of the TCA have been violated by the failure to comply timely with the law. The same acts also constitute violations of Oregon law. The wrongful withholding of refunds has produced damages under the provisions of the TCA and Oregon law that the Plaintiffs are now seeking. This litigation along with the amended complaint filed in the Marion County Circuit Court, with a caption the same as in this case, except that the Oregon PUC is also a party, Docket No. 02C14442 (the "Marion County Action") and recent actions taken in the Oregon PUC are the latest in the eleven year effort by the independent payphone operators in Oregon, to obtain what the TCA of 1996 under the authority of the FCC ordered Qwest to do, what the Oregon Court of Appeals ordered Qwest and the Oregon PUC to do and what the Plaintiffs believe the Oregon PUC ordered Qwest to do; reduce the rates to payphone operators and refund wrongly charged monthly phone bills for the billing periods during which the rates were unlawful; in Oregon from May 1, 1996 until November 15, 2007.

The rates were, during years of debate at the Oregon PUC, reduced and made legally effective in Oregon on November 15, 2007; but the full refunds have not yet been calculated or paid. Qwest has for years claimed that the TCA and the FCC orders are not clear. While Plaintiffs do not agree with that characterization, any doubt must be removed. Prior to the filing of this amended

complaint, Plaintiff s filed with the Oregon PUC a Second Amended Complaint for a refund to the Plaintiffs herein, in a case that had been abated for years until February of 2009, awaiting a request for clarification by the Oregon PUC to the FCC. The clarification has not been forthcoming, and while the Oregon PUC may decide the pending Oregon Refund case without reference to the TCA, under the Oregon Statutes alone, it remains unsettled. The Federal questions are still ripe to provide the clarification that the Oregon PUC had unsuccessfully sought and for the balance of the Plaintiff's claims which require an Order from this court as requested herein as well as clarification of Federal law with respect to FCC Orders under the TCA and interpretation of the TCA for the benefit of the Oregon PUC.

The NPCC[1], Central Telephone, Inc., Communication Management Services, LLC, Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC, Interwest Telecom Services Corporation, NSC Communications Public Services Corporation, National Payphone Services, LLC, Pacific Northwest Payphones, Partners in Communication, T & C Management, LLC, Corban Technologies, Inc., and Valley Pay Phones, Inc. (collectively the "Plaintiffs" and each individually a "Plaintiff"), through their attorney, Frank G. Patrick, Esq., for their complaint allege as follows.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under 28 U.S.C. §1331 because Plaintiffs' claims arise under the laws of the United States. This Court has subject matter jurisdiction under 28 U.S.C. §1337 because Plaintiffs' claims arise under the Communications Act of 1934, 47 U.S.C. §1 et seq., as amended by the Telecommunications Act of 1996 which constitute Acts of Congress

[1] NPCC was formerly known as the Northwest Payphone Association until in or about 2001.

regulating commerce. This Court also has pendant and supplemental jurisdiction over all state law claims or issues pursuant to 28 U.S.C. §1367.

2. Venue is proper in this District pursuant to 28 U.S.C. §§1391 and 1392 because substantial parts of the claims asserted herein arose in this District, the defendants reside in this District and operate and have ongoing and continuous business contacts in this District and many of the prospective witnesses to the acts alleged herein reside in this District.

3. In connection with the acts, transactions and conduct alleged herein, defendants, directly and/or indirectly, use the means and instrumentalities of interstate commerce, including the United States mail and other forms of wire communication, such as telephone and facsimile communications.

4. This Court has personal jurisdiction over the defendants because defendants conduct substantial continuous business in this District.

5. Pursuant to 28 U.S.C. §2201, 47 U.S.C. §§201, 202, 206, 207 and 276, this complaint encompasses an action for declaratory judgment and other relief under the laws of the United States.

PARTIES

6. Plaintiff NPCC is a regional trade association representing companies and individuals who provide payphone services (as defined in 47 U.S.C. §276(d)) to the general public (such payphone services are referred to herein as "Payphone Services"). The companies and persons who provide Payphone Services are referred to as "PSPs" and each individually is a "PSP."

7. NPCC is comprised of member PSPs operating in Idaho, Montana, Oregon and Washington, including all the other Plaintiffs who are each PSPs (such Plaintiffs are referred to herein as the "PSP Plaintiffs").

8. The PSP Plaintiffs and other NPCC PSP members provide Payphone Services that compete with the Payphone Services provided by local exchange carriers (as defined in 47 U.S.C. §153(26)) (collectively "LECs" and individually a "LEC") in the areas in which the PSPs operate.

9. NPCC PSP members purchase access to public access lines and related telephone exchange services (as defined in 47 U.S.C. §153(47)) and exchange access services (as defined in 47 U.S.C. §153(16)) from LECs to provide their own Payphone Services to the public. Most, if not all, of NPCC's PSP members purchase "smart" and "basic" PAL service from Qwest Corporation ("Qwest") to connect their payphones to the local telecommunications network and, through that local network, the national and international telephone networks.

10. Qwest is the largest LEC in the 14 Western States in which Qwest acts as a LEC (the "Qwest Service Area").

11. NPCC's principal office is in Beaverton, Oregon.

12. Plaintiff Central Telephone, Inc. is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

13. Plaintiff Communication Management Services, LLC is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

14. Plaintiff Davel Communications a/k/a Phonetel Technologies, Inc. is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

15. Plaintiff Interwest Tel, LLC is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

16. Plaintiff Interwest Telecom Services Corporation is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

17. Plaintiff NSC Communications Public Services Corporation is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

18. Plaintiff National Payphone Services, LLC is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

19. Plaintiff Pacific Northwest Payphones is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

20. Plaintiff Partners in Communication is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

21. Plaintiff T & C Management, LLC is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

22. Plaintiff Corban Technologies, Inc. is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

23. Plaintiff Valley Pay Phones, Inc. is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

24. Upon information and belief, defendant Qwest is a Colorado corporation with its principal place of business located in Denver, Colorado and with offices in Oregon.

25. Qwest is a successor or assign of U.S. WEST Communications, Inc. (a/k/a U.S. WEST Communications Company) and is a "Bell operating company" ("BOC") as that term is defined in 47 U.S.C. §153(4).

26. The BOCs along with independent LECs who had regulated monopolies in the provision of telephone exchange services and exchange access prior to deregulation of the telecommunications industry in 1984 are referred to as "Incumbent LECs" and individually as an

"Incumbent LEC."

27. Upon information and belief, Unidentified Corporations I-X are corporations incorporated in various states presently unknown to plaintiffs who are both affiliated and unaffiliated with Qwest.

28. Upon information and belief, the Unidentified Corporations I-X, in conjunction with Qwest, provide and/or receive from Qwest, access to basic and enhanced telecommunications services that relate to the provision of Payphone Services.

29. Upon information and belief, the John Does 1-10 are individuals who acted in concert with Qwest and/or the Unidentified Corporations I-X in perpetrating the unlawful acts as alleged herein. The Unidentified Corporations I-X, the John Does 1-10 together with Qwest and its predecessors in interest, including, but not limited to US WEST, Inc. and US WEST Communications, Inc., or their related entities to the extent that such related entities may be liable for the damages, including refunds, sought herein are collectively referred to herein as the "Defendants."

30. PSP Plaintiffs and Defendants engage in intrastate and interstate commerce within the Qwest Service Area.

BACKGROUND FACTS COMMON TO ALL CLAIMS

31. Among the largest LECs are the former BOCs. At relevant times, the BOCs have been, and are, among the largest owners of pay phones in the United States.

32. Until in or about 2004, Qwest was the largest owner of pay phones in the State of Oregon and in the 13 other states in the Qwest Service Area.

33. Until the sale of its pay phone business, Qwest owned more than 80% of the pay

phones in the State of Oregon and in the other states in the Qwest Service Area.

34. With a few exceptions, when the 1996 Act was adopted, Qwest owned a complete monopoly of the telephone exchange services and exchange access in the Qwest Service Area, including the State of Oregon.

35. The combination of ownership of more than 80% of the pay phones in Oregon and the rest of the Qwest Service Area and its monopoly of telephone exchange services and exchange access in the Qwest Service Area gave Qwest monopoly power in the provision of Payphone Services in the State of Oregon and the rest of the Qwest Service Area.

36. Qwest and certain of the Unidentified Corporations I-X and John Does 1-10 (the "Regulated Defendants") are regulated by the FCC under the provisions of the TCA and particularly Chapter 5 of the TCA, 47 U.S.C. §§151 et seq. governing communications by wire or radio.

37. Section 201(b) of the TCA requires that Regulated Defendants' practices be just and reasonable and that any practice that is unjust or unreasonable is declared to be unlawful.

38. Section 202(a) of the TCA makes it unlawful for Regulated Defendants to make any unjust or unreasonable discrimination in charges, services or practices.

39. Section 416 of the TCA further provides that the Regulated Defendants are required to comply with all applicable FCC orders.

40. The 1996 Act substantially increased the level of deregulation of the telecommunications industry by modifying the TCA.

41. With respect to Payphone Services, the 1996 Act was designed to promote the expansion of the number of pay phones available to the public through the deregulated provision of Payphone Services.

42. The 1996 Act was also designed to eliminate discrimination and the unfair competitive advantages LECs who were also PSPs enjoyed over Non-LEC PSPs.

43. One of the principal concerns of the Congress and the FCC in further deregulating the telecommunications industry pursuant to the 1996 Act was the potential for anti-competitive conduct by the BOCs arising from their historical regulated monopoly of Basic Services (as defined below).

44. Basic Services (as defined below) continue to be regulated by the FCC under the TCA. However, many telecommunications services that were being deregulated, such as Payphone Services, were to be provided in a competitive unregulated market just as Enhanced Services (as defined below) were deregulated in the Computer III Inquiry.

45. With respect to Payphone Services, the FCC concerns related to the potential for several categories of anti-competitive conduct by BOCs, including the following.

a. BOCs engaging in discrimination in providing exchange access and/or telephone exchange service between competitors for the purpose of providing BOC Payphone Services a competitive advantage over their non-BOC competitors.

b. BOCs having the opportunity to impose tariffs on Payphone Services that were based on recovering historical costs incurred for regulated activities. Such action would have the following effects, (i) such tariffs would have the effect of increasing the cost of providing Payphone Services to BOC competitors, and (ii) the increased costs reflected in the tariffs imposed on BOC Payphone Services would be recouped by the BOCs through tariffs paid by ratepayers of regulated services.

c. The potential for cross subsidization of BOC regulated and unregulated services. Costs associated with unregulated Payphone Services could be reallocated to

regulated Basic Services and thereby recouped through ratepayers. The effect of such reallocation of costs would be to (i) unfairly charge ratepayers for costs incurred in unregulated Payphone Services activities, and (ii) subsidize the unregulated Payphone Services thereby providing the BOC a competitive advantage over the independent PSP who would not have such a subsidy.

46. The TCA implemented a number of procedures and prohibited certain conduct to prevent the BOCs from engaging in anti-competitive conduct of the type described above.

47. With respect to Payphone Services, the TCA -

a. required that BOCs segregate those assets used by to provide unregulated Payphone Services from assets used to provide regulated services;

b. provided that BOCs could not subsidize their unregulated Payphone Services from revenues generated by their regulated telephone exchange services or their exchange access operations; and

c. provided that the BOCs could not prefer or discriminate in favor of their own Payphone Services.

48. When the FCC was developing regulations to implement the deregulation requirements of the 1996 Act, it considered requiring that all unregulated services be provided through separate legal entities to prevent the types of anti-competitive conduct by the BOCs described above. This legal separation is referred to as a "structural safeguard."

49. Ultimately, the FCC determined that in many circumstances the benefits obtained by structural safeguards were out weighed by the costs and inefficiencies imposed by such structural separation. In those cases, the FCC determined to institute procedures and requirements designed to

provide safeguards against BOC anti-competitive conduct that did not involve structural separation. These types of procedures and requirements are referred to as "non-structural safeguards."

50. The requirement that Payphone Services assets be segregated from the BOCs' assets used to provide regulated telephone exchange services and exchange access but not in a separate juridical entity is a non-structural safeguard. The purpose of the segregation of Payphone Services assets is to treat such assets as though they are a separate economic entity operating as stand alone businesses that are required to compete against other PSPs on a level competitive playing field.

51. Under the 1996 Act, the non-discrimination and non-subsidization requirements with which BOCs had to comply with respect to Payphone Services are contained in 47 U.S.C. §276. These requirements became effective upon adoption by the FCC of rules and regulations implementing the foregoing requirements.

52. The regulations 47 U.S.C. §276 required the FCC to develop had to contain non-structural safeguards at least as strong as those developed as part of the "Computer III Inquiry (CC Docket No. 90-623) proceeding" (the "Computer III Inquiry").

53. The Computer III Inquiry was a regulatory response to the increasing integration of computer data processing with telecommunications. In response, the FCC developed a new regulatory framework that created two definitional categories, basic service and enhanced service.

54. Basic service was limited to the common carrier offering of transmission capacity for the movement of information. Data processing, computer memory or storage and switching techniques can be components of basic service if they are used solely to facilitate the movement of information. These services continued to be regulated under the TCA. Such services are referred to as "Basic Services."

55. Enhanced service was any offering over the telecommunications network, which is more than a basic transmission service. Enhanced services refer to services offered over common carrier transmission facilities which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information. Such services are referred to as "Enhanced Services" and are unregulated.

56. Qwest, as a BOC, is subject all the special restrictions on Incumbent LECs and BOCs in the provision of local telephone exchange services and exchange access.

57. Pursuant to the mandate contained in 47 U.S.C. §276 that BOCs not prefer or discriminate in favor of their own Payphone Services as against the Payphone Services provided by the independent PSPs, including the PSP Plaintiffs, the FCC adopted rules that required Incumbent LECs, such as Qwest, to set their tariffs for Payphone Services according to the FCC's "new services test" ("NST"). NST compliant tariffs governing the provision of interstate Basic Service for PSPs, including Payphone Services provided by Incumbent LECs (such tariffs are referred to herein as "Payphone Interstate Tariffs") were to be filed with the FCC on or before January 15, 1997 and were to be effective on or before April 15, 1997.

58. Tariffs governing the provision of intrastate Basic Service for Payphone Services, including Payphone Services provided by Incumbent LECs (such tariffs are referred to herein as "Payphone Intrastate Tariffs"), were to be filed with the public utility commissions in all the states (the "State Commissions") in which the Incumbent LECs, including Regulated Defendants, operated. Such proposed Payphone Intrastate Tariffs that were compliant with the NST were to be filed on or before January 15, 1997 with the appropriate State Commission. The State Commissions

were to review such Tariffs to determine NST compliance and approve such Payphone Intrastate Tariffs such that they would be effective on or before April 15, 1997.

59. Any Payphone Interstate or Intrastate Tariff that was not NST compliant and was higher than the NST compliant Payphone Interstate or Intrastate Tariff was in violation of 47 U.S.C. §276 and unlawful.

60. To ensure that BOCs moved expeditiously to file NST compliant intrastate and interstate Basic Service Tariffs for Payphone Services, the FCC ruled that until NST compliant Payphone Intrastate and Interstate Tariffs were filed, reviewed, approved and made effective by the FCC or the State Commission, as the case may be, BOCs could not receive Dial Around Commissions.

61. Dial Around Commissions is the compensation payable to the owner of a pay phone with respect to calls made from such pay phone that are made using 800 numbers rather than depositing coins in the pay phone. Prior to the breakup of AT&T in 1984, AT&T paid to its BOC subsidiaries such commissions. Historically, PSPs that were not BOCs had not been compensated for calls made from their pay phones that were made using credit cards or 800 numbers.

62. In 1996, the BOCs were the largest owners of pay phones and as such were entitled to receive hundreds of millions of dollars in Dial Around Commissions annually from interexchange carriers such as AT&T and Sprint.

63. The regulations governing Payphone Services established by the FCC were developed in the course of the FCC proceeding conducted by the Common Carrier Bureau (now the Wire Bureau) captioned *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (the

"Implementation Proceeding"). Regional Bell operating companies (themselves either BOCs or the parent company of BOCs (collectively "RBOCs" and each individually a "RBOC"), including Qwest, were active participants in the Implementation Proceeding and represented all BOCs in the Implementation Proceeding.

64. In the Implementation Proceeding, the Common Carrier Bureau developed and refined the regulations ultimately issued in a series of orders. On September 20, 1996, the FCC issued the Payphone Order (the "First Payphone Order") that established the regulatory framework for providing Basic Services to unregulated Payphones Services.

65. On November 8, 1996, the FCC reconsidered the First Payphone Order and issued another order clarifying and expanding the First Payphone Order (the "Reconsideration Order"). The Reconsideration Order made absolutely clear that a BOC or RBOC would not be entitled to receive Dial Around Commissions with respect to intrastate calls in any state in which NST compliant Payphone Intrastate Tariffs had not been made effective. It was equally clear that in order for any Payphone Intrastate Tariff to become effective, the State Commission had to review either a previously filed Tariff or any newly filed Tariff and specifically find that such Tariff was NST compliant and ordered that it be effective.

66. Since Payphone Interstate Tariffs had to be filed with the FCC, the FCC could ensure that the necessary review of such Tariffs was made and NST compliance determined and the NST compliant Payphone Interstate Tariffs made effective on or before April 15, 1997.

67. However, no similar assurance could be made with respect to the Payphone Intrastate Tariff being reviewed by the various State Commissions. Although such tariffs were filed both with the FCC and the State Commissions, the responsibility for determining compliance and establishing

rates under a state's regulatory process, was delegated to the State Commissions. If the State Commission did not conduct the necessary review and find NST compliance by the April 15, 1997 deadline, the BOC or RBOC would not be able to collect Dial Around Commissions for intrastate calls within that state.

68. In or about April 1996, the RBOC Coalition, a coalition of all the RBOCs, including Qwest, involved in the Implementation Proceeding, informed the FCC that they had not realized that the NST applied not only to newly filed tariffs but also to previously filed tariffs that had been approved by State Commissions. This was first reflected in a letter from the RBOC Coalition to the FCC related to interstate tariffing requirements for certain interstate unbundled features and functions.

69. On its own motion, the FCC issued an order dated April 4, 1997 (the "Clarification Order") providing a 45 day waiver period for RBOCs to file NST compliant tariffs with the FCC with respect to such interstate unbundled features and functions.

70. As the April 15, 1997 deadline approached for all Payphone Intrastate and Interstate Tariffs to be effective and payment of Dial Around Commissions to begin, the RBOCs claimed that they did not realize that previously filed intrastate tariffs would also have to be NST compliant. In order to review the existing tariffs for NST compliance and to file new tariffs if the existing tariffs were found to be non-compliant, the RBOCs sought a 45-day waiver to conduct this review and where necessary file new tariffs that were NST compliant.

71. The RBOCs were also concerned that the State Commissions would not complete their review of applicable Payphone Intrastate Tariffs to determine NST compliance and make such NST compliant Tariffs effective by the April 15, 1997 deadline.

72. Concerned about not meeting the April 15, 1997 deadline, the coalition of RBOCs, including Qwest, requested a waiver by letter dated April 10, 1997 (the "Waiver Request Letter"). In the Waiver Request Letter, the RBOCs requested that they be allowed (1) a 45-day waiver period to review previously filed tariffs for NST compliance and where such reviewed tariffs were found not to be NST compliant, file new tariffs that were NST compliant, and (2) to collect Dial Around Commissions effective April 15, 1997 notwithstanding that NST compliant Payphone Intrastate Tariffs were not in effect.

73. The RBOCs specifically acknowledged that "previously-tariffed intrastate payphone services" had to meet the FCC's "new services test." They claimed that it was not until the Clarification Order "that we [the RBOCs] learned otherwise."

74. To assure that there would be no discriminatory effect or preference as a result of this proposal, the RBOCs, including Qwest, agreed to refund to any PSP the differential between the NST compliant Payphone Intrastate Tariffs as ultimately determined and the higher rates paid by the PSPs based on non-NST compliant Payphone Intrastate Tariffs in effect prior to the effective date of the NST compliant Payphone Intrastate Tariffs.

75. In making the refund promise, the RBOCs, including Qwest, acknowledged that they were waiving their right to assert the "filed rate doctrine" as a defense to making any such refund. They specifically pointed out that neither the State Commissions nor the FCC could impose this obligation on the RBOCs but they were voluntarily promising to make these refunds if they were allowed to receive the Dial Around Commissions effective April 15, 1997 notwithstanding that the Payphone Intrastate Tariffs in question had not been made effective by the State Commissions nor found to be NST compliant by the State Commissions.

76. In the Waiver Request Letter, in addition to promising to review all previously filed intrastate tariffs to assure that they were NST compliant and where such tariffs were not NST compliant, file new tariffs that were NST compliant, the RBOCs undertook to file, ex parte, a list of tariffs that might have to be revised by April 15, 1997.

77. In response to, and based upon, the representations, waivers and promises contained in the Waiver Request Letter, the Common Carrier Bureau issued an order dated April 15, 1997 (the "Waiver Order") containing a conditional waiver of the requirement that RBOCs could only collect Dial Around Commissions effective April 15, 1997 on intrastate calls if intrastate NST compliant Payphone Intrastate Tariffs were approved by the appropriate State Commission and in effect. All other conditions contained in the various orders issued by the FCC with respect to compliance with Section 276[2] had to be complied with in order for the Dial Around Commissions to be paid. The Waiver Order basically granted the relief requested in exchange for the promises made by the RBOCs, including Qwest, in the Waiver Request Letter.

78. One of the Waiver Order conditions RBOCs had to satisfy to receive Dial Around Commissions was to refund to PSPs, including PSP Plaintiffs, the difference, if any, by which RBOC Payphone Intrastate Tariffs in effect prior to the effective date of NST compliant Payphone Intrastate Tariffs exceeded the NST compliant Payphone Intrastate Tariffs.

79. The refund requirement in the Waiver Order was created for the benefit of PSPs including PSP Plaintiffs, so that they were made whole for any discriminatory or subsidized Payphone Intrastate Tariffs that put them at a competitive disadvantage to Payphone Services offered

[2] The First Payphone Order, the Order on Reconsideration, the Clarification Order and the Waiver Order were issued in the Implementation Proceeding to implement 47 U.S.C. §276. These Orders are collectively referred to as the "Payphone Orders."

by BOCs.

80. American Public Communications Council ("APCC") was a participant in the proceedings that resulted in the issuance of the various Payphone Orders, including the Waiver Order. NPCC was a member of APCC. The PSP Plaintiffs were all members of NPCC at the relevant time and some were also members of APCC.

81. In reliance on the representations, waivers and promises contained in the Waiver Request Letter and the issuance of the Waiver Order, APCC took no action to appeal or seek reconsideration of the Waiver Order.

82. Under the Waiver Order, and by taking advantage of the reliance of Plaintiffs on the representations, promises and waivers the RBOCs, including Qwest, made in the Waiver Request Letter, upon information and belief, Qwest began to collect millions of dollars of Dial Around Commissions on intrastate and interstate calls beginning April 15, 1997.

83. Qwest received the foregoing Dial Around Commissions even though all its Payphone Intrastate and Interstate Tariffs were not in compliance with the TCA and particularly Section 276 of the TCA and the FCC orders and interpretations issued thereunder, including the Payphone Orders.

84. When the Waiver Request Letter was written, the RBOCs, including Qwest, had a unique position vis a vis the PSPs such as PSP Plaintiffs. The only person or entity that had access to the cost data from which NST compliant Payphone Intrastate Tariffs could be determined for the Qwest Service Area, including Oregon, was Qwest and/or one or more of the Regulated Defendants.

85. Thus, unless and until Qwest released its cost data, the PSP Plaintiffs had to rely on Qwest’s good faith in making the initial determination of which previously filed Payphone Intrastate

Tariffs were NST compliant and whether any replacement Payphone Intrastate Tariffs they filed was NST compliant.

86. Because initially Qwest would be unilaterally determining NST compliant Payphone Intrastate Tariffs and the PSP Plaintiffs would be obligated to pay whatever Payphone Intrastate Tariffs Qwest initially determined, Qwest had a fiduciary duty to set those initial rates in good faith and if they were ultimately determined to be too high, refund the amounts of the overpayments with interest promptly upon final determination of NST compliant Payphone Intrastate Tariffs within its service area, including Oregon.

87. Qwest knew at the time that it joined in the Waiver Request Letter that there would undoubtedly be some Payphone Intrastate Tariffs that would be lowered as a result of developing NST compliant Payphone Intrastate Tariffs.

88. Thus, Qwest knew that it would receive payments from PSPs, including the PSP Plaintiffs, beginning April 15, 1997 that it would be obligated to refund.

89. Qwest also knew that if the Payphone Intrastate Tariffs Qwest promised to certify as NST compliant by May 19, 1997 were ultimately determined to be higher than the NST compliant Payphone Intrastate Tariffs (as ultimately determined by the Oregon PUC and other State Commissions), it would be obligated to refund the overpayments that PSPs, including PSP Plaintiffs, had paid based on the tariffs that Qwest had certified were NST compliant Payphone Intrastate Tariffs.

90. These facts, coupled with the fact that Qwest was a regulated utility, created a special fiduciary relationship between Qwest and the PSP Plaintiffs under which the PSP Plaintiffs expected to have refunded to them, and Qwest undertook to refund to the PSP Plaintiffs, any overpayment in

Payphone Intrastate Tariffs Qwest received.

91. At the time the 1996 Act was adopted, in Oregon, Qwest was operating under an alternate form of regulation ("AFOR").

92. The Oregon PUC had initiated an investigation to determine the justness and reasonableness of the new rates Qwest had filed in 1995. The investigation constituted the initiation of a rate case in which all of Qwest's rates were being reviewed (the "Oregon Rate Case").

93. Upon the initiation of the Oregon Rate Case, under Oregon law, the terms of the AFOR and by Qwest's specific agreement, the Qwest telephone tariffs proposed, as part of the Oregon Rate Case, became interim rates subject to refund.

94. Effective May 1, 1996, the Oregon PUC terminated the AFOR for Qwest in the course of the Oregon Rate Case. The tariffs issued pursuant to the terminated AFOR, or in replacement thereof, were deemed interim rates subject to refund under Oregon law. The permanent rates would be determined in the course of the Oregon Rate Case.

95. As a result of the termination of the AFOR and the initiation of the Oregon Rate Case, as of May 1, 1996, all of Qwest's then existing Payphone Intrastate Tariffs became interim tariffs subject to refund under Oregon law.

96. The interim status of such Tariffs was confirmed by the Oregon PUC in May 1997 and would remain so until the investigation was complete and new rates finally approved and made effective in the Oregon Rate Case.

97. The Oregon Rate Case was split into two phases, the Revenue Requirement Phase and the Rate Design Phase. The Revenue Requirement Phase was to be addressed first.

98. Other than the obligation to ensure that the Payphone Intrastate Tariffs submitted by

Qwest were NST compliant Payphone Intrastate Tariffs and otherwise complied with the Payphone Orders, the refund, revenue requirement and revenue design issues in the Oregon Rate Case related solely to Oregon regulatory issues and were governed solely by Oregon law and not federal law or the Payphone Orders.

99. On or about May 19, 1997, Qwest filed new tariffs for Payphone Intrastate Tariffs in Oregon and elsewhere that Qwest certified to the FCC were NST compliant. These filings were made after Qwest had reviewed all previously filed Payphone Intrastate Tariffs to check for NST compliance and where such Tariffs were found not to be NST compliant Qwest filed new Tariffs it certified were NST compliant.

100. Based on the certification to the FCC and the representations contained in the Waiver Request Letter, upon Qwest filing the certification of NST compliance with respect to newly filed Payphone Intrastate Tariffs, it also certified as NST compliant all previously filed Payphone Intrastate Tariffs that it had not modified after review for NST compliance.

101. The Revenue Requirements phase of the Oregon Rate Case was determined in an order dated May 19, 1997 which, among other things, determined the total amount of the refund Qwest would be required to pay for the period May 1, 1996 through April 30, 1997; additionally it also determined that the refund would be determined by the difference between the final effective tariffs determined pursuant to the design phase of the Oregon Rate Case and the higher interim tariffs.

102. Qwest appealed the Oregon PUC orders and sought and received a stay of the appealed orders.

103. After a lengthy appeal process, the parties ultimately settled the Revenue

Requirements phase of the Oregon Rate Case. As part of the settlement, the mechanism to calculate the refund, i.e. the difference between the final effective rate and the higher interim rate was retained.

104. The final effective tariffs were to be developed as part of the Rate Design phase of the Oregon Rate Case.

105. As a result of the settlement, the total amount of the refund was reduced in the Revenue Requirements phase of the Oregon Rate Case for the period May 1, 1996 to April 30, 1997. The settlement resulted in the issuance of a refund and an effective interim reduction in tariffs going forward, including Payphone Intrastate Tariffs.

106. In making this interim rate reduction, the Oregon PUC did not make any determination with respect to whether Qwest's Payphone Intrastate Tariffs were NST compliant.

107. Although no NST compliance determination had been made, as a result of this interim rate reduction, in an abundance of caution, in May 2001 NPCC filed a claim for refund before the Oregon PUC for PAL overcharges made by Qwest in a case captioned *In The Matter of Qwest Corporation fka US West Communications, Inc*., Docket No. DR 26/UC 600 (the "Oregon Refund Case").

108. NPCC did not make a claim for CustomNet refunds because the Oregon PUC had not made an interim reduction in such rates and no determination had been made with respect to NST compliance for such rates.

109. Actual NST compliance could only be determined by the FCC or a State Commission. In the State of Oregon, the Oregon PUC would have to review and approve the Qwest Payphone Intrastate Tariffs. Only when the Oregon PUC approved such Tariffs and made them

effective was NST compliance determined.

110. The new services test required that new services be priced based on direct costs and forward-looking cost estimates for providing the service and a reasonable amount of overhead.

111. Despite the interim rate reduction, Qwest continued to assert that its Payphone Intrastate Tariffs were NST compliant and non-discriminatory, did not favor Qwest Payphone Services and were reasonable and just.

112. Upon information and belief, Regulated Defendants submitted proposed Payphone Intrastate Tariffs in Oregon and elsewhere that they certified were NST complaint but that Regulated Defendants knew were not NST compliant.

113. Upon information and belief, the submission of proposed Payphone Intrastate Tariffs that were three to six times higher than NST complaint tariffs was done by Regulated Defendants as part of a deliberate scheme and plan to make the provision of Payphone Services by independent PSPs such as the PSP Plaintiffs as unprofitable as possible and thereby destroy the businesses of PSP Plaintiffs.

114. Upon information and belief, the deliberate imposition of unreasonably high and discriminatory non-NST compliant Payphone Intrastate Tariffs was part of Defendants' scheme to initially permit Qwest to discriminate in favor of its own Payphone Services by subsidizing them through recovery of costs included in their regulated services and imposing a higher cost on PSP Plaintiffs and other independent PSPs that such PSPs could not recover through cost subsidies.

115. Upon information and belief, the same high Payphone Intrastate Tariffs would provide the Regulated Defendants with unjustified and discriminatory revenues that would subsidize their own Payphone Services.

116. In order to promote the goals of deregulation and competition and prevent BOCs from engaging in anti-competitive acts, the FCC imposed a number of non-structural safeguards to which BOCs were required to adhere. One of these safeguards is referred to as comparably efficient interconnection ("CEI"). Whenever a BOC offered an Enhanced Service with respect to any Basic Service, the BOC was required to provide a CEI to its competitors so that they could interconnect to the Basic Service and provide their own competitive Enhanced Service.

117. Among the requirements that had to be satisfied to comply with CEI was that LECs were required to minimize interconnection costs for other providers either by adopting an allocation policy or by providing the most efficient available means of concentrating traffic, such as loop or trunk multiplexing.

118. Another non-structural safeguard approved by the FCC was what is known as Open Network Architecture ("ONA"). The goal of ONA is to have the telephone network reconfigured in such a way that non-LECs could pick from various network elements of Basic Service and use those elements to provide Enhanced Services. Such Enhanced Services need not be restricted to Enhanced Services provided by the BOCs.

119. The FCC determined that ONA could not be fully implemented immediately but determined to implement it as an evolutionary policy beginning in 1988.

120. The combination of these established FCC policies combined with the deregulatory telecommunications policy promoted in the TCA, imposes on BOCs, such as Qwest, the obligation to provide PSPs such as the PSP Plaintiffs access, on an unbundled basis, to Basic Services network elements so that Enhanced Services can be provided and concentration of telephone line traffic can be achieved, including the ability to have more than one payphone operate on a single line.

121. Upon information and belief, as part of Regulated Defendants' scheme to interfere with PSP Plaintiffs' customers and potential customers and to damage, if not destroy, PSP Plaintiffs' Payphone Services business in the State of Oregon and elsewhere in the Qwest Service Area, unreasonably denied PSP Plaintiffs access to Basic Services network elements on an unbundled basis. In addition, as part of the scheme, to charge exorbitantly high and unreasonable Payphone Intrastate Tariffs, Regulated Defendants also provided Enhanced Services to Regulated Defendants' Payphone Services in Oregon and other parts of the Qwest Service Area that have not been made available to PSP Plaintiffs on any or the same basis.

122. Upon information and belief, among the Enhanced Services provided to Defendants' Payphone Services that have not been made available to the PSP Plaintiffs is the ability to handle the calls of more than one pay phone on a single line and to be able to collect Dial Around Commissions with respect to each pay phone on such single line.

123. Upon information and belief, Qwest has taken action to frustrate the efforts of PSP Plaintiffs to develop and implement Enhanced Services by preventing PSP Plaintiffs from having Enhanced Services developed by PSP Plaintiffs integrated with Qwest's Basic Services in a manner which would continue PSP Plaintiffs' ability to identify and receive Dial Around Commissions on calls placed on their payphones.

124. As a consequence of Qwest's unlawful actions, PSP Plaintiffs' ability to introduce Enhanced Services that would improve the profitability and increase the availability of PSP Plaintiffs' pay phones has been greatly curtailed or completely frustrated.

125. Upon information and belief, Regulated Defendants, in conjunction with three former Qwest executives, used the discriminatory practice of denying PSP Plaintiffs access to Basic

Services in compliance with CEI and the policy behind ONA as part of their scheme to take over the Payphone Services business of PSP Plaintiffs in the Qwest Service Area to the extent they did not destroy it.

126. In September 2001, the Rate Design phase of the Oregon Rate Case was concluded by the issuance of an order establishing specific tariffs for all categories of Qwest services, including Payphone Intrastate Tariffs for PAL and CustomNet. NPCC appealed this order on the ground that the Payphone Intrastate Tariffs were not NST compliant and in violation of the TCA.

127. As part of the September order terminating the Rate Design phase of the Oregon Rate Case, and in reliance on orders previously issued in the Oregon Rate Case and related orders, the Oregon PUC determined that refunds to be payable pursuant to the Oregon Rate Case would be equal to the difference between the final effective tariffs established in the Rate Design phase of the Oregon Rate Case and the higher interim tariffs that had been in effect since May 1, 1996.

128. During the pendency of NPCC's appeal of the order terminating the Rate Design phase of the Oregon Rate Case, in or about 2003-2004, it became apparent to Regulated Defendants and Qwest executives involved in the provision of Payphone Services, that Regulated Defendants' practice of charging exorbitant and discriminatory Payphone Intrastate Tariffs in Oregon and the rest of the Qwest Service Area could not be continued much longer.

129. Upon information and belief, having reaped the benefits of its exorbitant Payphone Intrastate Tariffs, Qwest determined to sell substantially all its Payphone Services assets to three Qwest executives.

130. Upon information and belief, in or about May 2004, three Qwest executives formed FSH Communications, LLC ("FSH") to purchase Qwest's Payphone Services assets.

131. Upon information and belief, in or about August 2004, Qwest sold substantially all of its Payphone Services assets to FSH.

132. Upon information and belief, Regulated Defendants continue to discriminate in favor of FSH Payphone Services as it discriminated in favor of their own Payphone Services prior to such sale.

133. Upon information and belief, Qwest continues to provide competitive advantages to FSH by providing preferential rates and services to FSH, that are not provided to PSP Plaintiffs.

134. Upon information and belief, Qwest continues to enjoy the benefits of its interference with, and destruction of, PSP Plaintiffs' Payphone Services businesses by having a long term contract with FSH pursuant to which it provides telephone exchange services and exchange access to FSH.

135. Upon information and belief, FSH is the largest PSP in the Qwest Service Area.

136. Upon information and belief, Qwest is FSH's largest supplier of telephone exchange services and exchange access.

137. Upon information and belief, through the foregoing contract, FSH is precluded from becoming a competitive LEC of Qwest or from using the telephone exchange services or exchange access of Qwest's competitors.

138. Although Plaintiffs came to believe that the Payphone Intrastate Tariffs filed in 1997 were not NST compliant and were discriminatory, unjust and unreasonable, no claim for liability could be asserted against the Regulated Defendants until NST compliance was determined by the appropriate State Commission or the FCC and the Payphone Intrastate Tariffs approved and made effective. Only if the Payphone Intrastate Tariffs in effect prior to the effective date of NST

compliant Payphone Intrastate Tariffs are higher than the NST compliant Payphone Intrastate Tariffs is there liability for a violation of 47 U.S.C. §276.

139. By order dated November 10, 2004, the Oregon Court of Appeals ruled that the Payphone Intrastate Tariffs approved by the Oregon PUC in the Rate Design phase of the Oregon Rate Case were not NST compliant and reversed the decision of the Oregon PUC and remanded the case to have rates established in accordance with the FCC new services test and other standards set forth in the Payphone Orders and in accordance with 47 U.S.C. §276.

140. Only after the reversal of the Oregon PUC original order did Qwest for the first time submit cost data associated with the Payphone Intrastate Tariffs in Oregon. Prior to the reversal, Qwest had consistently maintained that its filed Payphone Intrastate Tariffs in Oregon were compliant with the Payphone Orders.

141. Qwest submitted new proposed Payphone Intrastate Tariffs for Oregon in or about 2006. By stipulated order, the Oregon PUC entered a Final Order dated November 15, 2007 approving the proposed Payphone Intrastate Tariffs as NST compliant (the "Stipulated Order").

142. Although the Stipulated Order was by stipulation of the parties, the Oregon PUC independently determined that Qwest's Payphone Intrastate Tariffs encompassed within the Stipulated Order were NST compliant, approved them and made them effective.

143. No earlier than a reasonable period of time after the expiration of the time to seek reconsideration of, or appeal of, the November 15, 2007 Stipulated Order in Oregon, did Plaintiffs= claims based on discriminatory pricing, unjust or unreasonable charges and preferential treatment of Qwest Payphone Services arise.

144. Under the Waiver Order, as of the effective date of the Stipulated Order, Regulated

Defendants were under an obligation to refund to Plaintiffs, within a reasonable period of time after the expiration of the time to seek reconsideration of, or appeal of, the November 15, 2007 Stipulated Order in Oregon, any and all overcharges made with respect to Oregon Payphone Intrastate Tariffs. The overcharges to be refunded are equal to the difference between the effective Payphone Intrastate Tariffs adopted in the Stipulated Order and the higher Tariffs charged each of the PSP Plaintiffs pursuant to the Payphone Intrastate Tariffs in effect between April 15, 1997 and the date the Payphone Intrastate Tariffs set forth in the Stipulated Order became effective.

145. Under Oregon law, as of the effective date of the Stipulated Order, Defendants were under an obligation to refund to Plaintiffs, within a reasonable period of time after the expiration of the time to seek reconsideration of, or appeal of, the November 15, 2007 Stipulated Order in Oregon, any and all overcharges made with respect to Oregon Payphone Intrastate Tariffs. The overcharges to be refunded are equal to the difference between the effective Tariffs adopted in the Stipulated Order and the higher rates charged each of the PSP Plaintiffs pursuant to the Payphone Intrastate Tariffs in effect between May 1, 1996 and the date the Payphone Intrastate Tariffs set forth in the Stipulated Order became effective.

146. Although due demand has been made for the refunds, Qwest has failed and refused to make such refunds to Plaintiffs.

147. Upon information and belief, Qwest, in furtherance of the scheme to drive PSP Plaintiffs out of business, has used every artifice to avoid its obligation to pay refunds to the PSP Plaintiffs promptly.

148. Through its artificially high Payphone Intrastate Tariffs and its discriminatory practices in the provision of telephone exchange services and exchange access, Defendants have

carried out their unlawful intent to interfere with PSP Plaintiffs business relations with its customers and with potential future customers.

149. As a result of Defendants' unlawful conduct, Defendants have had the benefit of the discriminatory, unjust and unreasonable overcharges for the past 13.5 years.

150. Since Section 276 of the TCA became effective on April 15, 1997, the number of pay phones PSP Plaintiffs have had in service in the State of Oregon alone has dropped from about 6,000 phones to about 3,000 phones today.

151. The foregoing reduction in the number of PSP Plaintiff pay phones in service is a result of the unlawful conduct of Defendants as alleged above.

152. Substantial reductions in the number of PSP Plaintiff pay phones in service have also occurred in other states within the Qwest Service Area as a result of Defendants' unlawful conduct.

153. NPCC sought to prosecute its claims for refund in the Oregon Refund Case. However, the administrative law judge handling the Oregon Refund Case issued an order dated March 23, 2005 holding in abeyance any further proceedings until the FCC ruled on the interpretation of the Waiver Order in the Implementation Proceeding.[3] The matter was held in abeyance in the expectation that, within a year, guidance would be received from the FCC with respect to the interpretation of various provisions of the Waiver Order, particularly the duration of the period with respect to which refunds are to be paid.

154. The Oregon PUC confirmed the order of the administrative law judge by order dated May 5, 2005.

155. Since the filing of the Oregon Refund Case, a court decision has put in question the

[3] See Exhibit A, Oregon PUC Ruling dated March 23, 2005.

Oregon PUC's jurisdiction to determine the refund under the Waiver Order and other related claims that are being asserted in the Oregon Refund Case.

156. Such court decision has also put in question the jurisdiction and authority of State Commissions and State Courts to provide relief under the TCA.

157. Other court decisions and decisions of the Oregon PUC have put in question the jurisdiction and authority of the Oregon PUC to provide relief for violations of Oregon statutes regulating telecommunications utilities.

158. There has also arisen question concerning the jurisdiction of the Oregon PUC to enforce other Oregon state law claims arising from Defendants' unlawful conduct.

159. As a result of the foregoing ambiguities in the authority of the Oregon PUC to enforce the TCA and to enforce certain violations under Oregon state law, Plaintiffs have undertaken the following actions.

160. PSP Plaintiffs have adopted the action of NPCC in moving to add them as parties' plaintiff in the Oregon Refund Case and have filed a Second Amended Complaint in the Oregon Refund Case to add claims under Oregon regulatory laws.

161. Prior to filing this amended complaint or contemporaneously therewith, the PSP Plaintiffs took the following actions: Plaintiffs filed a second amended complaint in the Refund Case (as of right and pursuant to a precautionary motion) seeking, among other claims for relief, refunds required by Section 759.185 of the Oregon Revised Statutes and prior orders of the PUC and discrimination claims under ORS 759.455.

162. Contemporaneously with the filing of this Amended Complaint, PSP Plaintiffs will be filing an amended Complaint in an abated case presently pending in the Marion County Circuit

Court, seeking declaratory relief to clarify the authority of the Oregon PUC to hear and provide relief with respect to claims that have been asserted before the Oregon PUC and which are outside the authority of the PUC to grant.

163. PSP Plaintiffs will be filing contemporaneous with this filing, appropriate motions before the Oregon PUC in the Refund Case. The first will be seeking an Order requiring Qwest to pay the refunds required by Section 759.185 of the Oregon Revised Statutes and prior orders of the Oregon PUC and to set for immediate discovery and adjudication claims for refund under Oregon Statutes.

164. The second motion is to hold in abeyance all other claims asserted in the Refund Case at the PUC, other than the claims that are the subject of the first motion, until this Court and the Marion County Circuit Court rule on Plaintiffs requests for declaratory relief as that may be required.

165. The FCC has not ruled on the various referrals to it from Federal Courts and various State Commissions, including requests from the Oregon PUC seeking interpretation of the Waiver Order in the Implementation Proceeding. The Oregon PUC has begun to consider the pending matters in the Refund Case. However, the original reasons for holding the matter in abeyance related to the TCA remain cogent. For this reason, Plaintiffs have again requested that the Oregon PUC hold matters related to the TCA, and potentially beyond its authority, in abeyance. As a result of the foregoing, Plaintiffs have concluded their only effective course of action is to seek relief in this Court.

(Declaratory Relief)
AS AND FOR PLAINTIFFS' FIRST CLAIM
FOR DECLARATORY RELIEF, PLAINTIFFS
ALLEGE AS FOLLOWS

166. Plaintiffs repeat and re-allege paragraphs 1-165 with the same force and effect as though fully set forth at length herein.

167. The provisions of the Waiver Order and the TCA determine (1) the period during which Payphone Intrastate Tariffs are subject to being refunded, (2) how such refunds are to be calculated, (3) statute of limitations period after which claims for refunds cannot be made, and (4) if the filed rate doctrine can be asserted as a defense by the Defendants to payment of refunds.

168. There is a question as to whether state law claims based upon or comparable in nature to the claims under the TCA and particularly 47 U.S.C. §§201, 202 and 276 are preempted and Plaintiffs have asserted or seek to assert such state law claims against Defendants.

169. A real and justiciable controversy exists between the parties concerning whether Defendants are obligated to pay Plaintiffs refunds set forth in the Waiver Order, how such refunds are calculated, the period during which such refunds are calculated, the statute of limitations applicable to claims for such refunds, whether the filed rate doctrine is a defense to payment of refunds, the jurisdiction of the State Commissions to adjudicate claims for violations of the Waiver Order and to provide relief under the TCA for such violations and whether state law claims comparable to, or based upon, violations of the TCA as they relate to Payphone Services are preempted. The Oregon PUC requested clarification from the FCC by letter, which has gone unanswered, and there have been other such requests with similar results.[4]

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[4] See the observations of the 10th Circuit Court of Appeals in the decision of Ton Services, Inc. v. Qwest Corp., 493 F.3d 1225 at Footnote 17 (10th Cir., 2007). "Some of the most relevant actions currently pending before the Commission were filed many years ago. See, e.g., In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Illinois Public Telecommunications Association Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the

170. Plaintiffs are entitled to a declaration as follows:

a. Defendants are liable to pay Plaintiffs for refunds with respect to Oregon Payphone Intrastate Tariffs (the "Oregon refund") as calculated below, for the period April 15, 1997 to and including November 15, 2007, the date NST compliant Payphone Intrastate Tariffs became effective in Oregon, and were less than the Payphone Intrastate Tariffs in effect prior to November 15, 2007

b. The amount of the Oregon refund shall be calculated as follows: the difference between NST compliant Payphone Intrastate Tariffs and higher Payphone Intrastate Tariffs in effect during the period April 15, 1997 to November 15, 2007.

c. The method of calculation of the refund determined by the Oregon PUC in the Oregon Rate Case is the same methodology that is used to calculate the refund payable pursuant to the Waiver Order.

d. The failure to pay refunds pursuant to the Waiver Order is a violation of Sections 276 and 416 of the TCA.

e. The statute of limitations for the Oregon refund began to run no sooner than a reasonable period of time after expiration of the time to move for reconsideration of, or appeal of, the Stipulated Order dated November 15, 2007.

Commission's Payphone Orders (filed July 30, 2004), available at http://svartifoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_ydf=pdf&id_document=6516286237. Although the Commission, pursuant to 47 U.S.C. § 208(b)(1), is obligated to issue an order concluding an investigation into actions or omissions that contravene the Communications Act within five months of the filing of a complaint, the Commission's docket involving the implementation of the Act's payphone provisions clearly indicates the FCC is not complying with the statutory timetable."

f. The filed rate doctrine is not a defense to payment of the refunds.

g. With respect to Payphone Services, state law claims based upon the TCA including 47 U.S.C. §§201, 202, 276 and 416 are not preempted by the TCA, including but not limited to, refund claims, claims under Unfair Practices Acts, common law fraud and equitable claims such as estoppel.

h. With respect to Payphone Intrastate Tariffs, State Commissions have subject matter jurisdiction to determine refund claims under the TCA arising from Payphone Intrastate Tariffs and to impose remedies provided by the TCA in awarding refunds.

171. In a separate proceeding before this Court, the Court should determine the amount of the refund to be awarded each of the Plaintiffs.

(Violation of 47 U.S.C. §276)
AS AND FOR PLAINTIFFS' SECOND CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

172. Plaintiffs repeat and re-allege paragraphs 1-171 with the same force and effect as though fully set forth at length herein.

173. 47 U.S.C. §276(a) prohibits the Regulated Defendants from giving their Payphone Services preferential treatment or from discriminating against independent PSPs' Payphone Services in favor of themselves, and is intended to benefit independent PSPs such as PSP Plaintiffs.

174. Applicable orders of the FCC required Regulated Defendants to file NST compliant Payphone Intrastate Tariffs with various State Commissions and/or with the FCC and to pay refunds to PSPs in the amount of the difference between higher non-NST compliant Payphone Intrastate Tariffs and NST compliant Payphone Intrastate Tariffs, from April 15, 1997 to the effective date of NST compliant Payphone Intrastate Tariffs. Such orders constitute the FCC's authoritative

interpretation of 47 U.S.C. §276(a).

175. Regulated Defendants violated 47 U.S.C. §276(a) and the related applicable FCC orders by failing to file NST compliant tariffs timely and collecting tariffs for Payphone Intrastate Tariffs that were discriminatory and preferential in violation of Section 276 of the TCA.

176. Regulated Defendants also violated 47 U.S.C. §276(a) by failing to pay the required refunds to PSP Plaintiffs.

177. Under 47 U.S.C. §206, Defendants are liable to plaintiff for the damages caused by Defendants' failure to timely file NST compliant Tariffs, collecting discriminatory and preferential Tariffs and failing to pay required refunds to Plaintiffs, as required by 47 U.S.C. §276(a) and related applicable orders of the FCC, together with reasonable attorneys' fees.

178. Under 47 U.S.C. §207, Plaintiffs are entitled to bring suit against Defendants in this Court to recover such damages.

(Violation of 47 U.S.C. §201)
AS AND FOR PLAINTIFFS' THIRD CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

179. Plaintiffs repeat and re-allege paragraphs 1-178 with the same force and effect as though fully set forth at length herein.

180. 47 U.S.C. §201(b) requires that Regulated Defendants' practices be "just and reasonable" and that any practice that is "unjust or unreasonable is declared to be unlawful."

181. Regulated Defendants' failure to timely file NST compliant Payphone Intrastate Tariffs and to pay the required refunds to Plaintiffs constitutes an unjust and unreasonable practice in violation of 47 U.S.C. §201(b).

182. Under 47 U.S.C. §206, Defendants are liable to Plaintiffs for the damages caused by

Defendants violation of 47 U.S.C. §201(b), together with reasonable attorneys fees.

183. Under 47 U.S.C. §207, Plaintiffs are entitled to bring suit against Defendants in this Court to recover such damages.

(Violation of 47 U.S.C. §407)
AS AND FOR PLAINTIFFS' FOURTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

184. Plaintiffs repeat and re-allege paragraphs 1-183 with the same force and effect as though fully set forth at length herein.

185. Under 47 U.S.C. §407, if the carrier does not comply with an order for the payment of money within the time limit contained in such order, the person for whose benefit the order was made may file suit for damages resulting from such non-compliance.

186. The applicable FCC orders, including the Waiver Order, requiring Regulated Defendants to pay refunds to Plaintiffs as alleged herein constitute orders for the payment of money within the scope and meaning of 47 U.S.C. §407.

187. Regulated Defendants have failed to comply with applicable FCC orders requiring Regulated Defendants to pay refunds to Plaintiffs, and are liable for the amount of the refunds ordered by the FCC, together with reasonable attorneys fees as authorized by 47 U.S.C. §407.

(Violation of 47 U.S.C. §416)
AS AND FOR PLAINTIFFS' FIFTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

188. Plaintiffs repeat and re-allege paragraphs 1-187 with the same force and effect as though fully set forth at length herein.

189. 47 U.S.C. §416(c) requires the Regulated Defendants to comply with FCC orders.

190. By failing to timely file NST compliant Payphone Intrastate Tariffs, and by failing to pay the refunds ordered by the FCC, Regulated Defendants have violated 47 U.S.C. §416(c).

191. Under 47 U.S.C. §206, Defendants are liable to Plaintiffs for the damages caused by Regulated Defendants' failure to timely file NST compliant Payphone Intrastate Tariffs and pay the required refunds to plaintiffs as required by 47 U.S.C. §416(c) and the related applicable orders of the FCC, together with reasonable attorneys' fees.

192. Under 47 U.S.C. §207, Plaintiffs are entitled to bring suit against Defendants in this Court to recover such damages.

(Unjust Enrichment)
AS AND FOR PLAINTIFFS' SIXTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

193. Plaintiffs repeat and re-allege paragraphs 1-192 with the same force and effect as though fully set forth at length herein.

194. By failing to timely file NST compliant Payphone Intrastate Tariffs and to pay refunds to Plaintiffs, as ordered by the FCC, Regulated Defendants have been unjustly enriched at the expense of Plaintiffs.

195. Regulated Defendants knew or should have known that by failing to timely file NST compliant Payphone Intrastate Tariffs and to pay refunds to Plaintiffs, as ordered by the FCC, Regulated Defendants were receiving an economic benefit in the form of greater revenues and profits than they would have received otherwise, and that Plaintiffs expected and were entitled to receive refunds for the difference between higher non-NST compliant Payphone Intrastate Tariffs and the NST compliant Payphone Intrastate Tariffs.

196. Regulated Defendants knew of the benefit, and the circumstances are such that

allowing Regulated Defendants to retain the benefit would be inequitable to Plaintiffs.

197. Regulated Defendants should be equitably required to compensate Plaintiffs for the reasonable value of the refund that should have been paid to Plaintiffs, plus prejudgment interest thereon at the maximum rate allowed by law.

(Third Party Beneficiary Claim)
AS AND FOR PLAINTIFFS' SEVENTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

198. Plaintiffs repeat and re-allege paragraphs 1-196 with the same force and effect as though fully set forth at length herein.

199. Defendants' agreement with the FCC to timely file NST compliant Payphone Intrastate Tariffs and provide refunds to independent PSPs, including PSP Plaintiffs, was intended to benefit all independent PSPs, including PSP Plaintiffs.

200. By failing to timely file NST compliant Payphone Intrastate Tariffs and to pay refunds to PSPs, including PSP Plaintiffs, Defendants breached their agreement with the FCC, such breach proximately causing damage to PSP Plaintiffs in an amount to be proven at trial.

201. Plaintiffs are entitled to enforce the agreement between the Defendants and the FCC, which is made for the benefit of PSPs, including PSP Plaintiffs.

202. As a result of Regulated Defendants' unlawful conduct, Plaintiffs are entitled to damages the amount of which is to be proven at trial.

(Conversion Claim)
AS AND FOR PLAINTIFFS' EIGHTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

203. Plaintiffs repeat and re-allege paragraphs 1-202 with the same force and effect as

though fully set forth at length herein.

204. Pursuant to Qwest's agreement with the FCC and APCC on behalf of independent PSPs, including PSP Plaintiffs, Plaintiffs were entitled to receive an immediate refund of the difference between higher non-compliant Payphone Intrastate Tariffs in effect prior to the effective date of NST compliant Payphone Intrastate Tariffs and such NST compliant Tariffs as soon as Regulated Defendants NST compliant Payphone Intrastate Tariffs were approved and made effective by the Oregon PUC.

205. Qwest has willfully and without lawful justification, refused to pay the required refunds to PSPs, including PSP Plaintiffs, and have thus willfully deprived PSP Plaintiffs of possession of the refunds to which PSP Plaintiffs are entitled.

206. By failing to pay refunds to PSPs, including PSP Plaintiffs, Regulated Defendants intentionally and willfully converted PSP Plaintiffs' property, such conversion proximately causing damage to Plaintiffs in an amount to be proven at trial.

207. As a result of Qwest's willful and wanton conduct in violation of Plaintiffs' rights, Plaintiffs are entitled to recover punitive damages.

(Estoppel Claim)
AS AND FOR PLAINTIFFS' NINTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

208. Plaintiffs repeat and re-allege paragraphs 1-207 with the same force and effect as though fully set forth at length herein.

209. Qwest made material representations and promises in the Waiver Request Letter to the FCC and to APCC as representative of persons and entities in the business of, or involved with, the provision of Payphone Services.

210. APCC, as representative, reasonably relied on Qwest's representations and promises contained in the Waiver Request Letter.

211. Plaintiffs were among the persons represented by APCC in the Implementation Proceeding.

212. Regulated Defendants are estopped from denying their obligation to pay the Oregon refund to Plaintiffs equal to the difference between higher non-NST compliant Payphone Intrastate Tariffs and NST compliant Payphone Intrastate Tariffs during the period April 15, 1997 to November 15, 2007

213. Although due demand has been made for payment of such refunds, Qwest has failed and refused to pay the amount of the Oregon refund.

214. As a result of Regulated Defendants' unlawful conduct, Plaintiffs have been damaged.

(Intentional Fraud)
AS AND FOR PLAINTIFFS' TENTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

215. Plaintiffs repeat and re-allege paragraphs 1-214 with the same force and effect as though fully set forth at length herein.

216. In the Waiver Request Letter and in oral statements made to the FCC, APCC and other participants in the Implementation Proceeding, Qwest represented that it would review all previously filed Payphone Intrastate Tariffs for NST compliance and where they were not NST compliant it would file new Payphone Intrastate Tariffs that were NST compliant.

217. As an inducement to the FCC, APCC and all parties to the Implementation Proceeding to permit the RBOCs, including Qwest, to receive dial around commissions beginning

April 15, 1997 even though it would not have in place NST compliant Payphone Intrastate Tariffs that satisfied the non-discrimination and non-preference provisions of Section 276 of the TCA, Qwest promised to refund any overcharges arising from receiving tariff payments based on non-NST compliant Payphone Intrastate Tariffs that were higher than the NST complaint Payphone Intrastate Tariffs that ultimately became effective after State Commission review and approval.

218. On or about May 19, 1997, Qwest filed Payphone Intrastate Tariffs that it certified were NST compliant. This certification also meant that Qwest was representing that all previously filed Payphone Intrastate Tariffs that it did not replace with new tariffs were NST compliant.

219. The foregoing representations and promises were made by Qwest knowing that they were false and that it never intended to carry out its promise to pay refunds.

220. Qwest made such intentional misrepresentations to Plaintiffs and others, including the FCC and State Commissions with the intent that they be relied upon.

221. Plaintiffs relied on such representations to their detriment and were severely damaged thereby.

222. As part of the Defendants' deceptive scheme, Regulated Defendants resisted under every pretense, requests for the cost data required to determine NST compliance of such Tariffs.

223. Upon information and belief the purpose of delaying provision of cost data to the State Commissions was to delay the time when Regulated Defendants would be required to disgorge their unlawful charges.

224. As a result of Defendants' unlawful conduct, Plaintiffs have been damaged by an amount to be determined at trial.

225. As a result of Defendants' willful and wanton conduct in violation of Plaintiffs'

rights, Plaintiffs are entitled to recover punitive damages.

(Negligent Fraud)
AS AND FOR PLAINTIFFS' ELEVENTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

226. Plaintiffs repeat and re-allege paragraphs 1-225 with the same force and effect as though fully set forth at length herein.

227. Qwest made the representations and promises set forth in the Waiver Request Letter negligently.

228. Qwest filed false certifications that it had filed new Payphone Intrastate Tariffs and that all previously filed Payphone Intrastate Tariffs not replaced by the newly filed Tariffs were NST compliant Payphone Intrastate Tariffs.

229. Qwest negligently represented that such certifications were true to Plaintiffs' representatives, the FCC and others.

230. As a result of Defendants' unlawful conduct, Plaintiffs have been damaged by an amount to be determined at trial.

231. As a result of Defendants' willful and wanton conduct in violation of Plaintiffs' rights, Plaintiffs are entitled to recover punitive damages.

(Oregon Deceptive Trade Practices Act)
AS AND FOR PLAINTIFFS' TWELFTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

232. Plaintiffs repeat and re-allege paragraphs 1-231 with the same force and effect as though fully set forth at length herein.

233. Defendants' unlawful conduct, as alleged above, constitutes deceptive and unlawful

trade practices in violation of the Oregon Revised Statutes §§646.605 et seq., including §605.608(s) and (u).

234. As a result of Defendants; unlawful conduct, Plaintiffs have been damaged by an amount to be determined at trial.

235. As a result of Defendants' willful and wanton conduct in violation of Plaintiffs' rights, Plaintiffs are entitled to recover punitive damages.

(Violation of ORS Chapter 759.185 - Refund)
AS AND FOR PLAINTIFFS' THIRTEENTH
CLAIM FOR RELIEF, PLAINTIFFS ALLEGE
AS FOLLOWS

236. Plaintiffs repeat and re-allege paragraphs 1-235 with the same force and effect as though fully set forth at length herein.

237. Effective May 1, 1996, Qwest's Payphone Intrastate Tariffs and its other tariffs were held to be interim pending final determination of tariffs in the Oregon Rate Case.

238. The interim rates in effect from May 1, 1996 that were higher than the NST compliant Payphone Intrastate Tariffs made effective November 15, 2007 were subject to mandatory refund in accordance with Chapter 759.185 of the Oregon Revised Statutes.

239. As a result of such overcharges, PSP Plaintiffs are entitled to a refund of the difference between all rates paid pursuant to tariffs that were higher than the rates that could be charged had the NST compliant Payphone Intrastate Tariffs been in effect throughout the period May 1, 1996 to November 15, 2007, together with interest.

240. As a result of such overcharges, PSP Plaintiffs suffered substantial additional damages over and above and in addition to the over charges they suffered, the amount of which damages shall be determined at trial.

241. As a result of Defendants' unlawful conduct, Plaintiffs are entitled to recovery of their attorneys' fees.

(Violation of ORS 759.275 - Undue Preferences)
AS AND FOR PLAINTIFFS' FOURTEENTH
CLAIM FOR RELIEF, PLAINTIFFS ALLEGE
AS FOLLOWS

242. Plaintiffs repeat and re-allege paragraphs 1-241 with the same force and effect as though fully set forth at length herein.

243. Based on the acts of Defendants as alleged above, upon information and belief, Qwest has provided undue preferences and advantages in telephone exchange services and exchange access in favor of PSPs who compete with PSP Plaintiffs, including FSH, its own Payphone Services and one or more Unknown Corporations I-X in violation of ORS 759.275 and other provisions of Chapter 759 of the Oregon Revised Code.

244. Such undue preferences and advantages constitute unjust discrimination under ORS Chapter 759.

245. As a result of such unlawful conduct, Plaintiffs suffered substantial damages, the amount of which is to be proven at trial.

246. As a result of Defendants' unlawful conduct, Plaintiffs are entitled to recovery of their attorneys' fees.

(Violation of ORS 759.455 - Denial of Access)
AS AND FOR PLAINTIFFS' FIFTEENTH
CLAIM FOR RELIEF, PLAINTIFFS ALLEGE
AS FOLLOWS

247. Plaintiffs repeat and re-allege paragraphs 1-246 with the same force and effect as though fully set forth at length herein.

248. Based on the acts of Defendants as alleged above, upon information and belief, Qwest has provided access to network elements in Basic Service to PSPs who compete with PSP Plaintiffs, including FSH and one or more Unknown Corporations I-X that it denied to PSP Plaintiffs, all in violation of ORS 759.455.

249. Such access constitutes unjust discrimination under ORS Chapter 759.

250. As a result of such unlawful conduct, PSP Plaintiffs suffered substantial damages, the amount of which is to be proven at trial.

251. As a result of Defendants' unlawful conduct, Plaintiffs are entitled to recovery of their attorneys' fees.

(Loss of Business Opportunity)
AS AND FOR PLAINTIFFS' SIXTEENTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

252. Plaintiffs repeat and re-allege paragraphs 1-251 with the same force and effect as though fully set forth at length herein.

253. PSP Plaintiffs had established contractual relations and/or reasonable expectation of advantageous business relations with prospective customers for their Payphone Services.

254. Defendants were fully aware of PSP Plaintiffs contractual relations and/or reasonable expectation of advantageous business relations with prospective customers for their Payphone Services.

255. As part of Defendants' unlawful scheme to destroy PSP Plaintiffs as competitors, Defendants intentionally and maliciously interfered with PSP Plaintiffs' contractual relations and reasonable expectancies by engaging in discriminatory and preferential pricing of Payphone Intrastate Tariffs, discrimination and preferential treatment in making available telecommunications

services and access as alleged above.

256. As a result of such unlawful conduct, PSP Plaintiffs suffered substantial damages, the amount of which is to be proven at trial.

257. As a result of Defendants' willful and wanton conduct in violation of Plaintiffs' rights, Plaintiffs are entitled to recover punitive damages.

(Breach of Contract)
AS AND FOR PLAINTIFFS' SEVENTEENTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

258. Plaintiffs repeat and re-allege paragraphs 1-257 with the same force and effect as though fully set forth at length herein.

259. The agreements, promises and representations Qwest made in the Waiver Request Letter and orally to Plaintiffs' representatives and Plaintiffs' representatives' acceptance and reliance thereon, constituted a binding contract between Qwest and the Plaintiffs.

260. Under the terms of that agreement, to the extent Payphone Intrastate Tariffs in effect prior to NST compliant Payphone Intrastate Tariffs were higher than NST compliant Payphone Intrastate Tariffs, Qwest would refund to PSP Plaintiffs the difference together with interest.

261. Qwest has breached its obligations under the contract and Plaintiffs have been damaged thereby in an amount to be determined at trial.

(Constructive Trust)
AS AND FOR PLAINTIFFS' EIGHTEENTH CLAIM FOR RELIEF, PLAINTIFFS ALLEGE AS FOLLOWS

262. Plaintiffs repeat and re-allege paragraphs 1-261 with the same force and effect as though fully set forth at length herein.

263. As a result of the facts as alleged above, Qwest had a special fiduciary obligation to the Plaintiffs to refund overpayments made to Qwest in respect of Payphone Intrastate Tariffs Qwest initially represented as NST compliant. The Oregon PUC has ordered some refunds to be calculated and a fund to be established to pay such refunds to its customers upon the resolution of its case in Oregon Rate Case.

264. Qwest's Payphone Intrastate Tariffs, which it represented were NST compliant, were ultimately determined by the Oregon PUC to be higher than NST compliant Payphone Intrastate Tariffs.

265. In violation of its fiduciary duty to Plaintiffs, Qwest has failed and refused to pay the Plaintiffs the refunds to which they are entitled together with interest and should also account for the "refund pool" it ordered in conjunction with the Oregon Rate Case disposition.

266. As a result of such unlawful conduct, Plaintiffs suffered substantial damages, the amount of which is to be proven at trial.

267. As a result of Defendants' willful and wanton conduct in violation of Plaintiffs' rights, Plaintiffs are entitled to recover punitive damages.

PRAYER FOR RELIEF

Wherefore, Plaintiffs pray for judgment granting declaratory relief as plead and further relief in the alternative as appropriate, for its claims as follows:

A. On Plaintiffs' First Claim: **Declaratory judgment declaring:**

1. Regulated Defendants are liable to pay Plaintiffs the Oregon refund pursuant to the terms of the Waiver Order, for the period April 15, 1997 to November 15, 2007 equal to the difference between the rates payable pursuant to the effective NST compliant Payphone Intrastate

Tariffs and the higher rates paid by Plaintiffs based on non-NST compliant Payphone Intrastate Tariffs.

2. The method of calculation of the refund determined by the Oregon PUC in the Oregon Rate Case is the same methodology that is used to calculate the refund payable pursuant to the Waiver Order.

3. The statute of limitations for Oregon refunds began to run no earlier than a reasonable period of time after the expiration of the time to seek reconsideration of, or appeal of, the November 15, 2007 Stipulated Order in Oregon.

4. The filed rate doctrine is not a defense to payment of the refunds.

5. The failure to pay refunds pursuant to the Waiver Order is a violation of Sections 276 and 416 of the TCA.

6. With respect to Payphone Services, state law claims based upon the TCA including 47 U.S.C. §§201, 202, 276 and 416 are not preempted by the TCA, including, but not limited to, refund claims, claims under Unfair Trade Practices Acts, common law fraud and equitable claims such as estoppel and unjust enrichment.

7. With respect to Payphone Intrastate Tariffs, State Commissions have subject matter jurisdiction to determine refund claims under the TCA and may impose the remedies provided for under the TCA.

8. In a separate proceeding before this Court, the Court should determine the amount of the refund to be awarded each of the Plaintiffs

B. On the Second Claim: Judgment in favor of Plaintiffs for Regulated Defendants' unlawful conduct in giving Qwest's Payphone Services preferential treatment and discriminating

against Plaintiffs' Payphone Services in favor of the Payphone Services of Defendants in violation of 47 U.S.C. §276(a.) and awarding Plaintiffs damages in an amount to be proven at the time of trial, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

C. On the Third Claim: Judgment for Plaintiffs pursuant to 47 U.S.C. §§201(b), 206 and 207 for Regulated Defendants' unlawful conduct as alleged above in violation of 47 U.S.C. §201 and awarding damages in an amount to be proven at the time of trial, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

D. On the Fourth Claim: Judgment for Plaintiffs pursuant to 47 U.S.C. §407 for Regulated Defendants' unlawful conduct as alleged above in violation of 47 U.S.C. §407 and awarding damages in an amount to be proven at the time of trial, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

C. On the Fifth Claim: Judgment for Plaintiffs pursuant to 47 U.S.C. §416 for Regulated Defendants' unlawful conduct as alleged above in violation of 47 U.S.C. §416 and awarding damages in an amount to be proven at the time of trial, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

D. On the Sixth Claim: Judgment for Plaintiffs for unjust enrichment of Regulated Defendants in an amount to be proven at the time of trial, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other

relief as to the Court may seem just and proper.

E. On the Seventh Claim: Judgment for Plaintiffs for Qwest's breach of contract of which Plaintiffs were third party beneficiaries and the award of damages equal to the amount of the Oregon refund due Plaintiffs, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

F. On the Eighth Claim: Judgment for Plaintiffs for Regulated Defendants' unlawful conversion of Plaintiffs' property in the form of unpaid refunds and awarding Plaintiffs damages in an amount to be proven at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

G. On the Ninth Claim: Judgment for Plaintiffs estopping Regulated Defendants from denying their obligation to pay Plaintiffs refunds of the difference between Oregon effective NST compliant Payphone Intrastate Tariffs and the higher Oregon Payphone Intrastate Tariffs Plaintiffs paid prior to the effective date of such NST compliant Payphone Intrastate Tariffs and awarding Plaintiffs the amount of such refunds, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

H. On the Tenth Claim: Judgment for Plaintiffs for Defendants' unlawful fraudulent misrepresentations and scheme awarding Plaintiffs damages in an amount to be proven at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

I. On the Eleventh Claim: Judgment for Plaintiffs for Defendants' negligently fraudulent misrepresentations and scheme and awarding Plaintiffs damages in an amount to be proven at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

J. On the Twelfth Claim: Judgment for Plaintiffs for Defendants' unlawful conduct in violation of Oregon Unlawful Trade Practices laws and awarding Plaintiffs damages in an amount to be proven at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

K. On the Thirteenth Claim: Judgment for Plaintiffs for Regulated Defendants' failure to pay refunds as required by ORS Chapter 79 for amounts charged Plaintiffs pursuant to interim Payphone Intrastate Tariffs in effect from May 1, 1996 to November 15, 2007 that were higher than NST compliant Payphone Intrastate Tariffs that were approved and made effective by the Oregon PUC on November 15, 2007 and awarding Plaintiffs damages in an amount to be proven at trial, including such refunds, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

L. On the Fourteenth Claim: Judgment for Plaintiffs for Regulated Defendants' provision of undue preferences and advantages in services in favor of Regulated Defendants' Payphone Services, and those of PSPs other than PSP Plaintiffs, including FSH and one or more Unknown Corporations I-X, in violation of ORS 759.275, and awarding Plaintiffs damages in an

amount to be proven at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

M. On the Fifteenth Claim: Judgment for Plaintiffs for Regulated Defendants' denial of access to Basic Service network elements that it provided to Regulated Defendants' Payphone Services and those of PSPs other than PSP Plaintiffs, including FSH and one or more Unknown Corporations I-X, in violation of ORS 759.455, and awarding Plaintiffs damages in an amount to be proven at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

N. On the Sixteenth Claim: Judgment for Plaintiffs for Defendants' unlawful scheme to destroy Plaintiffs as competitors and to interfere with Plaintiffs business relationships with their customers and prospective customers and awarding Plaintiffs damages in an amount to be determined at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

O. On the Seventeenth Claim: Judgment for Plaintiffs for Qwest's breach of contract and awarding Plaintiffs damages in an amount to be determined at trial, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

P. On the Eighteenth Claim: Judgment for Plaintiffs for Qwest's unlawful breach of its fiduciary obligation by imposing a constructive trust on Qwest with respect to all

overpayments made by the PSP Plaintiffs to Qwest with respect to non-NST compliant Payphone Intrastate Tariffs in the state of Oregon, and also awarding Plaintiffs damages in an amount to be determined at trial, punitive damages, plus reasonable attorneys fees, prejudgment interest at the highest applicable rate, costs of court and disbursements, and such other relief as to the Court may seem just and proper.

Dated: November 13, 2009

Frank G. Patrick, OSB 76022
Attorney for Plaintiffs

/s/
Frank G. Patrick
OSB 76022

JURY DEMAND

Demand is hereby made pursuant to Fed. R. Civ. Proc. 38 for a trial by jury on all issues so triable on this Complaint.

Dated: December 12, 2010

Frank G. Patrick, OSB 76022
Attorney for Plaintiffs

/s/ ____________________________________
Frank G. Patrick

ORDER NO. 96-107

ENTERED APR 24 1996

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 80

In the Matter of the Petition of PACIFIC NORTHWEST BELL TELEPHONE COMPANY dba U S WEST COMMUNICATIONS, INC., to Price List Telecommunications Services Other than Essential Local Exchange Services.	))))))	ORDER

DISPOSITION: STIPULATION TERMINATING AFOR ADOPTED

Background

In Order No. 91-1598, the Commission adopted an alternative form of regulation (AFOR) plan for U S WEST Communications, Inc. (U S WEST). Under the terms of the plan, the Commission granted U S WEST pricing flexibility within specified constraints for certain non-essential services, such as call waiting and centrex-type services. The plan also granted U S WEST the ability to earn rates of return within a broad range before rate action would be taken, and provided revenue sharing credits to customers. The Commission adopted the AFOR to help the company better respond to dramatic changes in the telecommunications industry that resulted from the emergence of competition and rapid technological advancement.

To ensure that U S WEST would maintain adequate service levels for its customers, the AFOR contained a number of technical service quality standards. This part of the plan requires U S WEST to file monthly or semi-annual information with the Commission to allow the monitoring of technical service quality. If U S WEST fails to comply with this or other provisions, the Commission is authorized to terminate or modify the AFOR prior to its expiration.

Service Quality Problems

During the past four years, U S WEST has experienced a severe increase of service quality problems, relating to both customer service and technical service. In December 1995, the Commission Staff (Staff) determined that U S WEST was in violation of one of the technical service quality standards set forth in the AFOR. Staff concluded that the number of customers

reporting problems with their phone service exceeded a prescribed limit for 24 of U S WEST's 77 central offices. In January 1996, Staff concluded that U S WEST had violated a second technical service standard relating to transmission loss level variation.

Pursuant to procedures adopted in Order No. 91-1598, Staff convened a settlement conference in February 1996 to discuss resolution of the technical service quality violations. Staff also scheduled a special public meeting to address those issues for March 27, 1996.

Staff Recommendation

On March 26, 1996, Staff submitted a report to the Commission indicating that, as a result of settlement discussions, the parties had agreed to certain remedies to improve U S WEST's service quality standards. These remedies included: (1) the termination of the company's AFOR effective May 1, 1996; (2) the provision of a cellular phone loaner option for U S WEST customers who do not receive requested phone service in a timely manner, effective June 1, 1996; (3) adoption of an automatic out-of-service credit for U S WEST customers who experience unreasonable delays in receiving telephone service repairs; and (4) rulemaking to review utility service standards set forth in OAR 860-23-055.

Staff further indicated, however, that the parties had not had the opportunity to develop either a comprehensive set of service quality standards or a formal stipulation incorporating them in time for the special public meeting. Accordingly, Staff requested that the Commission adopt the proposed actions in principle, with the understanding that Staff would present a formal stipulation for approval at the Commission's April 16, 1996, public meeting. Staff subsequently submitted the proposed stipulation on April 11, 1996, and recommended its adoption. The stipulation and Staff's accompanying report are attached as Appendix A.

Stipulation

The stipulation is generally intended to cover orders for access lines or out-of-service repairs pending with U S WEST on May 1, 1996, or submitted thereafter up to and including October 31, 1996. It has been signed by Staff, U S WEST, TRACER, Teleport Internet Services, and the Citizens Utility Board.

The first six sections detail the negotiated remedies designed to improve U S WEST's service quality standards. U S WEST agrees that all remedies shall be funded entirely by stockholders.

Section 1 terminates U S WEST's AFOR on May 1, 1996, including the revenue sharing portion of the plan. It provides that the company's current rates will become interim rates on May 1, 1996, subject to refund with interest, at a rate of 11.2 percent per annum. Any party may seek, by May 31, 1996, a declaratory ruling from the Commission regarding how the refund amount should be determined pursuant to the applicable provisions of the AFOR agreement.

Section 2 provides that a rulemaking shall be initiated to review the utility service standards set forth in OAR 860-23-055.

Section 3 requires U S WEST to continue to provide technical service quality reports until the above noted rulemaking has been completed.

Section 4 establishes a cellular telephone loaner program for primary lines. On June 1, 1996, U S WEST shall provide a cellular phone to customers who do not receive requested primary lines within five business days from the due date. Customers who do not want a cellular phone, or who already have one, may instead receive up to a $100 credit for each month they are without service.

This section also acknowledges that the implementation of a cellular loan program is contingent on the approval by the Federal Communications Commission and the successful negotiation and award of contracts to cellular vendors. In the event that the cellular loan program is implemented after June 1, 1996, U S WEST shall provide customers a pro-rated basic exchange credit of $100 per month. If the cellular loaner program is implemented after June 17, 1996, U S WEST shall provide customers a pro-rated basic exchange credit of $150 per month.

Section 5 provides remedies for business customers with multiple-line held orders. Customers with less than ten delayed lines will receive a waiver of non-recurring charges associated with the requested lines. They will also receive credits equal to the monthly rate they would have paid for the lines, until the requested lines are installed. Customers with more than ten delayed lines are entitled to the same remedies, or may obtain from U S WEST a written confirmation of the installation due date and negotiate their own remedies with the company.

Section 6 provides a remedy for existing customers who experience unreasonable delays in having service restored. If service is not restored within 48 hours, customers will automatically receive an out-of-service credit equal to one-thirtieth of their normal fixed monthly charge for the first five days they are without service. If U S WEST does restore service within five days, the out-of-service credit amount escalates.

Disposition

This matter came before the Commission at its March 27, 1996, and April 16, 1996, public meetings. After consideration, the Commission accepts Staff's recommendation and adopts the stipulation in its entirety. 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 subject to refund with interest, at a rate of 11.2 percent.

The service quality remedies detailed in the stipulation and summarized above are adopted, with one clarification. As noted above, Section 5 provides that a business customer requesting ten or more lines may obtain a written confirmation of an installation date from U S WEST and then negotiate with the company for damages if service is not installed by that date. If the customer and U S WEST are unable to agree on damages, the customer

shall be entitled to waiver of the nonrecurring charges and credits provided to business customers requesting less than ten lines. The Commission clarifies that, under that provision, U S WEST is not entitled to an additional 30-day period before the customer is entitled to such remedies.

The Commission agrees with Staff that the remedies detailed in the stipulation will provide U S WEST strong incentive to improve its service quality. The Commission acknowledges, however, that necessary improvements will take considerable time and that, unfortunately, the re-establishment of high quality service will only come gradually. The Commission also notes the impact of U S WEST's actions on economic development. The company's delays in providing businesses with new or additional lines has, in effect, created an "economic drag" that ratepayers should not be required to tolerate.

Furthermore, a rulemaking docket shall be initiated to review and amend OAR 860-23-055 to enhance solutions to future customer service concerns. Until such rulemaking is complete, U S WEST shall continue to provide all technical service quality reports currently provided under the AFOR.

In making this decision, the Commission acknowledges that, pursuant to the terms of the AFOR, U S WEST has filed numerous price listings with the Commission. Upon the termination of the AFOR, U S WEST need not re-file these listings as tariffs. Rather, the Commission will consider any price list filing with an effective date of May 1, 1996, as a fully-regulated tariff, subject to all suspension and investigation procedures set forth in ORS 759.180 to 759.190.

ORDER

IT IS ORDERED that the Stipulation Terminating the AFOR, attached as part of Staff's April 11, 1996, report in Appendix A, is adopted in its entirety with clarification stated above.

Made, entered, and effective APR 24 1996.

Roger Hamilton
Chairman

Ron Eachus
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order to a court pursuant to ORS 756.580.

ut80afor.doc

ORDER NO. 96-183

ENTERED JUL 16 1996

THIS IS AN ELECTRONIC COPY

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 80(1)

In the Matter of the Petition of U S WEST COMMUNICATIONS, INC., for Clarification and Request for Ruling.	) ORDER

DISPOSITION: REFUND PROCEDURES CLARIFIED

Introduction

In response to reduced service quality by U S WEST Communications, Inc., (USWC), this Commission recently terminated the company's alternative form of regulation (AFOR) plan authorized in Order No. 91-1598. USWC subsequently filed this Petition for Clarification and Request for Ruling concerning the interpretation of Order No. 91-1598 with respect to the "procedures to be followed or the rates to be charged by USWC in the event the [AFOR] is terminated prematurely[.]" USWC contends that, in determining whether a refund is warranted, we must review the company's actual earnings for the period during which interim rates were in effect.

Staff filed a reply to USWC's petition and disputes the company's interpretation of the refund provisions. It contends that the January 1 to September 30, 1995, annualized test year, as modified by adjustments ordered in pending docket UT 125, should be used to determine if the company overearned during the interim rate period. On July 11, 1996, USWC filed a response to Staff's reply.

Discussion

In November 1991, the Commission offered USWC an AFOR plan under terms and conditions set forth in Order No. 91-1598. USWC accepted the offer, and the AFOR was implemented effective January 1, 1992.

Among other things, Order No. 91-1598 contained the method for determining the amount of refund by USWC upon a premature termination of the AFOR. The relevant language in that order provides:

> The Commission finds that the [AFOR] stipulation should be modified to include a provision which protects USWC and its customers in the event the Plan is terminated prematurely due to one of the [specified conditions.] We propose that Paragraph 10 should be amended to include the following language[:]

* * * * *

> (2) If the Commission declares the plan terminated, it may also order USWC to refrain from making any further changes in rates or terms of price listed services. * * * The Commission may also initiate an investigation to determine the rates and terms of service which should be placed in effect on a permanent basis.

> (3) Unless otherwise ordered by the Commission, rates authorized under (2) of this subparagraph after the plan has been terminated shall be considered interim rates subject to refund. The amount subject to refund with interest shall be that portion of USWC's earnings which the Commission finds have exceeded a reasonable rate of return, commencing with the date of the order terminating the plan and ending with the date that permanent rates are set and are in effect. For purposes of determining the amount of the refund, the Commission shall not be bound by the provisions of this paragraph or any other provision of the Plan.

* * * * *

The amendments proposed by the Commission are intended to remove any uncertainty regarding the procedures to be followed in the event the Plan is prematurely modified or terminated. The changes will also prevent USWC from over or under earning while proceedings are held to establish new permanent rates. To clarify:

Subparagraph (2) provides that the Commission may freeze the rates charged by USWC at the levels in effect on the date the plan is terminated. The Commission would likely choose this option if the Plan is terminated because USWC's earnings have exceeded the upper limits established in the Plan. * * * Lastly, subparagraph (2) permits the Commission to initiate a separate proceeding to determine the permanent rates to be charged.

Subparagraph (3) specifies that the rates in effect from the date the plan is terminated until the date new permanent rates are set shall be interim rates subject to refund. A refund will take place only where USWC has been determined to have been overearning. *The amount of any refund will equal the difference between the amount USWC is actually earning and the amount subsequently found to be reasonable.* Any refunds will accrue interest at USWC's authorized rate of return on rate base.

Order No. 91-1598 at 27-29 (footnote omitted) (emphasis added).

Relying on the italicized language, USWC contends that, now that the AFOR has been terminated, our refund determination must be based on an examination of the company's actual earnings during the period rates are interim. Comparing the process to a true-up of base earnings in an application for deferral under ORS 759.200(4), it argues that earnings cannot be adjusted for disallowances imposed retroactively, for annualization of intra-period events, or normalization adjustments for nonrecurring and unusual events.

Staff disputes USWC's assertions and presents a different interpretation of the language cited above. It contends that the amount subject to refund is equal to the difference between the permanent rate level established by the Commission and the current, interim rate level, assuming that the latter amount of revenues is greater than the former. It argues that the Commission used the term "interim rates" to refer to the commonly understood method of refund determination used in ORS 757.215(4) and 759.185(4).

Resolution

In this proceeding, we are asked to resolve a dispute between USWC and Staff concerning what financial information should be used to determine whether the utility must refund a portion of interim rates to customers. Our resolution of that issue, however, need not be based on the specific wording of any provision contained in Order No. 91-1568. As the last sentence of paragraph (3) set forth above expressly states: "For purposes of determining the amount of the refund, *the Commission shall not be bound by the provisions of this paragraph or any other provision of the Plan.*" Order No. 91-1598 at 28 (emphasis added). Accordingly, the terms of the accepted plan clearly authorize us to determine the amount of refund through any legal process we find reasonably protects USWC and its customers.

With that clarification, we conclude that a refund procedure similar to that in ORS 757.215(4) and 759.185(4) should be used to determine what amount of refund, if any, is warranted during the period of interim rates. The amount subject to refund by USWC should be equal to the difference between the permanent rate level we establish in Docket UT 125 and the current interim rate level. This method, we believe, will adequately assure that ratepayers will be charged the proper rates under traditional rate base/rate-of-return regulation commencing with the date of order terminating the AFOR.

We reject USWC's proposed refund methodology for three primary reasons. First, USWC's proposal would limit the refund determination to an examination of the company's actual earnings, while excluding normalization adjustments for nonrecurring events, annualization adjustments for intra-period events, and new test year disallowances and imputations. As Staff notes, that proposal would allow USWC to modify its earnings picture during the period of interim rates by accelerating expenses and deferring revenues.

Moreover, the exclusion of imputations is inconsistent with other provisions of the AFOR, where USWC agreed not to challenge our authority to impute Yellow Page revenues for ratemaking purposes. *See* Order No. 91-1598 at 8-10, 22-24, and 42 n.32. USWC's proposal could have the effect of allowing the company to retain more revenues during the period of interim rates than it was entitled to under the AFOR, or that it would otherwise be entitled to receive under traditional rate base/rate-of-return regulation.

Finally, USWC's refund proposal could substantially increase its refund obligation. In order to determine the amount of USWC's actual revenues earned during the period of interim rates, Staff would be required to perform another examination of the company's books of account in addition to the examination of those books for the purposes of determining the company's revenue requirement in Docket UT 125. This additional review would delay the refund determination process by several months, during which time USWC's refund obligation would accrue interest at 11.2 percent, the authorized rate of return on rate base.

Conclusion

Accordingly, for the reasons stated above, we conclude that the amount subject to refund by USWC is equal to the difference between the permanent 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. We find this refund procedure, similar to that used in ORS 757.215(4) and 759.185(4), protects both the utility and its ratepayers now that the AFOR has been terminated prematurely due to USWC's noncompliance with its terms.

ORDER

IT IS ORDERED that the annualized test year from January 1 to September 30, 1995, as modified by adjustments ordered in docket UT 125, shall be used to determine whether U S WEST Communications, Inc., overearned during the period from May 1, 1996, to the effective date of rates established in docket UT 125.

Made, entered, and effective ______________________________.

______________________	______________________
Roger Hamilton	**Ron Eachus**
Chairman	Commissioner
	______________________
	Joan H. Smith
	Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A party may appeal this order to a court pursuant to ORS 756.580.

ORDER NO. 00-190
ENTERED APR 14 2000

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 125/UT 80

In the Matter of the Application of U S WEST Communications, Inc., for an Increase in Revenues.	)))	ORDER

DISPOSITION: STIPULATION ADOPTED; ORDER NO. 96-107 MODIFIED; ORDER NOS. 96-183, 96-286, AND 97-171 RESCINDED

Background. This docket began in December 1995, when U S WEST Communications, Inc., (USWC) submitted its general rate filing with the Commission pursuant to the terms of the Alternative Form of Regulation (AFOR) adopted by the Commission in 1991.[1] In its filing, USWC requested a revenue increase of $28 million. The case was bifurcated into a revenue requirement phase (Phase 1) and a rate design phase (Phase 2). By Order No. 97-171, the Commission completed the revenue requirement phase. In that order, we rejected USWC's requested increase and instead ordered a revenue reduction of $97.4 million and a refund of $102 million, retroactive to May 1, 1996. We adopted an authorized rate of return of 8.77 percent for USWC.

USWC appealed the Commission's order to Marion County Circuit Court and moved for a stay. On July 16, 1997, the Circuit Court stayed the order, including USWC's obligation to issue any refund to its customers. The Circuit Court, in a judgment entered February 19, 1998, reversed and modified Order No. 97-171. The Commission appealed the judgment to the Court of Appeals, and USWC cross-appealed. The appeals involving Order No. 97-171 are called below the Rate Case Appeals.

In addition to the UT 125 issues on appeal, USWC has filed an appeal with respect to refund methodology. Order No. 91-1598 (Docket UT 80) stated that any refund would be calculated using USWC's actual earnings during the interim rate period. In Order No. 96-183, at 4, the Commission stated that any refund would be based on "the difference between the permanent rate level established in pending docket UT 125 and

[1] The AFOR was adopted in Order No. 91-1598 and was due to expire on December 31, 1996. The Commission terminated the AFOR as of May 1, 1996, because of service quality problems. Under the terms of the AFOR, USWC was required to submit a general rate filing pursuant to ORS 759.180 at least nine months before expiration of the AFOR. USWC filed its general rate case on December 18, 1995. USWC's rates have been interim rates subject to refund with interest since May 1, 1996.

the current interim rate level, assuming that the latter amount of revenues is greater than the former." Specifically, the Commission ordered, at 5, that "the annualized test year from January 1 to September 30, 1995, as modified by adjustments ordered in docket UT 125, shall be used to determine whether [USWC] overearned during the period from May 1, 1996, to the effective date of rates established in docket UT 125." USWC believed that this decision contravened the plain language of the AFOR order and increased USWC's potential refund liability. Accordingly, USWC appealed Order Nos. 96-183 and 96-286 (the order denying reconsideration) to the Circuit Court of Marion County. The Circuit Court affirmed the Commission's orders and USWC appealed to the Court of Appeals, where the action is still pending. This appeal is referred to as the Refund Methodology Appeal. Both sets of appeals together are referred to as the Appellate Litigation.

At present, USWC's rates have been interim rates since May 1, 1996. USWC's ratepayers have received no refund, although the Commission ordered one nearly three years ago. The Appellate Litigation is pending, and if USWC prevails, there is a possibility that ratepayers will receive no refund.

Settlement negotiations began in November 1998 in an effort to resolve the revenue requirement phase of the case and proceed to the rate design phase. USWC, Commission Staff (Staff), Citizens' Utility Board (CUB), and American Association of Retired Persons (AARP) attended all negotiation sessions. On August 5, 1999, Staff and USWC reached a settlement in principle. They drafted a Stipulation that was executed on September 9, 1999. Negotiations took ten months, in part because USWC and Staff were originally almost $50 million apart in their positions.

As detailed below, the Court of Appeals partially lifted the stay and held the Appellate Litigation in abeyance for the purpose of permitting the Commission to consider the Stipulation. The Stipulation is also designed to resolve the issue of refund methodology from UT 80. On November 8, 1999, Staff filed testimony and exhibits in support of the Stipulation. USWC filed testimony in support of the Stipulation on November 12, 1999. CUB, Western States Competitive Telecommunications Coalition (WSCTC), AT&T, and Telecommunications Ratepayers Association for Cost-based and Equitable Rates (TRACER) filed testimony opposing the Stipulation in whole or in part. No party required cross-examination of any other, so no hearing was held. All parties who filed written testimony on the Stipulation executed a stipulation to admit testimony and exhibits filed with respect to the Stipulation. That stipulation to admit testimony and exhibits was filed February 9, 2000, and all testimony and exhibits covered by the stipulation are part of the record in this case. The parties that submitted testimony filed briefs, as did AARP and Teligent, Inc.

The Stipulation. The Stipulation reached between Staff and USWC in resolution of the Appellate Litigation is attached to this order as Appendix A. The Stipulation entails a number of changes to the findings and conclusions of the Commission's Phase I rate case order in UT 125, Order No. 97-171, which is rescinded by this order. Appendix B to this order, based on the testimony of Staff witness Terry Lambeth, details the revenue requirement effects of the Stipulation on USWC's Oregon intrastate revenue requirement. Appendix B is based on Appendix A to Order No. 97-171.

The Stipulation consists of three parts:

A. An agreement on procedures to implement the Stipulation;
B. A description of and procedures for distributing the refund; and
C. A description of and procedures for implementing a temporary bill credit pending implementation of a final rate design in UT 125.

A. Procedures to Implement the Stipulation. In July 1997, the Circuit Court entered a stay of all proceedings pertaining to Order No. 97-171. Before the Stipulation could be presented to the Commission, the Court of Appeals had to lift the stay for purposes of allowing the Commission to consider the Stipulation. On November 4, 1999, the Court of Appeals granted the joint motion of USWC and the Commission to lift the stay and allow the Commission to consider the Stipulation.

If the Commission rejects or modifies the Stipulation, both Staff and USWC have the right to withdraw from their agreement. If this occurs, the Appellate Litigation would resume. If the Commission adopts the Stipulation, the Commission and USWC will jointly move the Court of Appeals to dismiss the Appellate Litigation.

If the Commission approves the Stipulation, USWC agrees to implement the refund and temporary bill credits within 45 days after the Commission disposes of any motions for rehearing or reconsideration. Once the Commission disposes of any such motions, USWC is obligated to implement the refund and temporary bill credits despite pendency of any appeals of this order.

B. Description of and Procedures for Distributing the Refund. USWC will make a one-time refund of revenues to its Oregon local and access customers. The total amount, set forth in Exhibit A to the Stipulation, varies from $222.7 to $272.8 million, depending on the date of the refund. Oregon local service customers who subscribe to the services shown on Exhibit A, page 2 of the Stipulation will receive 86.2 percent of the refund, in the amounts derived in accordance with the methodology illustrated in that exhibit.

To be eligible for a refund, local customers must be on the USWC network as of the date of the refund and have had service 60 days prior to the refund date. Local customers will receive their refunds on a per-line basis and the amount per line will be determined by the type of service on each line. Local customers will receive their refunds in the form of a bill credit.

The refund to interexchange carriers (IXCs) is shown on Exhibit A, page 1. The amount due each IXC is based on the ratio of USWC's billed intrastate switched access revenues from each IXC to the total USWC intrastate switched access billed revenues during the 12 months immediately preceding the refund date. Refunds to IXCs will be by check.

The amount of the refund is given in a range because Staff and USWC did not know exactly when the refund would be made. The amount each local retail customer receives depends on which eligible service the customer subscribes to, the number of customers who subscribe to the eligible services, and the date of the refund. Because of the variables, the Stipulation requires USWC to calculate the refund as near as possible to the date of the refund. Carrier access customers will receive 13.8 percent of the total refund, the same percentage as in Order No. 97-171.

The Stipulation protects USWC from issuing double refunds in case a Commission order approving the Stipulation is reversed or modified by a court. It also guarantees that any subsequent additional refunds would be subject to interest at the current authorized rate of return.

No later than 45 days after the Commission disposes of any petitions for reconsideration of this order, USWC will issue the refund. At its sole discretion, USWC may make the refund earlier if it so chooses. The services subject to refund are the same as those specified in Order No. 97-171.

C. Temporary Bill Credit. Beginning from the date of the refund and extending until permanent rates become effective, as determined in the rate design phase of this docket, USWC will use bill credits and switched access rate reductions to reduce the company's revenues by $63 million per year. This calculation is made in reliance on USWC's local billing units as of August 31, 1997, and USWC's carrier common line minutes of use for the five months preceding and six months following August 1997. The actual effect of the reduction in revenues will be greater than $63 million because of the company's growth since 1997.

The services eligible for the temporary bill credits are the same as those that receive the one time refunds. Exhibit B to the Stipulation calculates the temporary bill credits. These are $1.85 for a private line, $2.47 for residential and Centrex lines, $5.93 for a simple business line (1FB), and $6.68 for complex business line. Switched access customers will receive temporary rate reductions in both originating and terminating carrier common line charges.

The refund is a separate item from the temporary bill credits. The refund is a return of revenues collected from customers, made in settlement of potential liability to make refunds at some future date. The bill credits reflect a reduction going forward in revenue requirement pending conclusion of the rate design portion of this docket.

Parties' Positions. ***AARP*** opposes both the content of the proposed settlement and the process by which settlement was reached. AARP believes that Order No. 97-171 is reasonable and in accordance with applicable law. AARP opposes reducing the refund amount as a transfer from ratepayers' to USWC's pocket. AARP also takes issue with the fact that the agreement allows USWC to add new plant to its rate base, a decision that accounts for 85 percent of the change in revenue requirement. AARP notes that Staff's agreement includes no mechanism to monitor whether USWC uses its additional plant to improve service quality.

Finally, AARP has concerns with the proposed reduction of the interest rate to be applied to the outstanding ratepayer refund, from 11.2 percent in Order No. 97-171 to 8.77 percent in the proposed Stipulation. According to AARP, the reduction amounts to a $10 million reduction of the total refund.

CUB opposes the Stipulation in general. According to CUB, the Stipulation is the result of political pressure and does not benefit customers. CUB argues that the proposed settlement gives away the fairly determined refund and revenue reduction determined in Order No. 97-171.

CUB asserts that this is the last traditional rate case USWC will ever see. Therefore, CUB claims that customers will live with the decisions in this case until the legislature or the voters reset prices. CUB questions whether the speed of settlement is worth the reduction in customer benefits, since anything given away might never be returned to customers.

CUB believes that USWC brought political pressure to bear on the Commission to settle the case rather than to proceed in such a way as to analyze issues in the best interests of customers. Specifically, CUB believes that USWC tried to use Senate Bill 622 (SB 622) as a mechanism for settling the case and withdrew its legislative proposal only because it was assured that the rate case would be settled at an acceptable revenue requirement reduction.

CUB contends that the Stipulation violates the agreement among CUB, TRACER, USWC, and Staff that was adopted by Order No. 96-107. There, the parties agreed that the interest rate on the refund would be 11.2 percent. Here, Staff and USWC propose an interest rate of 8.77 percent, constituting a dollar value difference to customers of $15 million (assuming a refund of $58 million).

CUB asserts that Staff has violated the used and useful standard set out in ORS 759.285[2] by including in rates additional plant investments made between May 1996 and December 1998. Staff argues that it is too difficult to adjust a future test year, but CUB disagrees, pointing out the Commission used a future test year in the PGE rate case, UE 88, but did not include the Coyote Springs plant in that test year. Coyote Springs was added to rate base in UE 93, after it came on line. Finally, CUB contends that it is inappropriate to adopt 40 new adjustments to the rate case, as Staff has done, without extending the proceeding and allowing parties to review work papers, submit data requests, and respond.

CUB objects to the proposed refund procedure and to the amount of the proposed refund in the Stipulation. Staff's evidence submitted in support of the Stipulation arrives at a $58 million figure for the refund, not the $53 million Staff now proposes. CUB acknowledges that the reduction going forward is set at $63 million per year, an increase of $5 million over the $58 million figure, but argues that this is not a

[2] ORS 759.285 provides: "No telecommunications utility shall, directly or indirectly, by any device, charge . . . rates which are derived from a rate base which includes within it any construction, building, installation or real or personal property not presently used for providing utility service to the customer."

fair trade, because we do not know how much of the rate reduction going forward will flow to customers and how much to shareholders. CUB claims that some of the revenue reduction actually covers competitive losses experienced by USWC. If price reductions are applied to services that are shrinking, the value to customers as a whole declines.

AT&T proposes only one change to the Stipulation. AT&T urges the Commission to adopt a time frame other than the 12 months proposed in the Stipulation to more appropriately distribute the refund amount intended for the interexchange carriers. AT&T proposes this change to reflect the state of the IXC market over the time frame during which overpayment of access charges occurred.

AT&T recommends that the Commission adopt a time period beginning on May 1, 1996, and running up to the date of the refund, as originally contemplated in Order No. 97-171, to allocate the refund amounts to the IXCs. As currently proposed, the refund would be based on the amount the individual carrier paid USWC for access service over the 12 months preceding the refund date.

AT&T argues that the current refund proposal would treat disparately situated IXCs the same by allowing a refund over the same one-year period for later and earlier entrants into the market. AT&T argues that the Commission should seek to reimburse customers who were assessed excessive charges. AT&T's recommendation is simply to use a longer period (from May 1, 1996, to the date of the refund) to allocate the refunds due to IXCs. The recommendation would not change the total amount of refund due to IXCs.

The Northwest Payphone Association (NPA) asks the Commission to condition approval of the Stipulation on USWC agreeing to a refund methodology that provides for refunds to former customers of USWC. Customers who have switched to competitors should receive refunds to avoid any anticompetitive distortion of the market. NPA fears that prospective refunds create an incentive to delay or curtail a change in competitive providers. Customers might remain on USWC's system rather than switch to a competitive local exchange carrier (CLEC), simply to receive the refund.

NPA argues that former customers should be allowed to file claims for refunds or that the Commission should require USWC to locate and notify former customers. NPA asserts that if USWC were to publish notices and permit former customers to file claims for refunds, the expense and burden would be fairly minimal.

NPA contends that even if no other class of former customer receives refunds, former Public Access Line (PAL) customers should receive them. USWC bills are a large portion of payphone service providers' expenses. Moreover, payphone service providers are more likely than residential and other business line customers to be former customers of USWC at least as to some of their lines.

NPA finally maintains that federal law may require USWC to provide refunds to payphone service providers. In its payphone orders, the FCC required local exchange companies including USWC to file cost based PAL rates. USWC was given a waiver excusing it from having the new rates in place by April 15, 1997, provided they

issue refunds to payphone service providers if the state Commission ultimately approves a rate lower than the rate filed by the local exchange company or the rate it had in place on April 15, 1997. *Order on Reconsideration, Re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket 96-128, FCC 96-439 (1996); Order, CC Docket 96-128 (DA 97-678 (1997)). NPA notes that the record does not clarify whether USWC would contend that its 1997 PAL rate is appropriately cost based.

Teligent argues that the refund mechanism proposed in the Stipulation will have an anticompetitive impact, would create a barrier to competition, and is inconsistent with the representations USWC made to the Marion County Circuit Court. Moreover, Teligent asserts that the proposed Stipulation would discriminate against USWC's former customers, including those who are now customers of CLECs.

Teligent contends that former customers who have left the USWC system would be punished for switching to a competitive alternative. Thus the proposed refund mechanism is unfair to former customers who are no longer on the system and to customers of longer standing, while it rewards new customers who did not overpay as much as the older customers did. Even worse is the bill credit, according to Teligent, because it gives CLEC customers an incentive to return to USWC. Thus, Teligent argues, USWC can delay and hamper competition for an additional 45 days after the Commission adopts the Stipulation, thereby creating a new disincentive to customers to leave USWC for a CLEC.

Additionally, Teligent believes that the refund mechanism raises legal issues under §253(a) of the Telecommunications Act of 1996 (the Act). That section provides: "No State or local statute or regulation, or any other State or local legal requirement, may prohibit or have the effect of prohibiting the ability of any entity to provide any interstate or intrastate telecommunications service." 47 USC §253.

Teligent asserts that the fact that there is no concrete evidence in the record of anticompetitive effects should not be the determinant on this issue. Teligent argues that the incentives and disincentives for competition are obvious.

Teligent maintains that USWC made representations to the Marion County Circuit Court that are inconsistent with the refund mechanism in the Stipulation. USWC represented that it would make reasonable efforts to pay any refund to its customers as of May 19, 1997. Teligent urges the Commission to adopt the refund procedures articulated in the Superior Court of King County review of USWC's general rate case in Washington State. There, USWC was required to give refunds to former customers by advertising the availability of refunds for former customers each day for one week. The court also ordered USWC to allow at least 60 days for the former customers to submit their refund claims.

TRACER also argues against the proposed refund mechanism. The proposed refund procedure, according to TRACER, is anticompetitive and unfair to customers who have been overcharged and have left the system or who have been on the system longer than customers who joined the system in time to qualify for the same

refund. TRACER fears that customers may delay or opt against changing service providers because of the refund mechanism. TRACER also urges the Commission to advertise the availability of the refund to all past customers or present customers about to change service providers. This would increase the costs associated with issuing the refund but TRACER believes the benefits merit the increase. Like Teligent, TRACER recommends some version of the Washington State general rate case refund provisions.

WSCTC, whose members consist of Electric Lightwave, Inc.; GST Telecom Oregon, Inc.; Advanced TelCom Group, Inc.; Shared Communications Services, Inc.; Advanced Telecommunications, Inc.; Global Crossing Telemanagement, Inc.; and Global Crossing Local Services, Inc., believes that the refund mechanism in the proposed Stipulation creates a barrier to competition and results in anticompetitive effects for CLECs. WSCTC recommends an alternative refund mechanism to diminish the Stipulation's anticompetitive harms by ensuring that former USWC customers who have switched to CLEC services receive their refunds without being forced to switch back to USWC.

As to the proposed refund for Centrex services, WSCTC recommends that the Commission amend the proposed refund ratio for resellers from 1.00 to 2.40 to reflect the special circumstances that surround Centrex resellers. WSCTC has in mind the $5.40 per line surcharge to which Centrex resellers are subject. WSCTC also advocates treating Centrex resellers on a par with business simple (1FB) customers.

As to the proposed refund mechanism, WSCTC points out that CLEC customers must return to USWC to receive the refunds they are owed. Staff's and USWC's proposals for speedy refunds do not address the CLECs' concerns. WSCTC argues that if all USWC customers, including former customers now taking service from CLECs, are made eligible for the refund, a slight delay in processing the refund will not matter. WSCTC proposes that USWC issue refunds to current customers and also to those former customers who have overpaid during the period in question and who have switched to a CLEC in the meantime. CLECs should be permitted to notify their customers that the customers should contact USWC to receive the refunds owed them. USWC should be required to notify its current customers through a billing insert that the customers may elect to receive a check rather than a billing credit for their refund. Further, USWC must explain that checks must be issued for any remaining balances if the customer elects to switch to a CLEC.

USWC argues in favor of the Stipulation, maintaining that it is in the public interest. USWC points out that its current rates have been interim for almost four years, leading to uncertainty for both USWC and ratepayers. USWC also notes that the Commission's initial order (Order No. 97-171) has been reversed in the Circuit Court and is currently on appeal. Moreover, ratepayers face the possibility of receiving a smaller refund, or none at all, if litigation proceeds. Third, the uncertainty of USWC's current rates impedes the development of competition by delaying implementation of rates more suitable to a competitive environment. The same uncertainty impedes USWC's ability to make needed investment decisions. All these issues would be put to rest by adopting the Stipulation.

USWC contends that the amounts of the refund and the rate reduction in the Stipulation are well within the range of reasonableness. Since the possible outcomes of continued litigation range from no refund and a rate increase to the original figures in Order No. 97-171, the figures of the Stipulation represent an outcome clearly consistent with the public interest. USWC also points out that it made a major concession in agreeing to make refunds prior to all appeals of the order on the Stipulation having run their course. USWC acceded to Staff insistence that the timing of the refund was critical and that refunds be issued despite any appeals.

In response to CUB's allegations that the Stipulation is the result of political pressure, USWC notes that CUB has provided no evidence in support of its position. USWC also refutes CUB's assertion that the financial terms of the proposed settlement are unreasonable and do not stand up to normal rate case scrutiny. USWC argues that the terms are within the reasonable range and are even skewed in favor of ratepayers. CUB, according to USWC, ignores the fact that one reason the Circuit Court gave for reversing Order No. 97-171 was because the Commission failed to use normal rate case scrutiny. Specifically, USWC believes that adjustments that forecast changes in revenues and expenses to the mid point of a future 32-month period have not appeared in prior USWC rate cases and were not used in UT 141, the GTE rate case.

In defense of the refund methodology, USWC points out that it is substantially the same as set forth in Order No. 97-171. USWC states that its refund is limited to current customers because it does not have readily available (online) records for customers who leave the system. The effort of reviewing each monthly bill for each customer back to May 1996 could be a massive manual undertaking.

USWC notes that the 60-day cutoff period is based on Staff's desire to discourage customers from subscribing to additional lines immediately before the refund date simply to receive a larger refund. Given the size of the potential refund, such a limitation is a practical response to customers who may attempt to procure an unwarranted windfall.

Alternative refund methodologies, according to USWC, fail to conform to the circumstances. Proponents of these methodologies do not address the practical problems each alternative would entail. USWC also points out that until the rate design phase of the case is completed, there is no evidence that any particular customer has paid USWC too much for telephone service. Finally, USWC notes that resellers may pass on the refunds they receive from USWC to their end users to mitigate the perceived unfairness of the mechanism.

In response to AT&T's argument that the refund should be allocated to IXCs based on relative revenues from May 1, 1996, to the date of refund, USWC points out that this proposal would increase AT&T's refund at the expense of other IXCs.

USWC characterizes TRACER's proposed refund procedures as complex and laborious. It would result in a delay of several months in refunds, besides being very expensive. USWC objects that there is no evidence on which to conclude that the

proposed procedure is anticompetitive. USWC again points out that reseller CLECs can pass the refunds on to their customers.

USWC opposes WSCTC's proposed method of granting customers refunds in the form of a check. USWC argues that this process would aggravate anticompetitive delay and increase the costs and burdens of implementing the refund. It would take over 30 days to prepare notices and notify customers that they have the option of receiving checks. That would require USWC to wait at least 30 days for responses. Then USWC would begin the cycle of issuing checks or billing credits, which takes another 30 days. This additional time would aggravate the situation that WSCTC thinks should be mitigated.

Staff recommends adopting the Stipulation in its entirety. Staff notes that the Stipulation, if adopted, would:

- Settle and resolve the appeals of the Commission's orders in UT 80 and UT 125 currently pending before the Oregon Court of Appeals;
- Reduce USWC's annual Oregon intrastate revenue by $63 million from current rates (based on August 1997 billing units for local services and the minutes of use for the five months preceding and six months following August 1997, for switched access services);
- Produce a refund to current customers of $53 million per year for the period May 1, 1996, to the date of the refund. The billing credits in aggregate would include interest at a rate of 8.77 percent compounded monthly.
- Provide temporary bill credits in the amount of $63 million per year on a going forward basis, until the Commission sets permanent rates for USWC in Phase II of this docket.

In response to CUB's opposition to the Stipulation, Staff argues that the settlement is not driven by political pressure. CUB speculates that Staff and USWC agreed to settle the rate case at a reduced level if the Legislature would drop from SB 622 provisions that would have limited USWC's liability in the rate case. Staff points out that the timing of the various events precludes CUB's allegations. The Legislature had no assurance that there would be a settlement when it passed SB 622, and the Governor signed the bill before he knew the rate case was settled. A settlement in principle was achieved August 5, 1999, and the Stipulation was signed on September 9, 1999.

According to Staff, a more plausible explanation of why the liability limitation provisions were removed from SB 622 is that the Governor's office as well as the Commission and CUB opposed their inclusion in SB 622. Settlement negotiations between Staff and USWC resumed in June 1999, only after USWC had increased its settlement offer from a $28 million revenue reduction to a $50 million reduction. Finally, Staff notes the lengthy settlement negotiations and the fact that the final revenue requirement settlement (a reduction of approximately $58 million, considering the $53 million refund amount and the $63 million permanent revenue reduction) is substantially above the $50 million that USWC offered in May 1999. These factors belie

CUB's theory that USWC and the Commission reached a political settlement in exchange for removal of the rate case from SB 622.

Staff also maintains, against CUB's contentions, that the revenue requirement settlement is reasonable and supported by substantial evidence. Staff reports that it had two self-imposed constraints in its settlement negotiations with USWC. First, it was unwilling to withdraw the adjustments to USWC's base case adopted in Order No. 97-171 that it strongly felt were proper adjustments. Second, it would not agree to a revenue requirement number that produced an unreasonable rate of return for USWC. Thus, Staff revised several of its test year adjustments in Order No. 97-171 to arrive at the revenue requirement settlement amounts. About 85 percent of the total revenue requirement change from Order No. 97-171 is attributable to documented plant additions USWC made between May 1996 and December 1998. Most of the remaining amount of revenue requirement change is attributable to Staff's revised recommendations about the imputation of directory revenues to USWC.[3]

Settlement would produce a return on equity of 10.2 percent and a return on rate base of 8.77 percent. These are the returns authorized in Order No. 97-171. Staff contends that some of CUB's arguments, if adopted, would result in lower refunds and benefits for USWC's customers than they would receive under the Stipulation.

CUB disagrees with the Stipulation's reduction of the interest rate on the utility's refunds to customers from 11.2 percent to 8.77 percent. Staff points out that the Commission ordinarily prescribes a utility's current authorized rate of return as the interest rate for refunds. Here, that figure is the 8.77 percent contained in the Stipulation.

Second, Staff argues that under the Stipulation, the reduction in USWC revenues going forward in effect amounts to $68 million rather than $63 million, a reasonable trade for the lower interest rate on the refund. The $5 million difference in effective and nominal revenue reductions results because August 1997 was the midpoint of Staff's review period for developing adjustments. Using two-year-old billing units and minutes of use effectively raises the revenue reductions in 2000 by $5 million.

Third, the agreement on the lower interest rate was one element of the Stipulation that will accelerate the beginning of the rate design phase in this docket. Under the Stipulation, paragraph 2(a), USWC was to file its rate design proposal by December 6, 1999 (in fact, USWC filed in November 1999), many months sooner than if the Commission waited for a final Court of Appeals or Supreme Court decision.

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[3] For settlement purposes, Staff made two changes to its imputation recommendations. First, Staff updated the adjustment in Order No. 97-171 to use the retention rate from Docket UT 102, which has been in effect since January 1, 1992. This modification increased the annual intrastate revenue requirement in Staff's proposed test year by $4.9 million. Second, Staff removed foreign directories from the revenue imputation because they are not sold to USWC's customers. That treatment is consistent with the stipulation in UT 141 for GTE Northwest Incorporated in Order No. 98-388. This increased USWC's annual intrastate revenue requirement in Staff's proposed test year by $0.3 million.

In support of the refund mechanism set out in the Stipulation, Staff notes that the procedures are virtually the same as in Order No. 97-171. Staff notes that intervenors who raise the issue of unfairness with respect to the procedures assume that specific customers or customer groups have overpaid USWC since May 1996. Staff points out that absent a Commission order in this docket assigning permanent rates to various telecommunications services, there is no basis for an assertion that any particular customer has overpaid USWC.

In response to parties who assert that USWC should make refunds to customers who have left its system, Staff notes that USWC as a practical matter cannot keep track of customers who leave the network. Staff opposes giving customers notice and allowing them to file claims. In 1992, Staff points out, it and USWC attempted to notify former USWC customers of a refund in UT 85. That attempt added substantial time to the process and benefited relatively few customers. Staff argues that the method it has proposed for distributing refunds is administratively efficient and is the optimal way of ensuring that USWC returns to its customers, generally, the company's excess revenues since May 1996.

In response to TRACER, which urged a weighted or pro rata refund approach, Staff notes that USWC does not maintain automated records back to May 1996, which would make TRACER's proposal highly unwieldy and time consuming.

Staff makes three responses to charges that the proposed refund mechanism is anticompetitive. In reply to TRACER and other intervenors who argue that customers awaiting refunds may stay with USWC to receive them, Staff responds that the sooner the refunds are made, the smaller the anticompetitive effect will be. Staff also points out that once USWC's customers receive their billing credits, they are free to terminate their USWC service, receive a check from USWC for the balance of their refund, and choose a different service provider. Finally, Staff notes that reseller CLECs will receive refunds on the same basis as USWC's end user customers and will be able to pass the refunds through to their customers.

WSCTC asks that customers be allowed to receive their refund in the form of a check. Staff points out that notice to customers of their right to request a check would entail allowing time for notice, time for customers to respond, and time for USWC to cross check its records so that it did not issue double credits. USWC would be unable to proceed with bill credits until after it was certain which customers preferred to receive checks.

Finally, Staff opposes AT&T's proposal that the refund to IXCs be based on the amount paid to USWC from May 1, 1996, to the date of the refund. The Commission's intent in Order No. 97-171 was to direct refunds to current customers based on their current service demand. The Stipulation reflects that intent by providing that each IXC will receive an amount based on the ratio of USWC's billed intrastate switched access revenues from each IXC to the total USWC intrastate switched access billed revenues during the 12 months immediately preceding the refund date. Staff contends that the use of access minutes over a year preceding the refund date is a

surrogate for the number of lines in use by a current customer as of the refund date. The refund mechanism is not designed to reflect possible overpayments by IXCs from May 1996 to the present.

Discussion. It is critical that we be able to proceed with the rate design phase of UT 125 without further delay. That will allow us to set the permanent rates of USWC's regulated telecommunications services. The last comprehensive rate design order for USWC was entered in 1990. Since then, Congress and the Oregon Legislature have both passed laws to promote development of competitive telecommunications markets—the 1996 Telecommunications Act and SB 622. We must establish a rate structure for USWC that more fully promotes the objectives of those laws. If the UT 80 and UT 125 appeals are not settled, those appeals could continue and delay the rate design phase of UT 125 for several more years.

Moreover, adopting the Stipulation would eliminate the litigation risks associated with those appeals. The outcome of litigation, especially in complex and highly technical cases, is uncertain. We note that several of the hotly disputed issues in the underlying UT 125 appeal involve tens of millions of dollars (imputation of directory revenues, plant investments and related costs, service reengineering costs, and service quality issues). Therefore, although the revenue reduction in the Stipulation is substantially less than the $97.4 million revenue reduction in Order No. 97-171, if a court reversed us on any or all of the issues listed above, the reduction could be significantly less than the $63 million USWC and Staff have settled upon.

In the following, we respond to the parties' objections to the Stipulation. We note at the outset, however, that a settlement necessarily represents a series of tradeoffs. Because we believe that the tradeoffs in the Stipulation benefit ratepayers more than they disadvantage them, we support the Stipulation for the most part. The benefit of settlement itself, in this context, is considerable, and the overall result is just and reasonable. We further note that Staff has preserved critical adjustments to USWC's rate case and has preserved the basic refund mechanism from Order No. 97-171.

Procedural Concerns. AARP and CUB challenge the process by which the proposed settlement was reached. CUB in particular alleges that the Stipulation is the result of political pressure. We find no evidence in the record to support this view, and believe that the timing of events (the Governor signed SB 622 before the Stipulation was signed, and the Legislature passed SB 622 before there was even a settlement in principle) supports the position that the Stipulation is not politically tainted. Like Staff, we find it much more likely that negotiations with USWC were resumed and successfully concluded because USWC came back to the table with a $50 million revenue reduction offer.

Staff's adjustments. AARP takes issue with the fact that one of Staff's adjustments is to allow USWC to add new plant in its rate base for the purpose of improving service quality, with no mechanism in place to monitor whether USWC uses its plant to improve service quality. We find Staff's adjustment reasonable. We have made our dissatisfaction with USWC's service quality public in the past; it would be counterproductive to disallow additional plant to improve the quality of service. While

we do not have a specific mechanism in place to monitor how USWC deploys its plant, we do have service quality monitoring in effect and are satisfied that our service quality requirements serve as a proxy for monitoring the use to which USWC puts its plant. We also note that in view of USWC's recent held order problems, any plant addition that leads to deployment of a desired service on time is a service quality improvement.

CUB challenges Staff's inclusion in rates of additional plant investments made between May 1996 and December 1998, as violating the used and useful standard of ORS 759.285. We do not agree that this inclusion violates ORS 759.285. In contradistinction to Coyote Springs in UE 88, this plant is already in use. Staff proposes using an updated rate base that contains only documented plant additions.

CUB also objects to Staff's making numerous adjustments to the rate case without extending the proceeding and allowing parties to review work papers, submit data requests, and respond. We find that the process provided adequate time for CUB to file two rounds of data requests and review all work papers prepared by Staff in support of its adjustments. In addition, we have reviewed Staff's testimony about its adjustments and find that they were made reasonably and prudently and were based on substantial evidence. The purpose of a settlement is to take issues out of dispute; in this case, the Commission is satisfied that those issues have been resolved in the public interest.

CUB also contends that it is inappropriate to adopt 40 new adjustments to the rate case. We find that Staff has not proposed an unreasonable number of new adjustments. Some of its adjustments, moreover, result from the circular effects of revised or new adjustments on all other adjustments. The record shows that the changes in Issue 8f (ORS 291.349, income tax refund) and Issue 8n (PUC fee increase) affected Issue 1b. In turn, the change in Issue 1b (net to gross factor) affected the revenue requirement of many adjustments. The change in Issue 3a affected Issue 3b (directory revenue growth). The addition of Issue 9d (new plant additions) affected Issue 9c (service quality). All the changes affected Issue 10 (final test year separation factors).

Amount of Refund. CUB's final objection to the Stipulation[4] is the amount of the proposed refund which, CUB argues, should be $5 million higher annually than the Stipulation's $53 million, based on Staff's case. We find that the tradeoff of a higher reduction going forward, as Staff explained, is reasonable. CUB's concerns about which services will bear the rate reduction will be addressed in the rate design phase of UT 125.

Refund Mechanisms: IXCs. We have reservations, however, about the Stipulation's refund mechanisms. AT&T's suggestion of a different time period than the proposed one-year period for the refund to IXCs appears reasonable to us. Rates have been interim and subject to refund since May 1996. It is not feasible to design a perfectly prorated scheme for distributing the refund money among IXCs, and it is not appropriate to prorate the refund amount until the rate design phase of this case is completed. However, we can more closely approximate an equitable distribution to the IXCs who have overpaid over a four-year period by using a four-year period for minutes of use. Administratively, it is much simpler to create an equitable solution with the IXCs,

[4] CUB's objection to the interest rate of 8.77 percent rather than 11.2 percent is discussed below.

because there are few carriers involved. We adopt AT&T's proposal of using the minutes of use from May 1, 1996, to the date of the refund as the basis for the refund to the IXCs. As AT&T points out, this change does not affect the amount of the refund to IXCs. It affects only the distribution of the amount among IXCs.

Refund Mechanisms: Payphone Providers. Like the remainder of the intervenors, NPA challenges the Stipulation's proposed refund mechanism. NPA notes that federal law may require USWC to provide refunds to payphone service providers, based on the FCC payphone orders. NPA itself, however, notes that the record does not contain enough evidence to clarify whether USWC's 1997 PAL rate qualifies it for a waiver from the FCC. This is not an issue that can be decided on the record before us.

Refund Mechanisms: Former Customers. NPA, Teligent, TRACER, and WSCTC urge the Commission to include former customers in the refund procedure. Not to do so, the parties argue, is to punish customers for switching to a competitive alternative.[5] As USWC and Staff have pointed out, the greater anticompetitive effect would come from delaying the rate design phase of the case. Any of the mechanisms for including former customers in the pool of recipients of the refund proposed by NPA, Teligent, TRACER, and WSCTC would delay the rate case.[6] Each of these proposed mechanisms is also cumbersome and will increase the time and expense of issuing the refund. Moreover, reseller CLECs are free to pass their refunds through to their customers, thus rewarding customers for switching to a competitive alternative.

We are sensitive, however, to the situation of USWC customers who ceased taking service before the refund cutoff date. The refund mechanisms proposed by NPA et al. are administratively unwieldy, but we believe that some way of allowing this group of customers to share in the refund is desirable. Numerous customers, large and small, have likely left the system in the nearly four years since rates have been interim, and some of those who left took service from USWC for a substantial period. Accordingly, we adopt a plan to return money to some of the customers who have left the system. This plan will permit some recovery of the refund by former USWC customers and will not delay the refund to customers currently on the system.

We will order USWC to set aside 5 percent of the local refund amount to return to customers who were customers of USWC for at least six months during the period from May 1, 1996 to the date of the refund bill credits (the Fund). We choose 5 percent as the set-aside figure because in our UT 85 refund experience, 1.8 percent of the total amount was refunded through the claim process. In this case we are dealing with a larger amount of refund and a longer period covered by the refund. Therefore, 5 percent seems a reasonable figure to designate for the refund to customers no longer on the system. The remaining 95 percent of the refund amount will be issued as bill credits

[5] Teligent also argues that the refund mechanism may raise legal issues under §253(a) of the Act. We reject Teligent's contention. Nothing about the refund mechanism effectively or actually prohibits any entity from providing telecommunications service.

[6] The same argument persuades us that it is preferable to allow local customers their refund in the form of bill credits rather than giving them the option of a check initially. *See* Staff's discussion of this issue above. As Staff and USWC point out, customers may ask for a check for any unused bill credit at any time after the initial credit, receive a check, and leave the USWC system at that point.

to local retail customers as described in the Stipulation. The timing of the refund to these customers will be as described in the Stipulation.

Former USWC retail customers who were customers for at least six months between May 1996 and the day the last refund bill credit is given are eligible for a refund. We choose to make a refund to customers of six months or longer for two reasons. First, we recognize that former customers who received less than six months' worth of service may have incurred some loss, but it is not substantial. We have designed a procedure to recognize substantial claims, those involving six months or more of service. Second, we will allow USWC to recover its costs of administering the refund to former customers. By limiting claims to customers with at least six months of service, we reduce the number of claims, reduce small claims, and keep administrative costs relatively low so that more of the Fund goes to customers than to administration costs.

The refund amount will be the same for the former customers as for retail customers still on the system. If a customer subscribed to multiple lines during the eligibility period, the customer's refund will be limited to the number of lines the customer had on the last day the customer was on the system. If a customer had more than one line sequentially during the eligibility period, because the customer moved and changed telephone numbers, for instance, the customer would be eligible for only a single line refund.

We will require USWC to advertise widely in newspapers throughout Oregon that former retail customers who were USWC customers for at least six months can apply to USWC for a refund from the Fund. USWC is to run quarter page ads in the following Oregon newspapers to provide statewide coverage:

Albany: Albany Democrat Herald
Astoria: The Daily Astorian
Baker City: Baker City Herald
Bend: The Bulletin
Corvallis: Corvallis Gazette Times
Eugene: The Register Guard
Grants Pass: Grants Pass Daily Courier
Klamath Falls: Herald and News
Medford: The Mail Tribute
Pendleton: East Oregonian
Portland: The Oregonian
Roseburg: The News Review
Salem: Statesman Journal

The ads will include information about the refund and a claim form to be clipped out, filled in, and mailed to USWC for a refund. USWC is also to publish a contact telephone number for customers who need claim forms or information about the refund. Four ads will run in each paper, one per week for four weeks. USWC is to establish and announce a contact telephone number at which potential claimants can receive information or request a claim form. The telephone number will be included in the notice of refund published in the newspapers.

On receipt of the claim form from customers, USWC will review the customer's claim and mail a check to the customer promptly, if the claim is verified. Staff and USWC will collaborate on developing language for the advertisements as well as the claim form that will be part of the advertisement. The form should contain language warning claimants of the consequences of filing a false claim.

Refunds from the Fund will be available until the Fund is exhausted. They will be paid in the order in which the claims are verified. The amount of the refunds will be the same as for retail customers who qualify for refunds under the terms set out in the Stipulation. Refunds from the Fund will be provided by check. The Fund will come into existence on the date USWC gives bill credits to its current local retail customers. It will remain in existence for a period of three months from its inception or until it is exhausted by claims. USWC will continue to pay interest on money in the fund at an annual rate of interest of 8.77 percent until the Fund ceases to exist. USWC will be allowed to recover the approved administrative costs associated with the Fund from the Fund pool.

After it is exhausted by claimants or after three months elapse, whichever comes first, the Fund will cease to exist. If there is a residue remaining in the Fund, it will be distributed as uniform bill credits during the next billing cycle after administrative costs have been verified and paid. All USWC retail customers of record at that time will receive an equal bill credit per line.

Interest Rate. CUB and AARP in particular object to the fact that the interest rate applied to the ratepayer refund is 8.77 percent in the Stipulation and was 11.2 percent in Order No. 97-171. The lower interest rate is one of a number of tradeoffs made for the sake of settlement. It is USWC's authorized rate of return, however, and is therefore a reasonable rate of interest. The Stipulation also represents a reasonable tradeoff between a lower interest rate and an accelerated start to the rate design phase of this case.

Centrex Resellers. WSCTC asks the Commission to amend the proposed refund ratio for Centrex resellers from 1.00 to 2.40 per line to reflect their special circumstances, particularly the surcharge. Centrex resellers have twice challenged the surcharge and the Commission has decided that the surcharge is justified. *See* Order No. 99-753 and discussions in Docket UM 909/UT 147. We are not convinced by WSCTC's arguments that Centrex resellers should be treated equally with business rather than equally with residential customers. We find that the pricing of Centrex station lines is far closer to prices paid by residential customers than by business customers. A more reasonable approach is to place Centrex customers on a par with residential customers, as the Stipulation does.

We conclude that the Stipulation, as modified above, is reasonable, is supported by substantial evidence in the record, is in the public interest, and should be adopted. The modifications above are reflected in the ordering paragraphs below.

Modification of Order No. 96-107 (UT 80). We modify Order No. 96-107 to change the refund interest rate from 11.2 percent to 8.77 percent. The discussion and procedures of that order remain intact.

Rescission of Orders No. 96-183 (UT 80), 96-286 (UT 80), and 97-171 (UT 125). To reflect the changes the Stipulation introduces, we rescind Order Nos. 96 183 (UT 80); 96-286 (UT 80); and 97-171 (UT 125). Portions of Order Nos. 96-183 and 97-171 are readopted in Order No. 00-191, entered on this date.

We set out below a summary of the issues in Order No. 97-171 that are modified by the Stipulation or readopted in Order No. 00-191.

a) Issue 1, Test Year, pages 8-20, is readopted.
   Issue 1b, Net to Gross Factors:
- The discussion on page 9 is readopted.
- The stipulated factors are weighted based on the revenue distributions used in settlement of Issue 11 below.
- The factors shown in Order No. 97-171, Appendix A, page 21, are readopted.
- The weighted net to gross factors from Appendix B, Lambeth/2, Column 4, of this order are added.

b) Issue 2, Cost of Capital, the discussion on pages 20-37 of Order No. 97-171 is readopted.

c) Issue 3a, U S WEST Direct Yellow Pages Revenue Imputation (*see* current order, Appendix B, Column 16), the discussion on pages 37-43 is readopted *except:*
- USWC may continue to use the retention rate from UT 102, in effect since June 1992; and
- Foreign directory revenues are removed from the imputation.

d) Issue 3b, U S WEST Direct Yellow Pages Revenue Growth, the discussion on page 43 is readopted, but the amount in Appendix A, Column 16a, of Order No. 97-171 is amended to reflect the $0.3 million reduction in growth due to exclusion of foreign directory revenues and the change in retention rate.

e) Issue 4, Affiliated Interests and Corporate Allocations, the Issue 4 adjustments at pages 44-59 are readopted.

f) Issue 5, UP 96 Sale of Exchanges, the Issue 5 discussion at pages 59-62 is readopted.

g) Issue 6, Operating Revenues, the discussion at pages 62-68 is readopted.

h) Issue 7, Employee Benefits, the discussion at pages 68-72 is readopted.

i) Issue 8, Operating Expenses and Taxes, the discussion at pages 72-83 is readopted except as modified with respect to Issue 8f and Issue 8n. Issue 8o is added as shown in Appendix B to this order, Column 59. *See* Stipulation, Appendix A to this order, paragraph 12.
- Issue 8f, ORS 291.349 Income Tax Refund: Staff modified adjustments at Issues 3 and 9 that affected taxable income. The Issue 8f discussion at pages 72-73 is readopted, but the amounts in Column 42 of Appendix A to Order No. 97-171 are amended as shown in Appendix B to the current order, Column 42.
- Issue 8n, PUC Fee Increase: The discussion at page 83 is readopted, but the amounts in Appendix A, Column 49a, of Order No. 97-171 are amended as shown in Appendix B to the current order, Column 50.

j) Issue 9, Service Quality and Reengineering:

- The findings regarding Issue 9a and 9b at pages 83-93 are readopted. In Order No. 97-171, Appendix A, the revenue requirement consequences of these issues are shown in Columns 50 and 51. In Appendix B to the current order, they are shown in Columns 51 and 52.
- Issue 9c, Service Quality: Staff added Issue 9d, New Plant Investments and Related Costs, for settlement purposes. That addition changed the revenue requirement of Issue 9c. The discussion at pages 93-101 is readopted, but the amounts shown in Appendix A, Column 52, of Order No. 97-171 are amended to include the Issue 9d effects on the service quality adjustment. The new amount is shown in Appendix B to the current order, Column 53.
- Issue 9d, New Plant Investments and Related Costs: Staff added rate base and related expenses to recognize investment made from May 1996 through December 1998, as shown in Column 54, Appendix B to the current order.

k) Issue 10, Final Test Year Separation Factors: Staff modified adjustments at Issues 3a, 3b, and 9d for settlement purposes. Staff calculated the intrastate effects of each adjustment on the final separation factors. The discussion at page 101 of Order No. 97-171 is readopted, but the amounts shown in Appendix A, Column 53 of that order are amended as shown in Appendix B to the current order, Column 56.

l) Issue 11, Refund Procedures: The discussion at pages 101 to 107 is readopted except: 1) the interest rate is revised; 2) the refund eligibility date is updated from May 19, 1997, to reflect the provisions of the Stipulation, Appendix A to this order, starting at 3; 3) we update the date when the refund will begin, in accordance with the Stipulation, *supra*; 4) we allow a refund for former customers; and 5) we allow temporary rate reductions and bill credits as provided in the Stipulation.

- Issue 11a, Amount of Refund: We revise the conclusions to allow refunds to be based on an amount lower than the adjusted test year revenue requirement.
- Issue 11b, Interest Rate for Refund: The interest rate for the refund shall be 8.77 percent.
- Issue 11c, Distribution of Refund: We update the refund eligibility date from May 19, 1997, to be consistent with the Stipulation, Appendix A to this order, Paragraph 1.

m) Issue 12, Cash Flow; Issue 13, Business Valuation: These issues were combined in Order No. 97-171 at pages 107-113. The issues were part of USWC's argument that Staff's proposed revenue requirement was unreasonable. Because USWC agreed to a revenue requirement in the Stipulation, these issues are moot and are not readopted.

n) Issue 14, Effect of UM 351 on access revenues: The discussion on page 114 is readopted.

o) Ordering Paragraph 4f at page 115 of Order No. 97-171: distribution of the refund: This paragraph is readopted.

ORDER

IT IS ORDERED that:

1. The Stipulation, Appendix A to this order, is adopted as modified. The first section of Appendix A, entitled Refund, is replaced by the following text:

1. Refund. In consideration of the Commission's issuance of an order implementing the terms of this Stipulation, and upon the Commission's final disposition of any motions to rehear and/or reconsider said order, U S WEST agrees to make a refund of revenues, within forty-five (45) days of said final disposition, to its Oregon customers of record who subscribe to the services identified, effective for one month of billing cycles beginning on the date of the refund. The amount of the local refund shall be 95 percent of the amount corresponding to the date of the refund, as set forth in Exhibit A hereto. Except for interexchange carriers, each customer of record shall be entitled to the refund for each line, provided that (a) they are a customer of record to the services set forth in Exhibit A on the date of the refund; (b) the customer has subscribed to the service set forth in Exhibit A for at least sixty (60) days immediately prior to the date of the refund; and (c) in the event that the customer has more than one line, the refund shall be limited to only those lines which the customer of record has at the time of the refund and had subscribed to for the sixty (60) days prior to the date of the refund. In addition, the refund shall be subject to the following terms and conditions:

a. With the exception of interexchange carriers and former customers, the refund shall be made in the form of a single credit to customers' bills and as follows:

   i. The amount of an individual customer's refund, per line, shall be based upon the customer's class of service and shall be calculated in the manner set forth in Exhibit A, page 2 hereto, less 5 percent. In the event a specific customer does not exhaust the full amount of the refund in one billing cycle, the remaining, unused portion of the refund due the specific customer shall be carried over to the subsequent bill(s) until such time as the full amount of the refund has been credited to the customer.

   ii. The parties hereby recognize that the calculations set forth in Exhibit A hereto are preliminary. Final calculations, utilizing U S WEST's most current billing units, shall be performed as near as possible to the date of the refund.

iii. Bill credits made pursuant to the terms of the Stipulation shall be separately identified on customers' bills with the following notation: "One time refund per PUC Order."

b. Refunds payable to interexchange carriers shall be made in the form of a check, and shall be based on the amounts paid to U S WEST for services provided over the period from May 1, 1996, to the date of the refund. The amount due to a carrier will be calculated based on a ratio of U S WEST's billed intrastate switched access revenues from the carrier to the total U S WEST intrastate switched access billed revenues during the period from May 1, 1996, to the refund date. Estimates of the total amount are set forth in Exhibit A. Again, the calculations set forth in Exhibit A are preliminary, and final calculations, using U S WEST's most current billing information, shall be performed as near as possible to the date of the refund.

c. Refunds to former retail customers shall be made from a Fund consisting of 5 percent of the total amount designated for local retail customer refunds as calculated in Exhibit A.

i. U S WEST shall publish notice of the Fund in the following newspapers once a week over a period of four weeks:

Albany: Albany Democrat Herald
Astoria: The Daily Astorian
Baker City: Baker City Herald
Bend: The Bulletin
Corvallis: Corvallis Gazette Times
Eugene: The Register Guard
Grants Pass: Grants Pass Daily Courier
Klamath Falls: Herald and News
Medford: The Mail Tribute
Pendleton: East Oregonian
Portland: The Oregonian
Roseburg: The News Review
Salem: Statesman Journal

Notice shall be a quarter page in size and shall include claim forms for customers to clip and submit. The notice shall include the information that claimants may not receive a refund because the Fund may be exhausted. Notice shall also include clear information on the deadline for submitting claims.

The claim form shall request information sufficient to allow USWC to verify the customer's claim of eligibility for the refund, such as

customer name, telephone number(s), and dates of service.

USWC shall establish and announce a contact telephone number at which potential claimants can receive information or request a claim form. The telephone number shall be included in the notice of refund published in the newspapers.

Staff and USWC shall collaborate on developing language for the advertisements as well as the claim form that will be part of the advertisement. The form shall contain language warning claimants of the consequences of filing a false claim.

ii. Customers who were retail customers of U S WEST for a period of no less than six months between May 1, 1996, and the date of the refund bill credit, who are no longer U S WEST customers, and who did not receive a refund bill credit, are eligible for a refund from the Fund. If customers subscribed to more than one USWC line for a six-month period between May 1, 1996, and the date of this order, they will receive refunds for each line to which they subscribed simultaneously, provided they subscribed for six months or more. Customers who had a varying amount of lines will be limited to the number of lines the customer had on the last day the customer was on USWC's system.

Customers shall receive only one refund for multiple lines to which they subscribed sequentially, as would be the case if a customer moved residences within USWC's service area and switched to a new account at the new address.

Refund to these former customers shall be made by check. The base amount of the refund shall be the same as for retail customers still on the system. If the Fund is exhausted by claims against it, claims made after its exhaustion will not be paid.

iii. Claims against the Fund will be paid in the order in which they are verified. The Fund shall be disbursed until it is exhausted or until three months elapse from the time the last refund bill credit is given, whichever comes first. If three months elapse and the Fund has a residual amount, after administrative costs are approved and assessed, that amount will be spread across all U S WEST retail customers of record as of the first of the month following the date the disbursement ends. The residual amount shall appear as a credit

on retail customers' bills and shall be identified as "Residual refund as ordered by PUC."

iv. USWC shall continue to pay interest on money in the Fund at the rate of 8.77 percent per year.

v. USWC shall recover its approved administrative expenses from the money set aside for the Fund.

2. Exhibit A, Page 1 of 2, footnote 3 of the Stipulation is revised to read as follows:

Interexchange carriers who are access service customers of U S WEST will receive refunds based on amounts paid to U S WEST over the period from May 1, 1996, to the refund date. The amount due to a carrier will be calculated based upon a ratio of U S WEST's billed intrastate switched access revenues from the carrier to the total U S WEST intrastate switched access billed revenues during the period from May 1, 1996, to the refund date.

3. Exhibit A, Page 1 of 2, footnote 4 of the Stipulation is revised to read as follows:

Ninety-five percent of the local refund amount will be distributed to customers of record, as of the date of the refund, for the services listed in Exhibit A of this Stipulation, provided the customers have been customers for at least 60 days prior to the refund date. The accumulated balance will be divided by the total billing units on the date identified pursuant to Paragraph 1 of this Stipulation. The exact number of customers will not be known until the Commission issues an order adopting this stipulation and establishes a date for the refund.

3. Order No. 96-107 is modified to change the refund interest rate from 11.2 percent to 8.77 percent, but the discussion and procedures of that order remain intact.

4. Order No. 96-183 is rescinded.

5. Order No. 96-286 is rescinded.

6. Order No. 97-171 is rescinded.

7. USWC shall file with the Commission a detailed breakdown of administrative costs for advertising and disbursing from the Fund. The final disbursement from the Fund shall occur after USWC's administrative costs are verified and paid from the Fund.

Made, entered, and effective APR 14 2000.

Ron Eachus
Chairman

Roger Hamilton
Commissioner

Joan H. Smith
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.
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ORDER NO. 01-810

ENTERED SEP 14 2001

This is an electronic copy. Attachments may not appear.

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 125/PHASE II
RATE DESIGN

In the Matter of the Application of QWEST CORPORATION for an Increase in Revenues.	)))	ORDER

DISPOSITION: RATES APPROVED

INTRODUCTION

Procedural Background

By Order No. 00-190, the Commission adopted a stipulation between Qwest Corporation (Qwest) and Commission Staff (Staff) in resolution of Phase I of this docket, the revenue requirement phase. In the stipulation, Qwest agreed to reduce its annual revenues by $64.2 million, based on August 1997 billing units. *See* Appendix A to Order No. 00-190. Phase II of this docket establishes the rate design for the stipulated revenue requirement.

On November 15, 2000, Qwest filed Advice No. 1849, replacing in their entirety the earlier filed Advice No. 1806 and Transmittal No. 99-014-PL. On March 19, 2001, Qwest filed a modified portion of Attachment B, entitled "Revised UT 125 Rate Spread." These filings represent Qwest's rate design proposal to reduce annual revenues by $64.2 million. Qwest's revised rate design proposal incorporates comprehensive deaveraging of retail rates, consistent with the parameters set in UT 148 (*see* below, Legislation and Commission Decisions Affecting This Docket).

In the rate design phase, as in the revenue requirement phase, Qwest has the burden to demonstrate that its rate design proposal creates rates that are "just and reasonable." ORS 756.040(1), 759.035, 759.180.

After settlement discussions, parties to the rate design phase of the docket identified 13 issues to be resolved in Phase II. Those issues are set out below.

On April 19, 2001, Staff filed its rate design proposal and supporting testimony in response to Qwest's filed rate design proposal. Staff's proposal would reduce Qwest revenues by $64,232,454.

The following parties filed petitions to intervene in this phase of the docket. All petitions were granted.

- Advanced TelCom Group, Inc. (ATG)
- American Association of Retired Persons (AARP)
- AT&T Communications of the Pacific Northwest, Inc. (AT&T)
- Citizen's Utility Board of Oregon (CUB)
- Integra Telecom of Oregon, Inc.
- MCI WorldCom, Inc. (WorldCom)
- Northwest Payphone Association (NWPA)
- Rhythm Links, Inc.
- Telecommunications Ratepayers Association for Cost Based and Equitable Rates (TRACER)
- Unicom
- Verizon Northwest, Inc.

In addition to Staff and Qwest, the following parties filed direct and/or rebuttal testimony on April 10 and May 3, 2001:

- ATG
- AARP
- AT&T
- NWPA
- WorldCom

A hearing was held in this matter on May 29-June 1, 2001. The following attorneys entered appearances:

- For ATG and NWPA, Brooks Harlow
- For AARP, Robert Manifold
- For AT&T, Mark Trinchero
- For Qwest, Lawrence Reichman
- For Staff, Michael Weirich and Jason Jones
- For WorldCom, Ann Hopfenbeck and Lisa Rackner

The parties submitted two rounds of briefs after the hearing.

Legislation and Commission Decisions Affecting This Docket

The 1999 Oregon State Legislature passed Senate Bill 622 (SB 622), now codified as ORS 759.400 *et seq.* SB 622 introduced a permanent price cap regulation

option to replace rate of return regulation for telecommunications utilities that elect that option. Qwest elected the price cap regulation option on November 30, 1999, to be effective on December 30, 1999.

SB 622 authorizes the Commission to define and set rates for basic services for utilities electing price cap regulation. ORS 759.410 provides for maximum prices (price caps) and minimum prices (price floors) for nonbasic services. The current price caps are the rates in place when Qwest elected price cap regulation. However, ORS 759.415 allows the price caps for nonbasic services to be adjusted in a pending rate case. This is, therefore, the Commission's only opportunity to adjust Qwest's price caps. The price floors ensure that a utility's prices will not fall below the sum of the total service long run incremental cost (TSLRIC) of providing the service for the nonessential functions of the service and the price charged to other telecommunications carriers for the essential functions.

Commission Docket UM 731 involves the Oregon Universal Service Fund (OUSF). Qwest was required to make a revenue neutral filing in UM 731. The filing reduced Qwest's revenues by $26.75 million, which amount was offset by OUSF funds. This includes a $15.388 million reduction for basic business access lines and an $11.365 million reduction for miscellaneous business rates. Staff used this revenue neutral filing as the starting point for the rate design proposal in this proceeding.

The Commission's decision in Docket UT 148 also affects this docket. UT 148 involved the deaveraging of wholesale unbundled network elements (UNEs). In order to foster local exchange competition, the Federal Communications Commission (FCC) requires states to establish different rates for UNEs in at least three defined geographic areas within the state to reflect geographic cost differences. FCC Rule 51.507(f). In Oregon, the only element with geographic variability sufficient to warrant deaveraging is the loop. Order No. 00-481 at 7.

The Commission chose to deaverage the loop by grouping wire centers by cost similarity into three zones and by establishing a weighted average loop rate for each zone. *Id.* at 9. The Commission established three zones because three zones adequately accounted for the cost difference between wire centers and three zones would be easier for both customers and telecommunications carriers' sales staff to use than an alternative five zone proposal. *Id.*

The Commission created three deaveraged rate zones. Since Order No. 00-481 issued, Qwest has made rate filings in UM 731 and UT 125. In both dockets, Qwest proposes retail rate deaveraging of certain services because of the wholesale deaveraging accomplished in Order No. 00-481. In these dockets, Qwest uses the term "rate group" synonymously with the Commission use of the term "rate zone" in Order No. 00-481. This order will use the term Rate Group with the same meaning as rate zone.

Staff's rate design proposal incorporates deaveraged network access channels (NACs) for private line service, Centrex services, and residential and business local exchange services consistent with the final order in UT 148, Order No. 00-481.

Finally, Dockets UM 351 and UM 844 set prices for unbundled building blocks and set imputation standards for pricing by telecommunications utilities.

Issues

The overall issue in this proceeding is how to apportion the $64.2 million reduction in revenues agreed to in the stipulation that the Commission adopted in Order No. 00-190. The issues are:

- Issue 1: Switched Access Rate Design
- Issue 2: Private Line Rate Design
- Issue 3: Message Toll Service
- Issue 4: Features (Residential and Business)
- Issue 5: Features (Nonrecurring Charges)
- Issue 6: Listings
- Issue 7: Centrex Plus
- Issue 8: Centrex 21
- Issue 9: Extended Area Service
- Issue 10: Advanced Services
- Issue 11: Business Local Exchange Services
- Issue 12: Residential Local Exchange Services
- Issue 13: Residential Nonrecurring Charges

NONCONTROVERSIAL ISSUES

Several of these issues are not controversial. Staff has noted that it agrees with Qwest's proposal on these issues, and no other party has presented arguments about them. These issues include Issue 4, Issue 5, Issue 6, Issue 8, and Issue 10. AARP mounts only a cursory argument against Qwest's position on Issue 13, so Issue 13 will be included in this group as well. For each issue treated in this section, we find that Qwest has carried its burden to show that the rates it proposes are just and reasonable.

Issue 4: Features (Residential and Business)

Residential Features. Qwest proposes significant price reductions for various primary residential features, for an annual revenue reduction of $5,587,158. Staff agrees with Qwest's proposal. Staff notes that its goal is to align prices for telecommunications services toward cost, as represented by the price floors for each service. Qwest's proposal leaves prices for residential features significantly above their price floors. However, Staff proposes no additional reductions in residential features because Staff is limited to total reductions of $64.2 million. Staff believes that because Caller ID, Call Waiting, and Call Forwarding are popular features, it is reasonable to target them for price reductions, as Qwest has done. Reducing prices for the most popular features will benefit the greatest number of ratepayers.

Staff points out that Qwest's Transmittal No. 2000-005-PL, effective October 1, 2000, grandfathered customers subscribing to the obsolete CustomChoice and ValueChoice services as of September 30, 2000. Staff wishes to leave the grandfathered customers of these services at the total package prices they currently pay. CustomChoice customers currently pay $29.95 for an initial line, plus $26.95 for an additional line. ValueChoice customers pay $23.95 including the line charge.

Staff proposes raising monthly flat rates for residential lines in Rate Group 2 by $1.00 and in Rate Group 3 by $2.00. See Issue 12 below. The Commission has adopted Staff's residential rate design proposal. Staff argues that we should allow Qwest to reduce prices for its grandfathered residential CustomChoice and ValueChoice customers in Rate Group 2 by $1.00 and in Rate Group 3 by $2.00, to keep their rates at the amounts given above.

Resolution. We agree with Staff and Qwest that it is reasonable to target the most popular telecommunications features for price reduction. The reductions proposed by Qwest are adopted. Qwest shall reduce prices for its grandfathered residential CustomChoice and ValueChoice customers in Rate Group 2 by $1.00 and in Rate Group 3 by $2.00.

Business Features. Qwest proposes to reduce prices for various business features by $1,276,230. As with residential features, most business features will remain priced significantly above their price floors, because total reductions in this docket cannot exceed $64.2 million. Qwest has targeted its most popular business features for reduction. Qwest proposes to eliminate 12 business feature packages identified by the following uniform service order codes: NLUB+, NLUY1, NLUY2, ESA, ESR, ET8, ETC, ESG, ESB, ET3, ES3, and ES5. Staff agrees that it is reasonable to allow elimination of these services, but imposes the following conditions. Qwest should be required to contact all affected customers to assist them in migrating to the a la carte purchase of the individual features in their packages or to an alternative feature package. Further, customers should not be required to pay nonrecurring charges because of this migration.

Resolution. Staff's conditions mean that no customer will be economically disadvantaged as a result of the elimination of these business features. We adopt both Qwest's proposal on this issue and Staff's conditions.

Issue 5: Features (Nonrecurring Charges)

Qwest proposes to eliminate nonrecurring charges for residential features, resulting in an annual revenue reduction of $729,744. Staff believes that the differences between the price floor and the tariffed monthly recurring charge for individual residential features and their average product service life are sufficient to ensure that even if Qwest does not recover its costs of initiating service through a nonrecurring charge, it will not be selling these services below the price floor in violation of ORS 759.410.

Resolution. We adopt Qwest's rate design proposal on this issue.

Issue 6: Listings

Qwest proposes to decrease the monthly recurring rates for Nonlisted and Nonpublished Listing services, which decreases annual revenues by $237,196. Qwest's proposal lowers Nonlisted service from $0.50 to $0.35 per month and Nonpublished service from $0.75 to $0.65 per month. Staff supports this proposal.

Resolution. Qwest's proposed rate design for this issue is adopted.

Issue 8: Centrex 21

Qwest proposes modest reductions and a specific rate design for Centrex 21 service. Qwest originally proposed to deaverage Centrex 21 prices for Rate Groups 1 and 2, but not for Rate Group 3. Qwest believes that the price floor requirements of ORS 759.410 would make a deaveraged rate for Rate Group 3 too high to be economically attractive.

Staff's proposal decreases Qwest's annual revenues from Centrex 21 service by $12,411. Staff's proposal is consistent with Qwest's proposal to increase the monthly rates in Rate Groups 1 and 2 to $46.95, which allows Qwest to maintain a proper pricing relationship with Qwest's Business CustomChoice service, grandfathered at a monthly price of $49.95 including the line charge. The Business CustomChoice service includes more features than Centrex 21, so Staff believes that a $3.00 per line price difference is reasonable. Staff's proposal also adopts Qwest's proposal to reduce rates for the 12 to 36 month and the 37 to 60 month rate stabilization contracts in Rate Groups 1 and 2.

Qwest has since agreed with Staff's proposal to establish rates for Centrex 21 service in Rate Group 3, consistent with the price floor requirements of ORS 759.410 and the deaveraging requirements of Order No. 00-481 (UT 148). Rate Group 3 rates will be set to recover annual revenues from the average Rate Group 3 Centrex 21 customers, based on subscription to the service from March 1997 to February 1998. However, Staff and Qwest agree that the new prices will not make economic sense for current Centrex 21 customers in Rate Group 3. Accordingly, Qwest has agreed to contact all Rate Group 3 Centrex 21 customers and migrate them to a less expensive alternative feature package. Eventually, Rate Group 3 will have no Centrex 21 customers. Staff recommends that Qwest not require Rate Group 3 customers to pay nonrecurring charges as a result of the migration to a different feature package.

Resolution. We adopt Qwest's proposal for Centrex 21 service pricing, as modified by Staff. Centrex 21 customers in Rate Group 3 shall not pay nonrecurring charges for their migration to a different feature package.

Issue 10: Advanced Services

Qwest proposes rate reductions for ISDN Basic Rate Service (ISDN-BRS), ISDN Primary Rate Service (ISDN-PRS), Digital Switched Services (DSS), and Direct Inward Dialing (DID).

After correcting the current rates contained in Qwest's initial proposal, Staff's reductions for ISDN-BRS slightly exceed Qwest's proposed reductions. Staff's proposal reduces Single Line ISDN-BRS rates by $100,000 by reducing rates in Rate Group 1 by 6 percent, leaving the current rates for the various terms of service unchanged in Rate Group 2, and increasing rates in Rate Group 3 by approximately $17.00. This increase in Rate Group 3 has no revenue effect, because there are no ISDN-BRS lines in that rate group. Staff's recommendations and corrections to Qwest's proposal are minor. The primary difference between the proposals is that Qwest wishes to raise rates for each term period in Rate Group 2 by approximately $6.00, whereas Staff proposes that the current term period rates remain unchanged. Staff argues that it is inappropriate to raise the rates in Rate Group 2 because the rates are already well above their established price floor and the rates were lowered by approximately $7.00 as recently as November 8, 2000. Qwest agrees with Staff's recommendation on this issue.

Staff agrees with Qwest's proposal to decrease certain ISDN-PRS rates, which results in an annual revenue reduction of $30,000. The proposed reductions will make the relationships between the price floors and the proposed ISDN-PRS rates similar to those for local business access lines.

Finally, Staff agrees with Qwest's proposal to reduce certain DSS rates, resulting in an annual revenue reduction of $200,000. Staff also agrees with Qwest's proposal to reduce rates for DID, resulting in an annual revenue reduction of $300,000.

Resolution. We adopt Qwest's proposed rate reductions for advanced services, as modified by Staff.

Issue 13: Residential Nonrecurring Charges

Qwest proposes to raise the nonrecurring charge for residential service installation from $12.00 to $16.50 to bring the rate closer to the direct cost of the service. The resulting annual revenue increase is $1.4 million. Even at that level, Qwest notes, the rate will still be significantly below cost. Staff recommends that the Commission adopt Qwest's proposal, because it moves rates closer to the established TSLRIC and still remains one of the lowest charges for this service applied by any former Bell Operating Company in the United States.

AARP disputes Qwest's proposal to raise the nonrecurring charge for residential service. AARP makes no specific argument opposing this increase. AARP's general argument is that there is no basis for an increase in basic local residential rates in the context of an overall revenue reduction.

Resolution. We adopt Qwest's proposal without modification on this issue. We note that in the overall rate design, many other rates benefiting residential customers are reduced, such as features, intraLATA toll, and EAS. We have a goal of moving rates toward cost. For below cost rates, such as the rate for residential service installation, this means increasing rates to move them closer to cost. AARP's counterargument is not convincing.

CONTESTED ISSUES

ISSUE 1: SWITCHED ACCESS RATE DESIGN

Background

Switched access is a service Qwest provides to interexchange carriers (IXCs) for the purpose of connecting the IXCs to their end user toll customers via the local switched network. Switched access service has three main parts: local transport, local switching, and the carrier common line charge (CCLC).

The CCLC recovers costs for the portion of the local loop assigned to the intrastate toll/access jurisdiction through the separations process. The CCLC is recognized as an implicit subsidy. In the 1996 Telecommunications Act (Act), Congress directed the Federal Communications Commission (FCC) and the states to eliminate implicit subsidies in rates and make them explicit. All parties testifying in this docket agree that the CCLC should be eliminated.

The Commission has broad discretion in the switched access rate design area. Switched access rate design is largely a matter of public policy.

Party Positions

Staff's proposal results in a $21.8 million dollar annual reduction, lowering Qwest's intrastate switched access revenues by 71.32 percent. Staff's proposal eliminates the CCLC and decreases the average access charge rate per access minute from 2.8 cents to 0.8 cents.

Qwest proposes to reduce its intrastate switched access revenues by $16 million, a 52 percent annual decrease. Qwest also proposes to eliminate the CCLC and reduce the average access charge rate from 2.8 cents per access minute to 1.3 cents.

AT&T/WorldCom propose to reduce Qwest's intrastate switched access revenues by $25.3 million, an 82.7 percent reduction. They urge the Commission to lower Qwest's switched access rates to UM 844 prices, which would make them equivalent to UNE rates. AT&T/WorldCom also recommend eliminating the CCLC and reducing the composite access charge rate to 0.48 cents per access minute. AT&T/WorldCom argue that Qwest's position on Issue 3, Message Toll, must be considered together with its position here, because together a relatively high access rate and a relatively low toll rate reduce competitors' margins unacceptably.

Staff. Staff and Qwest share the overall rate design goal of moving Qwest's intrastate switched access rates closer to the company's lower interstate switched access rates. Staff argues that its own proposal consistently brings Qwest's intrastate and interstate rates closer while Qwest's proposal actually drives certain key interstate and intrastate rates further apart. Staff's proposal also removes the CCLC and aligns the switched access direct trunked transport rate and the private line transport rate.

To move Qwest's intrastate switched access rates closer to Qwest's interstate switched access rates, Staff proposes setting the local transport rates approximately equal to Qwest's current approved interstate access rates, where those rates are above the UM 844 and UT 148 prices. Staff follows the FCC's access charge reform rate design by decreasing the local switching rate by almost 27 percent and including the new access charge elements adopted by the FCC in its local transport rate design. Staff's local transport proposal increases Qwest's total local transport revenues by 10.77 percent. Qwest's proposal increases them by 64.31 percent.

Transport rates are variable by distance. Staff's local transport proposal generates 1.4 percent more intrastate revenue than Qwest's current interstate rates would generate within the UT 125 test period. This slight increase is mainly due to the inclusion of new access charge elements adopted by the FCC in its access charge reform docket, *Access Charge Reform*, CC Docket No. 96-262, FCC Order 97-158 (May 16, 1997), and Staff's desire not to decrease rates below the UM 844 and UT 148 prices. Staff follows the FCC's access charge reform rate design by decreasing the local switching rate by almost 27 percent and including the new access charge elements adopted by the FCC in its local transport rate design. The new elements are End Office Shared Port, Common Transport Multiplexing, Tandem Trunk Port, and End Office Dedicated Trunk Port. Staff proposes to mirror Qwest's interstate rates for these elements.

Staff notes that Qwest's proposal also adds the FCC's new access charge elements and adopts new price elements for them. Qwest previously included the costs for these same new access charge elements in its local switching rate element. Staff is concerned that Qwest's proposal may result in a double recovery for these new access charge elements.

Staff's proposal reduces Qwest's local switching rates by 27 percent, bringing them closer to Qwest's interstate switching rates. Under Staff's proposal, Qwest's local switching rates are approximately 1.95 times greater than Qwest's interstate switching rates. Qwest's proposal increases its local switching rates by almost 32 percent. The resulting local switching rates would be approximately 3.5 times greater than Qwest's interstate switching rates.

The major difference between Staff's proposal and AT&T/WorldCom's is that AT&T/WorldCom want to reduce all switched access rate elements to the UM 844 wholesale price levels. AT&T/WorldCom's proposal would encompass about $25.3 million of the $64.2 million reduction, compared to Staff's $21.8 million reduction. Staff is unwilling to commit more of the $64.2 million rate reduction to switched access

rates than it has proposed (about 33.9 percent of the total rate reduction). Other classes of customers should enjoy rate reductions as well, and Staff believes its allocation of the $64.2 million is the fairest and most equitable for all customer groups.

Staff notes that moving Qwest's intrastate switched access rates closer to the company's lower interstate rates would help reduce arbitrage opportunities between the interstate and intrastate jurisdictions. Arbitrage is a potential problem, according to Staff, because IXCs purchase access services from Qwest to originate and terminate toll calls to Qwest end users. The IXCs self report to Qwest the jurisdiction of the traffic through the Percent Interstate Usage (PIU) mechanism. Qwest uses the PIU when billing its access charges and recording the revenues. The actual usage, however, is captured through Qwest's traffic studies. These studies identify the originating and terminating number so that the jurisdictional determination can be made. The IXC has incentive to report usage through the PIU in the jurisdiction with the most favorable rates. The result is a mismatch between usage and revenues. Actual usage may be intrastate but the revenues will be recorded as interstate.

Qwest's intrastate regulation is not based on earnings or rate of return. Thus, Staff believes that with Qwest under a price cap plan in the interstate jurisdiction and intrastate regulation under ORS 759.410, there is little incentive for Qwest to vigorously pursue misreporting problems. Other obligations, however, such as the Oregon Universal Service Fund and various regulatory fees, rely on accurate reporting by jurisdiction. Thus, Staff argues that it is important to decrease arbitrage incentives. Staff notes, however, that decreasing arbitrage opportunities is a secondary goal; its primary goal is to bring Qwest's interstate and intrastate switched access rates into closer alignment.

Staff also notes that its proposal is in line with expected future rate design events proposed by the FCC. The FCC states that it generally intends to move carriers' interstate switched access rates, including Qwest's, closer to cost. *In the Matter of Access Charge Reform*, CC Docket 96-262, FCC 00-193, ¶3 (May 31, 2000). The FCC desires to reduce the interstate switched access rates to levels even lower than today. It is important that the Commission take this chance to align Qwest's higher intrastate switched access rates with its lower interstate rates.

The FCC also declared in a recent Notice of Proposed Rulemaking that:

> There are currently two general intercarrier compensation regimes: (1) access charges for long distance traffic; and (2) reciprocal compensation. We believe it is essential to reevaluate these existing intercarrier compensation regimes in light of increasing competition and new technologies, such as the Internet and Internet-based services, and commercial mobile radio services (CMRS). We are particularly interested in identifying a unified approach to intercarrier compensation – one that would apply to interconnection arrangements between all types of carriers interconnecting with the local telephone network, and to all types

of traffic passing over the local telephone network. *In the Matter of Developing a Unified Intercarrier Compensation Regime,* CC Docket 01-92, FCC 01-132, ¶2 (April 27, 2001).

The FCC has thus declared its intent to remove implicit subsidies in access charges, move the access charges to cost based rates, and align all intercarrier compensation regimes. Staff's proposal moves Qwest's intrastate rates down toward the lower interstate switched access rates. Staff's proposal better aligns the two rate structures and is more consistent with expected FCC future adjustments to the interstate rate structure than Qwest's plan.

As a final matter, Staff observes that in Colorado, AT&T recently began charging its intrastate toll customers $1.25 a month to cover some of AT&T's intrastate switched access costs. AT&T witness Arlene Starr explained that the Colorado monthly charge was implemented because of the high Colorado intrastate access rates as compared to the Colorado interstate access rates. Qwest worries that AT&T may impose a similar charge in Oregon. Staff observes that because its proposal reduces the switched access rates and moves them closer to Qwest's interstate rates, its proposal reduces the likelihood that AT&T may need to impose an intrastate switched access surcharge to cover switched access costs in Oregon.

Qwest. Qwest proposes a 52 percent overall reduction in switched access, including the complete elimination of the CCLC. Qwest's proposal accounts for about 25 percent of the total revenue reduction in this case. Qwest also proposes a restructuring of switched access rates, introducing new local transport rate elements.

Qwest opposes AT&T/WorldCom's request for UM 844 pricing for switched access service. All parties agree that Qwest is not required to unbundle switched access service under the Act or to set prices equivalent to comparable UNE rates. It makes no sense, according to Qwest, to set retail rates at the UM 844 prices, which are price floors.

Qwest's proposal increases local transport revenues by 64.31 percent. Qwest's increase in local transport revenues, much larger than Staff's, arises because Qwest significantly increases the tandem switching rate, a component of tandem switched transport (an element of local transport). As a result, tandem switched transport revenues increase 25.97 percent for Staff, compared to a 91.25 percent increase proposed by Qwest.

In response to AT&T/WorldCom's argument that Qwest's pricing proposal creates a price squeeze[1] or is anticompetitive, Qwest contends that

[1] AT&T/WorldCom and Qwest argue about the definition of "price squeeze." Regardless of the term one applies, AT&T/WorldCom assert that the interplay of Qwest's proposed toll rates with its proposed switched access rates will narrow their gross margin and have anticompetitive effects.

AT&T/WorldCom will have sufficient margin even under its proposal to stay in the intrastate toll market.

Further, Qwest asserts that there is no basis for AT&T/WorldCom's position that toll rate reductions should not exceed switched access rate reductions on a cents per minute basis. This is the core of AT&T/WorldCom's argument. The argument assumes that AT&T/WorldCom will match Qwest's toll price reduction precisely and concludes that if their prices are lowered by an amount greater than the reduction in one item of their cost (switched access), their margin will be less than it currently is.

Qwest also notes that it will be lowering its revenue and thus its margin through the rates established in this proceeding; there is no reason that other IXCs should not do the same. (Qwest notes that the impact on their margins is not as straightforward as AT&T/WorldCom would have the Commission believe. The companies can recover switched access charges through monthly surcharges as well as through increased rates for customers served over switched access.)

Qwest also argues that its proposed switched access rates, even set above economic cost, do not give Qwest a competitive advantage of greater margins. AT&T/ WorldCom have not demonstrated that their nonaccess costs are the same as Qwest's, and Qwest contends that the record indicates otherwise. Moreover, according to Qwest, the companies' argument ignores the opportunity cost of Qwest selling a minute of toll when the alternative is that Qwest would recover switched access charges if a competitor provided that toll service. The lost opportunity is a real economic cost to Qwest. Any opportunity for greater margins vanishes, Qwest argues, when one considers the opportunity cost to Qwest of selling toll and forgoing revenue from switched access service.

Qwest asserts, finally, that other IXCs in Oregon may offer both interLATA and intraLATA toll service, but Qwest at this time may not. Thus AT&T/ WorldCom may spread their nonaccess costs over a far greater volume of traffic, which gives them a significant cost advantage over Qwest. Moreover, Oregon customers can reach far more telephone numbers through interLATA toll than through an intraLATA toll call. IXCs use their marketing and packaging of interLATA toll products to capture intraLATA toll customers. IXCs are not price regulated, so they can set their rates below cost if they want. They also can introduce rates that specifically recover intrastate switched access charges from their customers. They can impose surcharges, as AT&T did in Colorado. Qwest also contends that IXCs have alternatives to switched access, such as special or dedicated access.

Qwest contends that Staff's proposed decrease in switched access rates is too great. Qwest attacks Staff's rate design because it is based on the goal of avoiding arbitrage in PIU reporting, which Qwest contends is not a problem. Qwest notes that Staff is not aware of any misreporting instances in Oregon. Qwest has a financial incentive to pursue misreporting problems. Moreover, Qwest has available, through Signaling System 7, technology that can track the actual nature of traffic to detect and remedy any misreporting.

Qwest also contends that Staff's proposal to give approximately 32 percent of the revenue reduction to IXCs goes too far. Applying a portion of those revenue reductions to other end user services would result in greater overall consumer benefit.

Qwest responds to Staff's and AT&T/WorldCom's charge that Qwest's proposal may result in double recovery for the new access charge elements. The cost basis for these new rate elements is included in the tandem switching building block and the local switching building block from Qwest's previously approved cost studies. That does not mean double recovery for Qwest. Qwest notes that the building block cost studies were prepared and approved by the Commission before Qwest filed to separate these rate elements in this case. There is no double recovery, according to Qwest.

AT&T/WorldCom. AT&T/WorldCom assert that this issue must be considered together with Issue 3, toll rates. AT&T/WorldCom fear that Qwest's proposal will raise the price of switched access, a necessary input into providing toll service, and drop the price of toll. AT&T/WorldCom will then have to match Qwest's price decrease for toll while paying more for an input into the provision of toll service, switched access. AT&T/WorldCom argue that this proposal (and to a lesser degree, Staff's proposal as well) creates an anticompetitive situation.

AT&T/WorldCom argue that Qwest's proposal to implement larger per minute reductions in retail toll rates than in wholesale switched access rates creates a problem for Qwest's competitors. Qwest's access charges are costs to IXCs that must be recovered by a sufficient margin to offset the various other nonaccess retailing costs IXCs incur in providing retail toll services. To meet the Oregon Legislature's goal of promoting telecommunications competition, AT&T/ WorldCom urge us to set rates for switched access services equal to forward looking economic cost, as determined in UM 844.

AT&T/WorldCom note that Qwest's proposal includes reducing the average intraLATA toll rate per minute by 8.41 cents (Issue 3) and the per minute switched access charge rate from 2.76 to 1.31 cents. For a two ended call, the total access charge would fall from 5.52 cents to 2.62 cents, a drop of 2.9 cents. Where Qwest's retail toll rate drops an average of 8.41 cents, its competitors' switched access rate will fall by only 2.9 cents, effectively collapsing the competitors' margin by 5.5 cents. AT&T/ WorldCom argue that if Qwest's switched access rates were set at economic cost, the UM 844 prices, its proposal to implement larger per minute decreases in retail toll rates would not have an objectionable anticompetitive effect. Then other carriers would have the same input cost Qwest faces for a necessary element of toll service provision.[2] Unless all carriers face the same input costs, AT&T/WorldCom

[2] AT&T/WorldCom argue that Qwest has not entirely removed the CCLC from its rates. Qwest proposes a revenue reduction of $16 million on Issue 1. The CCLC currently generates about $20.4 million in revenues. AT&T/WorldCom argue that the difference, $4 million, has merely been shifted to other access

contend that it will cost competitors more to serve retail toll customers than it costs Qwest to serve the same customers, and anticompetitive effects will occur.

Qwest criticizes the assumption that IXCs will pass through cost reductions. AT&T/WorldCom respond that market forces resulting from significant toll reductions proposed by Qwest, one of the largest intrastate toll carriers in Oregon, would likely force IXCs to lower their toll rates. Qwest also criticizes the assumption that nonswitched access costs will be equal for Qwest and competing IXCs. Evidence introduced by AT&T/WorldCom indicates that nonswitched access costs for IXCs in Oregon could be significantly greater than for incumbent local exchange carriers.

Qwest further argues that IXCs have alternatives to using switched access to carry toll calls for Qwest local service customers. According to AT&T/WorldCom, Qwest produced no evidence that switched access is not an essential function. AT&T/WorldCom concedes that in limited circumstances, alternatives exist. AT&T/WorldCom note that special access is rare, however, and is almost nonexistent for termination of traffic.

According to AT&T/WorldCom, setting switched access at price floors makes sense. The UM 844 rates represent price floors. SB 622 established a pricing range to allow telecommunications utilities to respond to market signals. This flexibility is not needed with regard to wholesale services that are essential components for the provision of competing retail services provided by Qwest's competitors. Qwest has no incentive to reduce the cost of switched access, a fundamental service that its competitors must purchase to compete, to price floors. If switched access services are not set at cost, Qwest will always have a self interested incentive to price such services higher than price floors. Pricing switched access services at cost will promote competition in the market, driving retail service prices toward the price floors. Consequently, AT&T/WorldCom contend, it makes good economic sense for the Commission to set switched access rates at price floors.

Discussion and Resolution

Switched access rate design is largely a matter of public policy. We have considerable discretion in adopting switched access rates.

We believe Staff's proposal is the best balanced and fairest of the three proposals. It brings Qwest's intrastate switched access rates closer to its currently lower interstate switched access rates. This is an equitable development with respect to consumers and serves the goal of moving rates closer to cost, while still keeping them above the price floors. This also addresses the potential problem of misreporting PIUs to the more favorable jurisdiction. Although Qwest assures us that it has every incentive to report correctly, Staff remains concerned about the problem. The rate structure Staff

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rate elements and is an implicit subsidy. Because we do not decide this issue in favor of Qwest, we do not address this argument further.

proposes reduces the potential for arbitrage. We note, however, that this is a minor consideration. Our overall consideration is to set price caps so that interstate and intrastate switched access rates are more congruent.

We find that Qwest's proposal moves the interstate and intrastate rates further apart rather than decreasing the difference between them. Qwest's proposal greatly increases the tandem switching rate and would result in an overall 64.31 percent increase in local transport revenues. Qwest's proposal increases its local switching rates by approximately 32 percent as well. We do not believe that this proposal can further competition in telecommunications, which is our goal as well as the goal Congress expressed in the 1996 Telecommunications Act.

AT&T/WorldCom's desire to see switched access rates set at forward looking economic cost is understandable, given the companies' position as Qwest's competitors for intrastate toll traffic. The UM 844 rates include contribution. Thus, adopting them here is not an unreasonable proposal. However, we are reluctant to commit more of the $64.2 million reduction than Staff has proposed to this aspect of rate design.

Moreover, we believe that Staff's proposed rates adequately address AT&T/WorldCom's concerns about reduced margins. Staff's rates are considerably lower than Qwest's proposed rates, and Staff's proposed reductions on Issue 3, which we also adopt, are less than Qwest's. Therefore, the reduced margin that AT&T/WorldCom describes based on Qwest's proposals will be much less serious under Staff's plan.[3]

We note too that Qwest has introduced a number of considerations that make the IXCs' reduced margins both less straightforward and less anticompetitive than AT&T/WorldCom have argued.

Finally, we note that Staff's proposal on this issue better aligns interstate and intrastate access charges in view of anticipated FCC action in its access charge reform docket than Qwest's proposal does.

ISSUE 2: PRIVATE LINE RATE DESIGN

Background

Private line services are a collection of transport services that provide direct connections for customers between two or more locations. There are three basic types of private line service: analog, digital, and DS1. Further, there are four basic elements that comprise a two-point private line service: the network access channel (NAC), channel performance, transport mileage, and optional features and functions.

[3] We note also that the FCC is soliciting comments on the use of unbundled network elements to provide exchange access service. *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Public Notice DA 01-169 (January 24, 2001). If the FCC approves such use, IXCs will be able to forgo purchase of switched access for the lower UNE rates.

Channel performance rates are the main point of difference between Qwest and Staff, the only parties addressing this issue. All private lines require some channel performance element, but channel performance is not an independent function.

Party Positions

Staff. Staff proposes to change rates for various private line services, increasing Qwest's intrastate private line revenues by $0.305 million. Staff's proposal sets rates to cover the UM 844 and UT 148 price floors, reduces channel performance and features and function rates to help offset the two wire and four wire NAC increases, and aligns the private line and switched access transport rates. The proposal offsets analog private line increases with digital decreases, raising the total private line revenues by only 1.63 percent. The offset of analog increase and digital services reduction makes sense, according to Staff, because Qwest customers use both services.

For channel performance, transport mileage, and optional features and functions, Staff recommends setting Qwest's private line rates at approximately 25 percent over the UM 844 UNE prices. Staff chose the 25 percent markup to ensure that when a competitive local exchange carrier (CLEC) orders a private line for resale, the discounted private line rate will be at least equal to the sum of the UNEs required for the equivalent bundled service. This prevents a CLEC from purchasing a private line for resale at a price below the floor set in ORS 759.410(4) (calculated after applying the wholesale discount to the private line rate). Twenty two percent is a common resale discount rate in Qwest's Oregon interconnection agreements.

For the NAC, Staff recommends deaveraging the two wire and four wire NAC termination rates using the deaveraged UT 148 prices, with a 13 to 18 percent markup. Staff chose the lower markup for NACs because the same NAC rates have been significantly increased through UT 148, particularly in Rate Groups 2 and 3. Staff also wishes to avoid rate shock. Staff opposes Qwest's proposal to phase in rates for the NAC in Rate Groups 2 and 3, because that would leave in place prices that are below the price floor for several years. Staff contends that this approach violates the price floor requirements of ORS 759.410.

For analog service, Staff's proposal would increase the two wire and four wire NACs to cover the UT 148 price floors; deaverage the NAC rates into three rate groups; align the transport rates with Qwest's switched access transport rates; and lower most of the channel performance and optional features and functions rates. Staff's proposal would increase Qwest's intrastate analog private line revenues by 12.52 percent. Qwest proposes to increase the rates for these services by 23 percent because of potential cost increases.

Staff notes that its recommended analog rates are based on current evidence of cost and satisfy the requirements of ORS 759.410(4).[4] Staff argues that Qwest's concern about potential cost increases is speculative.

For digital private line service, Staff proposes to increase the Digicom1 and Digital Data service two wire and four wire NAC rates to cover the UT 148 price floors; deaverage the NAC rates into three rate groups; decrease channel performance and features and functions rates for all digital private line services; and align the DS1 monthly transport rates with Qwest's switched access DS1 transport rates. This portion of Staff's proposal would decrease Qwest's total digital private line revenues by 25.46 percent. Finally, for DS1 private line service, Staff proposes a 24.78 percent decrease in DS1 revenues.

Qwest. Qwest argues that Staff's proposal prices the NAC and channel performance element below the price floor. Staff and Qwest agree that the discounted price of a retail service should not fall below the price floor, but only Qwest's proposal realizes this goal, in Qwest's view. Qwest contends that it is appropriate to consider an NAC and a channel performance rate element together in analyzing what the discounted price would be, because neither element purchased independently provides a telecommunications service. Channel performance is also generally increasing in cost. Therefore, Staff's low price level is inappropriate. It makes sense, Qwest argues, to build in a sufficient cushion above the price floor so Qwest will not need to ask the Commission to raise prices later to ensure that the price remains above the required floor (assuming the Commission has the authority to make such adjustments).

Qwest and Staff agree that it is necessary to ensure that the discounted resale price is not below the price floor. It would be inappropriate to require Qwest to resell a finished service at a price below the floor established by ORS 759.410(4). In the case of analog NACs, however, Staff proposes prices based on equivalent UNE prices plus a 13 to 18 percent markup. If a 22 percent discount is applied to this price, the NAC would be sold for resale below the price floor. Qwest proposes to avoid rate shock by phasing in the higher rates for two wire and four wire NAC rates, which are currently below the price floor.

According to Qwest, the price of a two wire NAC in Rate Group 1 plus a common channel performance element (Voice Grade 32 Loop Start Sig – LS) under Staff's proposal would be $24.75. Under Qwest's proposal the price would be $25.40, the difference being due to Qwest's higher channel performance rate. The price floor for

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[4] ORS 759.410(4) provides:

> A telecommunications carrier that elects to be subject to this section and ORS 759.405 may adjust the price for a regulated retail telecommunications service between the maximum price established under this section and a price floor equal to the sum of the total service long run incremental cost of providing the service for the nonessential functions of the service and the price that is charged to other telecommunications carriers for the essential functions. Basic telephone service shall not be subject to a price floor.

these elements combined is $20.96. Qwest's proposed rates are 21 percent above the floor, while Staff's are only 18 percent above. To avoid the situation of Qwest having to resell services at prices below the price floor, Qwest urges us to choose its higher channel performance rates.

Qwest proposes less reduction than Staff for digital private line services, but is willing to accept Staff's proposal.

Discussion and Resolution

Staff and Qwest agree that the wholesale discounted price of a private line, when resold by Qwest to a CLEC, should not fall below the ORS 759.410(4) price floor. The parties do not contend that it is unlawful for a *discounted* NAC to fall below the price floor, but agree that this is a situation to be avoided if possible. Staff's proposal avoids this problem by setting private line rates at about 25 percent above the UM 844 UNE prices, except for certain NAC rates. For the NAC, Staff proposes deaveraged UT 148 prices with a 13 to 18 percent markup.

The NAC price Staff proposes is a problem only if Qwest retains the wholesale discount at 22 percent. However, in two dockets before the Commission, UM 962 and UM 973, Qwest has proposed a wholesale discount rate of 8.59 percent. We do not read ORS 759.410(4) to require that a discounted service be above the price floor. Therefore, we find Staff's proposed NAC prices legally acceptable.

Qwest addresses the NAC problem through two arguments. It proposes, first, to set NAC prices low and then phase in a higher rate over a several year time period. This proposal is not legal, because it would leave NAC rates in place that are below the price floor. It would therefore violate ORS 759.410(4). We reject this proposal.

Second, Qwest argues that the Commission should combine the NAC rates with high channel performance rates to ensure that the combined rate is sufficient (that is, above the price floor) when the elements are resold at a discount. Qwest believes that ORS 759.410(4), which sets the parameters for the price a telecommunications carrier may charge for a "regulated retail telecommunications service," addresses combinations of services as well as individually tariffed elements. Qwest argues that channel performance cannot be used alone, and that it therefore makes sense to combine it with the NAC and consider the two elements together as a telecommunications service. Combined, Qwest argues, the elements meet the price floor test.

We do not accept Qwest's reading of the statute. *See* our discussion of ORS 759.401(4) at Issue 3, Access Charge Imputation, below. The statute speaks of service in the singular. We read the statute to apply to individually tariffed elements, not to combinations of elements.

We note that even if we were to accept Qwest's combined rate theory, there are many combinations of NACs and channel performance. Qwest's combined rate

could still allow a combination of rates that is unlawfully priced below the floor. For example, Qwest proposes a price of $17.00 for the low speed data NAC two wire per termination. The imputed price floor for the element is $15.11. A potential Qwest customer could combine that NAC with the channel performance option LS2, priced at $2.64, with an imputed price floor of $5.39. The combination would result in a price ($19.64) below the price floor for the combination of $20.50. We find that each rate element must pass the price floor test under ORS 759.410(4).

Qwest also argues that analog private line rates are increasing and that the price should be set higher for that reason. Staff based its analog price proposal on current cost data. Anything else is speculative. The same argument holds for channel performance. Qwest's higher rates are based on what may happen, not on current costs.

Qwest has accepted Staff's digital private line rate design.

We adopt Staff's proposals on Issue 2.

ISSUE 3: MESSAGE TOLL SERVICE RATE DESIGN

Background

Qwest proposed to reduce Message Toll Service (MTS) by $32 million, almost half of the $64.2 million in rate reductions available in this case. Staff recommends a lower amount, a reduction of $23.4 million. The difference of $8.6 million is due to MTS rate design differences ($2.3 million) and to assumptions regarding MTS price elasticity ($6.3 million).

There are two sets of issues regarding MTS rate design: MTS rates, including Staff's access imputation analysis, and price elasticity.

Generally, Qwest proposes to simplify its MTS pricing structure and reduce prices where appropriate. However, Staff identifies $2.3 million in adjustments to Qwest's proposal.

Most of the MTS rate structure issues are straightforward. We discuss them immediately below. We then address access imputation and elasticity separately. Access imputation determines whether a service is priced above the ORS 759.410(4) price floors; Qwest disputes Staff's and AT&T/WorldCom's reading of the statute. The elasticity adjustment, or stimulation factor, is applied to take into account demand response to lowered prices. Qwest argues against applying the elasticity adjustment; Staff and AT&T/WorldCom are in favor of applying it.

MTS Rate Design

Postalized Rates. Current MTS rates are both distance and time of day sensitive, with different rates for the first minute and subsequent minutes. Qwest has proposed a "postalized" rate schedule that eliminates rate differences by distance band

and by initial and subsequent conversation minute. However, Qwest also proposed separate postalized rate schedules for residential, business, and miscellaneous calls. For residential customers, Qwest proposed postalized rates of 10 cents per minute for daytime calls and 6 cents for evening, night, and weekend calls (hereafter called peak and off peak rates). For business customers, Qwest proposed postalized rates of 12 cents for peak and 10 cents for off peak calls. For all other miscellaneous calls,[5] Qwest proposed postalized rates of 12 cents for peak and 6 cents for off peak calls.

Staff agrees with a postalized standard MTS rate structure but disagrees with the residential, business, and miscellaneous rate distinctions. Staff proposes a single standard postalized rate structure of 11 cents per minute for peak calls and 7 cents per minute for off peak calls. Staff makes this proposal because Qwest's customer class distinction has no relation to costs. Staff asserts that the underlying costs associated with a toll minute do not depend on the local service classification of the caller. Qwest defends its class distinctions based on usage patterns. That is, business calls are generally made during the day and are of short duration; residential calls tend to occur at night and last longer. Staff responds that the usage distinctions can be accommodated through off peak discounts.

Discussion and Resolution. We agree with the move toward postalized toll rates. Abolishing rate differences by distance band and by initial and subsequent conversation minutes is reasonable and serves consumers by simplifying the rate structure for intrastate toll. We will not adopt Qwest's customer class distinctions, however. We believe that Qwest's proposal of different rate structures for residential, business, and miscellaneous calls is overly complex and unrelated to cost. Staff's proposal to set two MTS rates, one for peak time and one for off peak hours, takes into account the different usage patterns of business and residential customers. Staff's proposal is simple and reasonable; we adopt the standard MTS rates of 11 cents per minute for peak calls and 7 cents per minute for off peak calls.

Optional MTS Discount Calling Plans. Qwest proposes to eliminate Toll-PAC; consolidate its discounted Calling Connection Plans from ten to six; eliminate WATSaver; retain and reduce 800 ServiceLine; retain Prime Saver; and extend the 50 percent discount for speech and hearing impaired customers to calling card and operator assisted calls. Staff agrees with these changes by and large but proposes modifications to specific rate plans as set out below. However, Staff and Qwest disagree on the Simple Value plan and the Super Savings plan.

Qwest and Staff agree on Qwest's Wide Area Telecommunications Service (WATS) proposals with the exception of Qwest's 800 Service proposal, which is discussed under the heading *Contested Proposals* below.

[5] Miscellaneous MTS rates include calls requiring operator assistance, credit card billing, or calls for which billing capabilities cannot determine the customer's identification as residential or business.

Staff notes that it centers its proposals regarding MTS on creating a standard rate structure that will provide all customers a reasonably priced toll rate structure without contracts, minimum usage, or other rate or customer class conditions.

Uncontested Proposals. Qwest proposes, and Staff agrees, to eliminate its Business Daytime Connection plan and transfer its customers to the Business Daytime Connection Plus plan. These plans are nearly identical. Qwest proposes, and Staff agrees, to reduce the minimum monthly rate for the Connection Plus plan from $9.00 to $6.00 for the first 60 minutes and to continue rates at 10 cents a minute for every minute thereafter. This proposal gives Connection Plus customers a 33 percent reduction and a lower minimum rate.

Qwest's City Connection plan members are charged a monthly rate of $1.00, which allows them to select the exchange they most frequently call. Calls to that exchange receive a 20 percent discount from standard MTS rates, and calls to other exchanges receive a 5 percent discount. Qwest proposes to retain the discount structure. Staff agrees. The discount rate, applied to Staff's proposed standard MTS rate design, reduces the average revenue per minute (ARPM) from 13.1 cents per minute to 7.4 cents per minute, an average rate reduction of 43 percent.

The rate structures for Qwest's Volume and Tenant Calling Connection are nearly identical except that the Volume Calling Connection plan has a monthly charge of $5.00 for call detail reporting. Customers subscribing to these plans pay a postalized rate of 10 cents per minute plus a volume discount of 10 percent after $50.00 per month and 20 percent after $100 per month. Qwest proposed that the per minute rate be reduced to 7 cents per minute with no change in monthly charge or discount rates. Staff agrees with Qwest's proposal, because it appropriately targets high volume toll customers with progressive discount levels. Staff recommends, and Qwest agrees, that the Volume and Tenant Calling Connection plans should be combined, retaining the monthly charge for call detail reporting. This would reduce and simplify customer options.

The Oregon Value Calling Plan I allows subscribers to pay $6.00 per month minimum for the first 60 minutes and 10 cents a minute thereafter. The rates apply only for off peak calls. For daytime calls, a 5 percent discount from standard MTS rates applies. Qwest proposes to discontinue this plan and transfer business customers to the Business Daytime Connection Plus plan. Qwest would transfer residential customers to standard MTS. Staff agrees that the plan should be discontinued. Staff would simply move all customers to standard MTS, where the off peak calling rate is only 7 cents per minute with no minimum usage. The Business Daytime Connection Plus rate has a $6.00 monthly minimum and a 10 cent per minute off peak rate.

Oregon Volume Calling Plan II customers pay a $14.40 per month minimum for the first 120 minutes and then a peak rate of 16 cents per minute and an off peak rate of 10 cents per minute. Qwest proposes to discontinue this plan and move residential and business customers to standard MTS. Staff agrees. The standard MTS rate schedule will offer reduced rates with no minimum usage. Under Staff's proposed

standard MTS rate schedule, the ARPM for Oregon Value Plan II drops from 13.5 cents per minute to 8.5 cents per minute, an average reduction of 37 percent.

Better Deal was a trial service offering during the test year. The service was discontinued on February 17, 1999. Better Deal offered customers a flat monthly rate for unlimited intrastate intraLATA toll calling. The business rate was $149.00 per month; the residential rate was $49.00 per month. The ARPM was 14.5 cents per minute. Staff agrees with Qwest's desire to discontinue this service.

WATS service is bulk toll service priced by the hour. There are two basic types of WATS: OutWATS and InWATS (i.e., 800 Service). WATS can be provisioned with dedicated access lines or over common lines. Dedicated WATS lines can access only the long distance network. They are not classed as basic telephone service and will be deaveraged based on the requirements of UT 148. Common lines are local exchange access lines on which WATS is simply an overlay service.

WATSaver is an OutWATS service using a common line. The hourly rate declines as usage increases; it ranges from $10.50 per hour to $8.25 per hour. The ARPM is 17.5 cents per minute. Qwest proposes to discontinue this service and transfer residential customers to the Super Savings plan, while business customers would migrate to standard MTS. Staff agrees that this service should be discontinued, but recommends that all customers be moved to standard MTS. Staff's proposal for standard MTS would provide a substantial reduction in all WATSaver bands.

Resolution. We adopt Qwest's proposals for the above plans. The proposals are reasonable and fair to customers. Qwest may eliminate Toll-PAC. All WATSaver customers as well as all customers from the Oregon Value Calling Plan I should be moved to standard MTS.

Contested Proposals. Simple Value was introduced on June 24, 1998. Customers subscribing to this plan are charged postalized rates for peak and off peak periods. For residential customers, current rates are 24 cents peak and 9 cents off peak per minute. For business customers, the current rates are 11 cents per minute peak and 8 cents per minute off peak.

Qwest proposes to eliminate the Simple Value plan for residential customers and transfer them to the standard MTS. Qwest also proposes to reduce rates for business customers to 9 cents peak and 6 cents off peak. Staff recommends that the Commission eliminate the entire Simple Value plan and transfer current subscribers to standard MTS. Staff's proposed standard of 11 cents peak and 7 cents off peak accomplishes the same goals as the Simple Value plan, and there is no reason for Qwest to have two nearly identical rate structures. This is particularly true in view of Qwest's stated desire to simplify or eliminate calling plans.

Qwest and Staff also disagree about Qwest's Super Savings calling plan. This plan was introduced on April 1, 1998. Like Simple Value customers, customers under Super Savings are charged a postalized rate but with no peak/off peak differential.

For residential customers, the rate is 10 cents per minute for all distance bands and all times of day. For business customers, the rate is 8 cents per minute all day.

Qwest proposes to reduce the rate for residential customers from 10 cents per minute to 8 cents per minute for calling at all times of day and for all distance bands. The rate for business customers would drop to 6 cents per minute for all times of day and all distance bands.

Staff agrees with Qwest's 8 cent proposal for residential customers but rejects Qwest's 6 cent rate for business customers. Staff proposes an 8 cent rate for both residential and business customers. Staff's recommendation reflects its concern that Qwest's 6 cent business rate, with no other charges or minimum usage requirements, would undermine its entire MTS rate structure. Qwest proposes a 7 cent rate for its Volume Calling Connection plan, 9 cents peak and 6 cents off peak for its Simple Value plan, and the standard MTS rate of 12 cents peak and 10 cents off peak. Staff believes that any rational customer would choose the Super Savings rate over these other options. Qwest plans to offer the Super Savings plan only to its best customers, but the rate is available to anyone who learns about it. Staff also argues that the Super Savings plan fails the imputation test and that the Commission should reject it for that reason as well.[6]

OutWATS uses a dedicated access line and a declining hourly rate based on usage. Before the UM 731 revenue neutral filing effective April 30, 2001, the rate per access line was $25.00 per month. With the UM 731 filing, the access line charge was deaveraged into three rate groups of $23.50, $26.00, and $28.50 per month. The hourly rate ranges from $7.50 per hour to $6.00 per hour (equivalent to 12.5 cents per minute to 10 cents per minute).

Qwest proposes to reduce the Rate Group 3 access line rate from $28.50 to $28.00 per month. It proposes no changes to the hourly toll rates and recommends that OutWATS be grandfathered to end 12 months from the effective date of the Commission's final order in this docket. Staff agrees with the grandfathering but disagrees with Qwest's proposed access line rates. The company's proposed Rate Group 2 and 3 rates are priced below the UNE prices set in UT 148, and thus fail to meet the imputation requirements of ORS 759.410(4). Staff recommends setting the access line rates for Rate Group 2 at $27.50 and for Rate Group 3 at $58.50.

800 Service is an InWATS service that uses a dedicated access line and a declining hourly rate based on usage volume. The called party pays for all incoming toll calls. Prior to the UM 731 revenue neutral filing, the access line rate was $35.00 per month. With the UM 731 filing, the access line rate was deaveraged into three rate groups at $33.50, $36.00, and $38.50 per month. The hourly rate ranges from $10.35 to $7.00 per hour (equivalent to 17.25 cents per minute to 11.67 cents per minute).

[6] The imputation argument is addressed below.

Qwest proposes to reduce access line rates in the three rate groups to $33.10, $35.60, and $37.60 per month. Qwest proposes no changes to the current hourly toll rates and proposes to grandfather the service. Staff recommends grandfathering the service but disagrees with Qwest's proposed rates for Rate Group 3, because the rates are below the UNE prices set in UT 148. Staff proposes instead setting the rates at $26.00, $30.00, and $61.00 per month, in order to meet imputation requirements.

800 ServiceLine is an InWATS service that uses a common line. The 800 telephone number overlays the regular telephone number. The service requires a flat monthly charge of $3.00 per month and an hourly usage rate of $7.20. Qwest proposes increasing the flat monthly charge to $5.00 and reducing the hourly usage rate to $6.00. Staff agrees with Qwest's proposal to reduce the hourly rate but disagrees with the proposed increase of the monthly charge. Qwest contends that the increase is comparable with competitors' recurring rates for 800 ServiceLine and is consistent with the other states in which Qwest operates. Staff notes, however, that the ARPM under Qwest's proposal is 21 cents when the per minute rate is combined with the monthly recurring rate. This ARPM is double that of any of the other MTS proposals except the OutWATS and 800 Service, which will be eliminated a year from the date this order issues. Because of the high ARPM and the fact that 800 ServiceLine will be the only InWATS service offered after the regular 800 Service tariff is eliminated, Staff continues to recommend no increase in Qwest's current monthly charge for 800 ServiceLine.

Discussion and Resolution. We agree with Staff that Qwest's proposed Simple Value plan should be eliminated. Given our adoption of standard MTS rates, the Simple Value plan has no discernible purpose. Eliminating the plan will help Qwest in its goal of streamlining rates.

We adopt Staff's recommendation that the Super Savings Plan should be offered at a flat 8 cents a minute to all customers. We base this decision on our belief that the Super Savings Plan offered at 6 cents a minute would undermine the rate structure for the remainder of MTS. We also find that the Super Savings Plan at 6 cents per minute fails the imputation test of ORS 759.410(4). *See* discussion following this section.

We agree with Staff's modification to Qwest's proposed pricing for the OutWATS access line rates, setting Rate Groups 2 and 3 at $27.50 and $58.50, respectively, to meet imputation requirements. For 800 Service, we also adopt Staff's access line rate proposal, setting prices at $26.00, $30.00, and $61.00 per month for Rate Groups 1, 2, and 3, respectively. We adopt this pricing to lower Rate Group 1 and 2 rates toward cost and to raise Rate Group 3 to pass the imputation test. We deny Qwest's request to raise the monthly rate for 800 ServiceLine from $3.00 to $5.00, based on the high ARPM this service would generate under Qwest's proposal. For the rest we adopt Qwest's proposed pricing.

Access Charge Imputation. Imputation is a regulatory device that imposes a price floor on local exchange services supplied to other providers of telecommunications services. Imputation requires a local exchange carrier to charge

itself the same price that others must pay to purchase essential functions from the carrier. Imputation thus prevents a local exchange carrier from creating a competitive advantage for itself by manipulating the price of the components only that carrier can supply. It protects carriers who have no adequate alternatives in the market. Order No. 94-1851 at 3.

In conducting its imputation analysis, the Commission sets a price floor below which price may not fall, to prevent anticompetitive pricing. ORS 759.410(4) sets the price floor "equal to the sum of the total service long run incremental cost [TSLRIC] of providing the service for nonessential functions of the service and the price that is charged to other telecommunications carriers for the essential functions."

In Dockets UM 351 and UM 773, the Commission calculated the TSLRIC for each building block service element. The prices for these service elements were then set in Docket UM 844. The Commission traditionally views all building blocks or elements established in these dockets as essential functions of the service. Order No. 96-188 at 53; Order No. 95-313 at 3, fn 3.

Access imputation, a consideration of the effect of access charges on competitors, arises out of Commission Order No. 89-221 in Docket UT 47. Staff performed an access imputation analysis for current and proposed access service charges, including originating and terminating access charges as well as billing and collection charges associated with Qwest's provision of intraLATA toll service. Staff also included an allowance for uncollectible toll revenue. Access charges are the prices IXCs pay to originate and terminate long distance toll calls on Qwest's local exchange network. Billing and collection charges are the prices that Qwest would charge in IXC for billing and collecting monies from end users on behalf of the carrier.

Staff's imputation analysis is presented at the aggregate ARPM for Qwest's intraLATA toll services, assuming two different methods of toll billing: full minute rounding and six second rounding. Although Staff's imputation analysis is summarized at the aggregate level, the imputed cost results can be compared against the ARPM for each Qwest toll service depending on how the toll conversation minute is measured for billing purposes (whether by the full minute or six second rounding). After making this comparison for each service, Staff concludes that Qwest's standard MTS and each of the discounted calling connection plans pass the imputation test based on Staff's proposed rates for toll and carrier access service.

Qwest performed an imputation test based on the UNE prices set in UM 844. Qwest then compared the ARPM for all toll services combined together to an imputation based price floor. Finally, while Qwest asserts that carrier access service is not an essential service, it specifically declined to pursue that issue in this case. The issue is whether a proper imputation analysis for switched access imputes the TSLRIC or the switched access rates (price) under ORS 759.410(4). Staff asserts that Qwest's tariff rate charged to other carriers for switched access is the proper input under the price floor test of ORS 759.410(4). For purposes of this case, the Commission agrees with Staff.

Staff illustrates the difference between the two approaches with the Super Savings issue. Staff and AT&T/WorldCom each performed imputation tests for Super Savings. Both Staff and AT&T/WorldCom concluded that Qwest's proposed 6 cent Super Savings rate for business customers fails the imputation test. That is, at 6 cents per minute, Super Savings is priced below the imputation price floor. Qwest concludes that Super Savings passes the imputation test if the ARPM for all of its calling plans considered together is above the imputed price floor for all services.

Staff argues that its and AT&T/WorldCom's approach is consistent with ORS 759.410(4), while Qwest's is not. The statute speaks of the sum of all relevant costs for *the* service at issue, not service categories in the aggregate. According to Staff, no reasonable interpretation of the statutory language accommodates Qwest's "average of all services" method.

Staff points out that customers purchasing Super Savings are not concerned about the average price for all of Qwest's calling plans. Customers are concerned only about the price of the particular service they are interested in. The same is true for competitors; they wish to compete in the market against particular calling plans, not the average of all plans. Finally, Staff maintains that Qwest's average of all services method would allow some services that are priced above the price floor to subsidize those priced below the floor. Such cross subsidies are impermissible, according to Staff and AT&T/WorldCom.

Qwest argues that the Super Savings plan passes the imputation test on its own. Qwest argues that an imputation calculation should consider the *cost* for billing and collection rather than the applicable *price*, because billing and collection is not an essential service. Staff and AT&T/WorldCom disagree. Order No. 89-221 treats billing and collection as an essential service. Staff and AT&T/WorldCom argue that billing and collection is to be considered an essential service until the Commission orders otherwise. *See also* Order No. 96-188 at 53.

Qwest disagrees, finally, with Staff's and AT&T/WorldCom's inclusion of access rates for calls originated by independent local exchange carriers (LECs) in their imputation analysis. Qwest argues that the Commission should include only the costs of traffic originated by Qwest.

Staff argues that Qwest must pay access charges and other reasonable compensation to the independent LECs to originate and terminate its toll calls on their local exchange networks. Qwest has no choice but to pay these access charges and other compensation. Qwest may not abandon those toll routes without explicit Commission authority.

Discussion and Resolution. Qwest maintains that the ORS 759.410(4) price floor test should be applied to a generalized group of services rather than to individual services actually offered to customers. Qwest argues on this basis that its ARPM for all toll services be used to determine whether its proposed toll rates are in compliance with ORS 759.410(4).

Qwest cites no legal precedent for applying the statutory imputation test in this manner, and we are aware of none. The language of the statute refers to "the service," as Staff points out; this argues in favor of the imputation test being applied to a single service, not a group of services.

Further, Qwest's proposed application of the imputation test to a group of services makes no economic sense. The Legislature intended the price floor imputation test to prevent unfair pricing that would undermine competition in the market. Customers decide to take service from a particular provider based on individual product rates. Qwest acknowledges that its toll pricing proposal contains numerous pricing plans. Qwest customers pay rates imposed under these individual plans, not an average rate per minute. These individual product rates provide the basis for competition.

We read ORS 759.410(4) to apply to individual services, not to a collection of services, as Qwest advocates.

In maintaining that its Super Savings plan passes the imputation test, Qwest states billing and collection is not an "essential function" of intraLATA service. The sequel to that position is that the cost of the service to Qwest is the imputation input for nonessential functions. The price charged to other carriers is the input for essential functions.

Staff has asserted that until the Commission states otherwise, billing and collection is an essential function. Order No. 89-221. We agree. However, in the case of billing and collection, this issue is moot. Qwest's cost for billing and collection is identified as the price it charges other carriers for the service. *See* Order No. 97-239, Appendix C, page 6, lines 9 and 10. Thus, cost and price for billing and collection are the same for imputation purposes, and they are both set at the price Qwest charges other carriers for billing and collection. As a consequence, Staff and AT&T/WorldCom are correct in stating that Super Savings does not pass the imputation test on its own.

Finally, as stated above, we agree with Staff that Qwest's tariff rate charged to other carriers for switched access is the proper imputation analysis input under the price floor test of ORS 759.410(4).

Price Elasticity and Stimulation of Toll

Background. Qwest's and Staff's MTS revenue proposals differ by $6.3 million due to Staff's application of a price elasticity factor to toll rates. Qwest argues against applying an elasticity factor, while Staff and AT&T/WorldCom support the use of such a factor, although they support different factors. AARP supports Staff's elasticity factor and Staff's position on the test year and the elasticity adjustment.

The following definitions emerge from the record and will be helpful for the discussion of the elasticity adjustment. Price elasticity measures the change in consumer demand when prices change. As prices fall, consumers generally purchase more of a product; when prices increase, consumption tends to fall. The implication of

price elasticity for this docket is that when Qwest lowers its MTS rates, demand will increase. The revenue impact that must be calculated is therefore subject to adjustment to take increased demand into account. The price elasticity factor adjusts the revenue reduction to account for increased demand.

Market price elasticity refers to consumers' demand response to a change in the overall market price level (when most or all firms in a market adopt a new price level). A monopoly provider such as Qwest was in the late 1980s and early 1990s essentially constitutes the market itself.

Firm price elasticity refers to the demand response to a price change implemented by one firm, assuming all other firms in the same market hold their prices constant. Firm price elasticity will always be equal to or greater than the market price elasticity.

Demand response refers to the responsiveness of consumer demand to changes in price alone. Demand response is shown as movement along a constant demand curve. Demand shift refers to the response in consumer demand to changes other than in price. These events cause the entire demand curve to shift left/down or right/up and may affect the slope of the curve itself.

Mathematically, price elasticity is measured as the ratio of the percentage change in quantity divided by the percentage change in price. Because this is an inverse relationship (when prices rise, quantity consumed falls and vice versa), price elasticity is expressed with a minus sign. For instance, price elasticity of –0.4 means that for each one percent drop in price, quantity would be expected to increase by 0.40 percent, all else being equal.

In the present case, Staff concluded that a conservative price elasticity for a 40 percent MTS price reduction for Qwest would be –0.3632. Staff calculated that Qwest's MTS toll usage would be stimulated by 14.5 percent. The formula to calculate stimulation of consumer demand is: (price elasticity) x (percentage price change); that is, -0.3632 x –40% = 14.5%. Staff stimulated each MTS service individually based on its proposed price change as expressed in ARPM.

The price elasticity dispute involves several areas. One underlying area of contention is Qwest's desire to use events that happened after the test year and that are not price events, such as increased competition, to modify Staff's and AT&T/ WorldCom's elasticity factors. The other areas are whether an elasticity adjustment is appropriate and, if so, which elasticity factor to use.

Post Test Year Issues. Staff objects to use of post test year information. The parties stipulated to the 1997 test year and the Commission adopted the stipulation in Order No. 00-190. In the stipulation, the parties agreed that Qwest would reduce its Oregon intrastate revenue by $63 million from current rates "based on August 1997 billing units for local services and the minutes of use for the five months preceding and

six months following August 1997, for switched access services." Order No. 00-190 at 10. *See also* Order No. 00-190, Appendix A at 5, 14.

Qwest argues for consideration of events that occurred after the test year that caused a demand shift for MTS. These events include increased competition resulting from the introduction of mandatory "1+" dialing parity; new toll calling alternatives arising from new technology (e.g., the Internet; cellular phones); and new extended area service routes. Qwest argues that it is unfair to stimulate the toll test year revenue when its toll revenues are much lower today because of the post test year events.[7]

Staff takes the position that all post test year demand shift events that are not price events (such as the implementation of 1+ dialing parity) are not relevant because they are outside the test year. Staff contends that Qwest wants to have it both ways. With regard to the elasticity adjustment, Qwest argues that its toll volumes and revenues have fallen since the test year. With respect to spreading the $64.2 million reduction, however, Qwest argues that the Commission should ignore the fact that its toll volume is slightly more than half what it was in 1997. Staff argues that if current toll service volumes were used as Qwest demands in its price elasticity argument, Qwest's $32 million toll rate reduction would be cut to only about $16 million. As a consequence, Qwest would need to reduce its rates by another $16 million.

AT&T's Witness Dr. Selwyn also argues that Qwest's lowered toll revenues today are no reason to ignore price elasticity and stimulation. Dr. Selwyn notes that it would be more accurate to substitute current service volumes for the test period quantities for purposes of the revenue impact analysis. This should occur for all of Qwest's services, according to Dr. Selwyn, not just for toll.

But for Qwest's and Staff's agreement on a test year, Staff is not opposed to recognizing that Qwest's toll revenues are much lower today than they were in 1997. However, Staff argues that the Commission should not allow Qwest to identify its toll call service volume declines as a reason to eliminate Staff's price elasticity adjustment. Such events are outside the test year, according to Staff and AT&T/WorldCom, and are not relevant or appropriate for consideration.

Discussion and Resolution. We conclude that events beyond the test year should not be considered in determining whether to apply the elasticity adjustment to the MTS pricing proposal. If, for the sake of argument, we were to move the test period into the current year, we would have to shift the entire base on which the proposed toll

[7] Qwest also makes a subargument that if Staff is going to forecast the revenue effect of price changes through the stimulation factor, Staff should also consider making the forecast as accurate as possible by considering post test year events. Reduction to Qwest's toll rates will occur "within the test year." That is, the toll rate reduction is a "test year event"; it is known and it will happen within the test year. There is no prediction or forecast involved. The elasticity principle measures consumer response to the known price change. The elasticity adjustment is a rate design adjustment that is applied to the proposed rate change to reasonably ensure that the revenue consequences of that change match the revenue requirement determined in the revenue requirement phase of a rate case. We reject Qwest's argument about forecasting.

revenue reduction is calculated. We would also have to substitute current service volumes for all intrastate services for the test period quantities. Changing the test year would mean beginning a new rate case. We reject this outcome as unfeasible and in violation of Qwest's agreement to a 1997 test year. We note that while Qwest may appear to lose as a result of this decision, Qwest wins in not having to spread an additional $16 million of reductions over its toll or other services, as Staff points out.

Use of an Elasticity Adjustment. Qwest disagrees with Staff and AT&T/WorldCom about whether an elasticity adjustment should be applied at all. Staff argues that it always adjusts toll revenues for price elasticity when a major rate change is proposed in a rate case. Here, Staff's proposal reduces Qwest's rates by 40 percent, a major reduction under any interpretation. Staff contends that the elasticity adjustment is a pro forma adjustment that is routine and straightforward.

Qwest argues that toll service volumes are set for the period of March 1997 through February 1998. Qwest claims that applying price elasticity to the toll revenues violates the order and stipulation setting the test year in this proceeding.[8] According to Qwest, application of a stimulation factor conflicts with the requirements of the stipulation that the rate design shall be based on March 1997 to February 1998 billing units. Qwest does not argue that intraLATA long distance service is price inelastic and admits that some customers will place more long distance calls when prices are lowered.

Qwest also argues that it is inappropriate for Staff to make pro forma adjustments during the rate design phase of a case. According to Qwest, pro forma adjustments are made in determining revenue requirement. Adjustments were made in the first phase of the case and cannot be made again. Rate spread should be a relatively straightforward distribution of the revenue reduction among different service groups or customer classes; it is not an opportunity to compound decisions made in the revenue requirement phase.

Staff responds that it did not view the stipulation as changing how parties traditionally perform their rate design work. Elasticity is a measure of consumer response to a price change, and Staff did not view the stipulation's discussion of 1997 billing units as removing its right to perform the required elasticity adjustment to toll. Staff notes that as even Qwest recognizes, the stipulation was not intended to change the basic way Staff conducts the rate design portion of a rate case. In its opening brief, Qwest explains that the stipulation is subject to one clarification: the phrase "August 1997 billing units" does not remove the parties' ability to adjust the toll data for "seasonality." Staff takes this to mean that Qwest recognizes that the stipulation's use

[8] Qwest initially seemed to argue that August 1997 billing units, rather than the March 1997 to February 1998 billing units, were the appropriate volume for toll service. The stipulation and the Order both set the test year as March 1997 to February 1998 for switched access services. Order No. 00-190 at 10; Appendix A at 5 and 14. Both Qwest and Staff extend this provision to toll. In its reply brief, Qwest notes that it does not oppose using the full year's data but does oppose forecasting billing units beyond the test year, that is, adjusting them for elasticity.

of 1997 billing units was not intended to change how the parties traditionally perform their rate design work for toll MOUs. Staff argues that its adjustment for elasticity for the reduced toll rates is consistent with the stipulation.

Staff further maintains that it did not previously perform an elasticity adjustment for toll minutes of use in Phase I of UT 125, contrary to Qwest's assertion. Qwest presents no evidence in support of its assertion. Qwest merely takes out of context Staff's comment that this is one of the pro forma adjustments usually made in a rate case. Staff notes that it always performs its toll stimulation in the rate design portion of a rate case. Staff cannot perform an elasticity adjustment in the revenue requirement portion of a case, because the proposed new rates have not yet been determined. Elasticity measures consumer response to a price change, and that price change is not determined until the revenue requirement phase of a rate case is concluded.

Finally, Qwest suggests that because UT 125 was bifurcated, Staff has somehow stimulated toll twice. Staff contends that bifurcation has nothing to do with how a rate case is constructed. The UT 85 rate case was bifurcated and Staff performed its toll stimulation adjustment in the rate design phase of that case as always. *See* Order No. 89-1807 (UT 85 revenue requirement) and Order No. 90-920 (UT 85 rate design).

AT&T/WorldCom agree that the language of the stipulation and of Order No. 00-190 do not preclude an elasticity adjustment to the billing units. AT&T/WorldCom also agree with Staff that it is appropriate to perform the elasticity adjustment in the rate design phase of the case.

Discussion and Resolution. We agree with Staff and AT&T/WorldCom that the language of the stipulation and of Order No. 00-190 does not preclude an elasticity adjustment. The language "based on August 1997 billing units" implies an ability to modify the billing units, using those units as a starting point, as Qwest notes in its modification of those units for seasonality. No other language in the order or stipulation precludes use of an elasticity adjustment to toll revenue.

The rate design phase of the case is the proper phase for performance of an elasticity adjustment. Demand stimulation cannot be determined until a rate is initially assigned, since the amount of stimulation caused by a rate change depends on the specific rate change. Staff did not stimulate toll revenue twice. Simply because Staff calls this a pro forma adjustment does not mean it necessarily belongs to the revenue requirement phase of the case, and it does not.

Finally, we agree with Staff and AT&T/WorldCom that it is appropriate to perform an elasticity adjustment to Staff's proposed toll rates. Elasticity in this case simply measures consumer response to reduced prices. Elasticity adjustments to toll revenues are a normal part of cases involving major price changes, such as this case. We note that even Qwest does not argue that toll services are price inelastic. We accept the contention of Staff and AT&T/WorldCom that the test year toll customers would have responded to the significant price reductions Staff proposes.

Which Elasticity Factor Should the Commission Use? Having determined that it is appropriate to apply an elasticity adjustment to toll revenue in this case, and that it is appropriate to apply the adjustment in this phase of the case, the question remains which elasticity factor to choose.

Staff proposes a factor of –0.3632. Staff began with Qwest's latest price elasticity study, from 1990, developed for UT 102. Staff characterizes its figure from the study, -0.3632, as conservative (that is, it favors Qwest). Qwest has not updated the study except to check its validity in response to a Colorado EAS expansion. Staff did not conduct its own elasticity study for this case because such studies require large amounts of data that Staff does not possess. Staff did draw on its experience in other cases and performed additional research to conclude that its proposed stimulation factor is reasonable.

Staff reviewed its work in Docket CP 317, the Sprint/United Telephone Company of the Northwest, Inc., primary toll carrier filing that became effective in July 1997 and found that an elasticity factor of –0.364 applied there. Staff also reviewed its work in Docket UT 141, a GTE Northwest, Inc. (now Verizon Northwest, Inc.), rate case. Verizon's 1995 price elasticity study, submitted in UT 141, showed that overall price elasticity for various Verizon states was –0.38 and –0.14 for residential and business toll, respectively. Staff's experience with EAS conversions showed that consumers respond to price reductions when toll rates are replaced by lower EAS rates. In such conversion cases the toll minutes converted to EAS minutes double due to the lower EAS prices.

Staff reviewed price elasticity work performed by the FCC and in other states. Staff reviewed the FCC's analysis of the CALLS Plan, where FCC analysts concluded that the elasticity effect for a change in the average interstate and international toll charge per minute for both business and residential customers was –0.8. This figure is based on an average revenue per minute of 13.5 cents, less than the 14.39 cents per minute for Qwest MTS service today. This elasticity figure is considerably larger than Staff's number.

Staff further reviewed a number of journal articles focusing on intrastate, intraLATA toll. The studies[9] produced elasticity factors ranging from –0.38 to –0.44. Staff concluded, based on its review and research, that an elasticity factor of –0.3632 is in the reasonable range and recommends that it be adopted here. Staff posed an interrogatory to Qwest inviting the company to produce a more current study, but Qwest did not do so.

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[9] Weingarten and Stuck, Business Communications Review 32-34, January 2001 (national study 1983-92), elasticity factor –0.4; Duncan and Perry, Information Economics and Policy 6, 163-178, 1994 (California study 1986-1990), elasticity factor –0.38; Train, Telecommunications Policy 708-713 (Delaware residential study 1985), elasticity factor –0.39; Rappoport and Taylor, Information Economics and Policy 9, 51-70, 1997 (national residential study 1994), elasticity factor –0.44. The authors of the last article note that the conventional view of the intraLATA price elasticity factor is in the –0.3 to –0.4 range.

Staff believes that its use of Qwest's 1990 elasticity study is conservative because the figure Staff proposes is lower than the figures the experts suggest and much lower than the FCC's figure. Staff notes also that the 1990 study is drawn from data collected during the 1980s, when Qwest was essentially a monopoly provider of intraLATA toll. Qwest's firm price elasticity was also the market price elasticity for all practical purposes during the study's time period. Firm price elasticity is always equal to or greater than market price elasticity. By 1997, the test year, the intraLATA market was expanding and becoming more competitive. The –0.3632 figure, a market price elasticity number, is therefore likely to be conservative when compared to the 1997 test year period and Qwest's firm price elasticity. AT&T/WorldCom agree with this analysis. AT&T's expert, Dr. Selwyn, noted that the most conservative approach to an elasticity adjustment is to assume that market elasticity is controlling and not to look at firm elasticity.

AT&T/WorldCom and AARP argue that Staff's elasticity figure is overly conservative in Qwest's favor but is reasonable. AT&T/WorldCom propose a higher price elasticity factor of –0.50 for toll calling volumes, based on a 1995 decision in California.

Qwest presents no price elasticity factor of its own. Qwest opposes imposition of any elasticity factor but argues that should one be applied, the figure should be supported by credible evidence. According to Qwest, parties advocating the stimulation factor rely on studies performed in other eras and for other jurisdictions that are inapplicable to the current Oregon market.

Qwest asserts Staff's position is inconceivable. Staff's argument is that firm and market elasticities were the same in 1990. Now, under competition, firm elasticity is likely to be higher than market elasticity. Therefore, Staff argues, it is conservative to use the market elasticity figure from 1990. Missing from Staff's analysis is any information about market elasticity in 2001 or even 1997. Qwest argues that it is likely that market elasticity in these later years is much lower than it was in 1990 and that firm elasticity today is probably also lower than market elasticity used to be.

Qwest also notes that in 1998, Verizon's elasticity study for UT 141 concluded that an appropriate factor for intraLATA toll stimulation was –0.19. Staff does not explain why the Commission should not use that figure or another lower figure, such as it applied more recently to Verizon (-0.277).

Qwest asserts that Staff's reliance on the FCC analysis of the CALLS Plan is also misplaced. The elasticity figure Staff reports, -0.8, is for interstate and international toll, not intraLATA toll. These are radically different markets, according to Qwest.

AT&T/WorldCom advocate for the stimulation factor the California Public Utilities Commission (CPUC) used in 1994, -0.50. Qwest notes that the CPUC used a stimulation factor of -0.20 in 1998. Qwest maintains that the competitive conditions in California in 1994 were radically different from the conditions in the Oregon market today. Further, the CPUC's decision to adjust the stimulation factor in

1998 "reflected recent market changes." AT&T/WorldCom also assert that the difference between the –0.50 and the –0.20 figures adopted by the CPUC in 1994 and 1998 is due to the "fact that the percentage rate decrease adopted in the 1998 case was much lower than in the 1994 decision." Qwest contends that a rate decrease is not the sole factor that drives price elasticity.

Qwest notes that the FCC and state commissions have determined that in order to be valid an elasticity study must account for cross elastic effects. In *In the Matter of AT&T Communications Tariff No. FCC No. 1; PRO American Optional Calling Plan,* 103 FCC2d 134 (FCC 1985), the FCC rejected AT&T's elasticity study because it failed to account for demand shift from a competitive response.[10]

Discussion and Resolution. We find Staff's elasticity factor reasonable. It is based on study and knowledge of the Oregon telecommunications market and on examination of FCC work and expert research on the subject. We decline to adopt an elasticity factor from California, whether the –0.50 or the –0.20 factor, when we know too little about the background of either of those factors to be convinced they are reasonable and when we have reason to adopt the figure proposed by Staff.

Qwest argues that the elasticity study with which Staff begins is not credible. Staff has argued convincingly that it checked its conclusions from that study against other, more recent work and its results are consistent with the conclusions of experts in the field. We find the evidence credible.

Qwest mounts attacks on each piece of evidence that Staff relies on to fortify its position. However, Staff has supported its position with a number of studies and cases, which have a cumulative effect. Qwest attacks the FCC CALLS Plan study. The FCC CALLS Plan study is not directly relevant to intrastate, intraLATA toll calls, but does provide a parameter by which to judge the reasonableness of Staff's proposed elasticity factor. Qwest questions why the Commission did not use the Verizon proposed or actually employed figure in this case. The Verizon rate case, UT 141, has a different record than this case. We conclude that Staff has convincingly supported its elasticity factor. Finally, Qwest argues that an elasticity study must take cross elastic effects into account. We have rejected this argument above, under Post Test Year Issues.

Qwest could have submitted a new elasticity study and chose not to do so. We adopt Staff's elasticity factor of –0.3632.

[10] AT&T/WorldCom and Qwest engage in a discussion of whether Qwest is asking to be made whole for competitive losses in asserting that the Commission should take cross elastic effects into account. Because we do not take these effects into account, we do not describe this argument.

ISSUE 7: CENTREX PLUS

Background

Centrex was designed to compete with private branch exchange (PBX) service. Rather than having an individual PBX at each customer location, Qwest has programmed a portion of its switching system to mimic a PBX. The Centrex service has three essential components: (1) the network access channel (NAC), a telephone line that connects the customer to the local exchange carrier; (2) the network access register (NAR), a switching function that provides dial tone, connects the customer's lines to phones outside the customer's Centrex system, and can limit the number of lines that have access to the telephone number at any one time; and (3) the switching function that provides system features like speed dialing and call waiting.

For Centrex Plus in Oregon, the three components are bundled as a single service. Line charges are set according to the number of station lines per location. Qwest offers discounts based on the number of lines at a single location. This is a form of volume discount.

Qwest filed its original rate design proposal as Advice No. 1849. Qwest modified the Centrex portion of that proposal in the March 19, 2001, modified portion of Attachment B to that Advice, entitled "Revised UT 125 Rate Spread." Staff did not agree with all of Qwest's modifications of March 19. However, in its opening brief, Qwest states that Staff and Qwest agree on Qwest's proposal for Centrex Plus rates. Although there are two Qwest proposals at issue (Advice No. 1849 and the March 19 modification), we take Qwest's statement to mean that it accepts Staff's selection of Qwest's proposals. ATG is the only other party to address this issue. ATG contests the location pricing aspect of Qwest's volume discount pricing.

Centrex Plus Rates

Because Staff adopts Qwest's originally filed proposal in some instances and the March 19 modification in others, we refer in the following to Staff's proposal. Staff's proposal decreases Qwest's composite annual revenues for Centrex Plus service by $726,284. The components of this reduction are a composite decrease of $459,024 from the Centrex Plus line charge, $209,323 from the Centrex Plus usage charge, and $57,937 from the Centrex Plus Network Access Facility (NAF) charge.

Line Charge. Staff agrees with Qwest's proposal for a composite decrease of $459,024 for Centrex Plus line charges. A customer's Centrex Plus line charge is determined by a price matrix based on three criteria.

First, Qwest assesses the number of lines at one location. The lines are divided into six size categories, also called cohorts: 1-20 lines, 21-50 lines, 51-100 lines, 101-300 lines, 301-500 lines, and over 500 lines. Second, the line charge is based on the geographically deaveraged rate group where the customer's Centrex Plus system is located. Staff used the three Rate Groups established in Order No. 00-481 to apply this

criterion to the Centrex Plus pricing matrix. The third criterion for the price matrix is the duration of the contract. Qwest gives pricing discounts for contracts of 12 to 35 months, 36 to 59 months, and 60 months.

Staff supports Qwest's proposal for changes to Centrex Plus line charges and the pricing matrix because the proposal is consistent with Commission rules and orders and with Oregon statutes. Centrex Plus is not a basic service. ORS 759.400; OAR 860-032-0260. As a nonbasic service, Qwest's proposal must meet the price floor requirements of ORS 759.410(4). Staff tested Qwest's proposal to ensure that it did meet the price floor, using the rate groups and NAC price floors approved in Order No. 00-481, and then Qwest's current unbundled network element prices for switching, transport, and other elements of Centrex Plus service besides the NAC. Staff concluded that Qwest's Centrex Plus line charge pricing proposal is consistent with ORS 759.410.

Resolution. We adopt Qwest's and Staff's proposal for a composite decrease of $459,024 for the Centrex Plus line charge.

Usage Charge. Staff's proposal decreases composite annual revenues for Centrex Plus usage charges by $209,323. The Centrex Plus usage charge is a monthly recurring charge per station for Centrex Plus systems that are not blocked. The current tariffed Centrex Plus usage charge is $14.90 per line for the 1 to 20 line cohort, $14.90 per line for the 21 to 50 line cohort, and $3.00 for all cohorts in excess of 50 lines. Staff's proposal replaces this matrix with a standard flat rate Centrex Usage Charge of $4.04 per line, regardless of the Centrex Plus system size.

Staff's proposal is consistent with Qwest's original Centrex Plus usage charges proposal. Qwest's modified proposal increases the Centrex Plus usage charge in order to offset Qwest's proposal to further decrease the Centrex Plus line charge. Staff adopted the March 19 proposal for additional decreases in the Centrex Plus line charge, but Staff proposes to offset the additional Centrex Plus line charge revenue decrease with adjustment to prices for services other than Centrex. Therefore, Staff opposes Qwest's revenue offsets filed on March 19.

Resolution. We adopt Staff's proposal on the usage charge issue. All lines, regardless of the Centrex Plus system size, shall be charged a standard flat usage charge of $4.04. Offsets for this reduction shall be made against services other than Centrex.

NAF Charge. Staff's proposal decreases Qwest's annual composite revenues for Centrex Plus NAF charges by $57,937. Staff's proposed NAF charge is set at Staff's proposed price for a Digital Switched Service trunk ($17.00). For Two Way and In Only service, a price element of $1.36 is added for the Hunting feature inherent in those services. Staff's proposal for monthly Two Way, In Only, and Out Only NAF charges is $18.36, $18.36, and $17.00, respectively.

Staff's proposal is consistent with Qwest's original proposed decreases in NAF charges. In Qwest's March 19 modification, Qwest proposed to increase the NAF

charge from its original proposal in Advice No. 1849. This adjustment was made as one of Qwest's proposed pricing elements to offset its proposed additional decrease in the Centrex Plus line charge. Staff has not adopted Qwest's adjustments to the NAF charge that were presented in the March 19 modification.

Resolution. Staff's proposal for Centrex Plus NAF charges is adopted.

Centrex Plus Nonrecurring Charges. In its Advice No. 1849, Qwest did not propose a price for the line identification database (LIDB) charge or the charge for chip in of additional numbers. Staff proposes that there be no tariffed LIDB charge for an initial installation and a $3.50 nonrecurring charge for subsequent changes.[11]

Staff proposes that the $4.25 nonrecurring per line charge for chip in, currently listed in Qwest's tariff but not applied, should be changed to reflect a zero nonrecurring charge for Centrex Plus resellers.

In Order No. 97-480, the Commission ordered that the charge for chip in be an issue in the rate design phase of UT 125. The Commission later stated that it "agrees with the joint petitioners and Staff that the proposed chip in charge contravenes the existing stipulation adopted by Order No. 93-746 and that the stipulation should remain in effect pending a complete investigation of the costs associated with the chip in service." Order No. 98-079 at 3.

Qwest appears to agree with Staff that the current nonrecurring chip in charge should be eliminated. However, Qwest conditions its proposal to eliminate that charge on the Commission's acceptance of Qwest's overall price proposal for Centrex Plus. Qwest asserts that if its proposal is not accepted, Centrex Plus margins may be insufficient to provide cost recovery for the chip in charge, and the assessment of the charge will have to be revisited. Qwest offers no evidence to suggest that cost recovery would be insufficient if the chip in charge is eliminated. Since the Commission ordered that the chip in charge be an issue in this proceeding and Qwest has offered no additional cost information concerning chip in service, Staff recommends that the nonrecurring chip in charge be eliminated whether Qwest's overall Centrex Plus proposal is accepted or not.

Resolution. Staff's proposed rates for the Centrex Plus nonrecurring charges are adopted. Qwest did not provide cost data to support its contention that eliminating the chip in charge would cause its Centrex Plus margins to be insufficient unless the rest of its proposal was accepted. Qwest did not contest eliminating the chip in charge in its briefs. We conclude that it is appropriate to eliminate the chip in charge.

The LIDB charge shall be set at no charge for the initial installation and a $3.50 recurring charge for all subsequent changes. There shall be no chip in charge.

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[11] In Order No. 97-441, the Commission ordered that "the proposed LIDB rate from Transmittal No. 97-037-PL supplemental will go into effect, effective December 5, 1997, subject to refund." The proposed rate from Transmittal No. 97-037-PL supplemental was a nonrecurring charge of $3.50 per line for subsequent changes only. Staff's proposal, which we adopt, makes this rate permanent.

Per Location Pricing

The remaining Centrex Plus issue is whether to change Qwest's volume discounts for a certain number of lines per location (street address). A reseller is permitted to aggregate customers as long as they are at one address. Currently, Qwest offers a discount to a customer at a given location with 50 or more access lines.

Party Positions. Qwest and Staff[12] agree that the current per location pricing scheme should be left in place; ATG argues that Qwest should instead offer volume discounts based on a customer's total lines in service at a Qwest wire center.

Qwest believes that its per location volume discount pricing approach is appropriate because Qwest's costs of serving a customer are reduced as the customer has more lines at a specific location. Qwest argues that its pricing approach for Centrex Plus must also be evaluated in the context in which it was developed, as a competitive alternative to customer owned PBX based systems. Qwest reminds the Commission that that Centrex Plus is a retail product that Qwest markets to retail customers.

ATG's Arguments. ATG does not object to Qwest's volume discounts per se, but only to the location restriction. ATG argues that Qwest's per location pricing scheme was designed to restrict resale and is not justified by cost. According to ATG, the volume discount price break points make sense only when viewed in light of the goal of restricting resale.

According to ATG, discounts should be based on a customer's total lines in service in a Qwest wire center, treating a reseller as one customer, rather than be based on end user volumes at a single location. ATG argues that its recommendation is consistent with Qwest's cost data, will conform tariffs to current laws regarding unreasonable discrimination against resale, and can be accomplished with a revenue neutral restructuring of Centrex rates.

History of Per Location Pricing. ATG maintains that Qwest originally offered volume discounts based on the number of station lines as a way to compete with PBX service, without a per location restriction. When resellers started obtaining volume discounts through aggregating smaller customers at multiple locations, Qwest decided to add the per location pricing requirement because it would thwart resale at the same time it permitted Qwest to continue giving substantial discounts to its largest customers with a large number of station lines at a single location. According to ATG, the record shows that per location pricing was instituted to restrict resellers from obtaining the volume discounts that Qwest already offered to its large customers to compete with PBX.[13]

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[12] Staff supports Qwest's proposal to price lines by location because it is consistent with prior approved tariff terms and conditions and Commission orders. *See* Qwest Tariff, PUC Oregon No. 29 ¶9.1.16.C.2; *see also* Order No. 99-438 at 7.

[13] ATG refers to some confidential exhibits it claims are evidence that per location pricing was intended to restrict resale of Centrex Plus service. Those documents discuss proposals from 1993, well before the Telecommunications Act of 1996, and are not relevant to Qwest's compliance with its resale obligations

In the early 1990s, when per location pricing was instituted in Oregon, the policy of the Commission was to discourage resale in local exchange markets, including Centrex resale. Thus, ATG contends, the Commission took no action against per location pricing when it was first introduced. In the meantime, however, the federal Telecommunications Act of 1996 has set the goal of opening telecommunications markets to competition. ATG alleges that despite this change, Qwest has failed to address a Centrex rate design here that it knew was meant to restrict resale.

Legal Considerations. ATG argues that the FCC has found restrictions on resale to be presumptively unreasonable. *In the Matter of Local Competition Provisions in the Telecommunications Act of 1996*, CC Dockets No. 96-98 and 95-185, *First Report and Order*, 11 FCCR 15499 (1996) (Local Competition Order). There, at 15,971, the FCC stated that:

> It is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high volume discount minimum usage requirements, as long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers. We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable.

Prohibited restrictions on resale include restrictions on volume discounts, according to ATG. *In the Matter of the Public Utility Commission of Texas, Memorandum Opinion and Order*, 13 FCCR 3460 at ¶220-223 (location restriction on Centrex that prevented resellers from aggregating customers determined to be unreasonable); Local Competition Order at 15,971. As an incumbent local exchange carrier, Qwest has the burden to show that its per location pricing is reasonable. 47 CFR §51.613(b); Local Competition Order at 15,966. State law also prohibits unreasonable restrictions on resale. ORS 759.455(i); (g).

ATG argues that Qwest's per location pricing scheme is a restriction on resale. According to ATG, the per location pricing plan precludes aggregation of multiple end users by resellers to achieve volume discounts comparable to those Qwest offers to its large retail customers. Centrex resellers' customer base consists primarily of small and medium sized businesses. The per location requirement of the retail tariff precludes aggregation of these customers unless they are at a single location. Tying volume discounts to a single location restricts resellers from obtaining volume discounts.

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under the Act. The one document from 1997 relates to Centrex Prime, not an issue here, and the arbitrage referred to is with other Qwest retail services, not competition with resellers.

Cost Justification for Per Location Pricing. ATG believes there is nothing wrong with the pricing structure Qwest has developed, even if it does not align with underlying costs; the problem is the restriction on resale of the discounts. ATG argues that there is no rational basis for Qwest's disparate treatment of costs of serving small and large customers other than to justify a scheme that discriminates against resellers. ATG calls Qwest disingenuous in saying that costs for smaller customers are linked to individual loops since that is how they are actually served. Qwest's witness admitted that smaller customers in multi tenant buildings are served by T-1s in several instances, and admitted that this is the efficient way to serve such a customer on a forward looking basis.[14]

ATG contends that Qwest cannot meet its burden of showing that per location pricing is reasonable and nondiscriminatory. Qwest's witness was unable to justify the price break at 101 lines in terms of efficiencies and economies. ATG argues that the line volumes used in per location pricing bear no relationship to the line volumes for T-1 service.[15] ATG also argues that the cost drivers for the lines between a customer's location and the central office are the density of the plant serving the neighborhood and the length of the plant. Therefore, a line serving a small volume user located in a large office building costs Qwest the same amount on a monthly basis as each Centrex line serving a single customer in the same building. Offering a discount to some customers who take more lines is not cost based and is hence discriminatory.

ATG also argues that lines serving each of the customers in different buildings in a commercial neighborhood are likely to be relatively low in cost and roughly equal in cost because of economies of density.

Qwest uses competition with PBX to justify per location pricing. However, according to ATG, Qwest admits that per location pricing has a negative impact on its competition with PBX. Thus, ATG contends that Qwest does not need to offer per location volume discounts to compete with PBX.

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[14] ATG argues that serving a particular number of lines at a single location cannot justify the volume discounts offered by Qwest. Qwest's own cost studies show that there is a small per line difference between serving 50 or fewer lines by copper loops and 51 and over by T-1s. Yet, ATG argues, Qwest's rate design proposes a discount at a multiple of actual savings.

[15] ATG notes that each T-1 carries 24 voice grade circuits, but Qwest does not offer per location discounts based at 24 line intervals. Technically, a location with fewer than 24 lines can use a T-1 just as efficiently as a location with greater than 50 lines. ATG contends that a 51 line system would be inefficient, since it would use two T-1s with 48 lines and a third T-1 with only 3 lines.
Further, Qwest's volume discounts assume 100 percent fill factors in the prices whether or not applied to a multiple of 24. Under the 51 line scenario a customer would receive the benefit of a larger volume discount by using only 70 percent of the total capacity of the three T-1s, while a 48 line customer would get a much lower discount using 100 percent of two T-1s. The unused portion of the T-1 in the 51 line scenario has not been factored into the price floor. ATG contends that there are no additional cost savings for customers subscribing to over 100 lines, assuming a T-1 technology. Since other Centrex price components are related to switching and are not sensitive to volume and location, ATG concludes that the large discount cannot be justified by other cost savings.

The Centrex Plus features, according to ATG, are provided through software in the central office switch; thus the costs are not tied to the customer's location. Any location based savings would be a saving in transaction costs, which are normally recovered in nonrecurring charges.

ATG also argues that small customers provide a cross subsidy for large customers under the Centrex Plus per location pricing plan, since large customers provide Qwest less net revenue than the same quantity of service provided to small customers.

Effect on Competition. ATG argues that Qwest's market power allows it to impose higher prices on smaller volume users. Smaller customers depend on resellers for competitive alternatives to Qwest. Smaller customers lack the volume to justify the T-1 facilities that make it economical for competitive carriers to serve customers. Because Qwest has market power for Centrex services with respect to small volume users, this price discrimination has an anticompetitive effect. According to ATG, this is an abuse of market power. The volume discount exceeds the level of discounts that would be provided in an effectively competitive market, where discounts are limited to the amounts of cost saved.

ATG also argues that competitors have made limited inroads in Oregon. Resale of all types of lines, including unbundled network platforms, appears to account for fewer than 65,000 lines out of more than a million access lines Qwest has in Oregon. Through its UM 731 revenue neutral filing, Qwest has recently reduced the price of basic business lines. One effect of the reduction is to make it harder for facilities based competitors to enter the market and provide alternatives to Qwest access lines. Another effect is to reduce the potential margins for Centrex resellers, because basic business lines compete with resold Centrex Plus lines. ATG argues that it is important for Centrex Plus lines to be priced appropriately to ensure that all businesses in Oregon have a competitive alternative to Qwest. ATG is aware that Qwest cites figures for growth of resale but argues that those figures would be higher without the per location discount restriction. ATG also argues that the current telecommunications market is much less favorable to competitors than the market in the years Qwest cites.

ATG argues that Qwest's per location scheme is designed to protect Qwest's large customer base through volume discounts and to make resale of Centrex Plus difficult. ATG believes that Qwest continues to pursue strategies to restrict Centrex resale. First, Qwest has proposed in this docket to increase rates for lower Centrex volumes, in order to curtail resale. At the same time, Qwest proposes an even greater discount at 100 and 300 lines to protect its large customer base. Continued use of per location pricing, according to ATG, restricts the ability of resale to constrain Qwest's anticompetitive pricing.[16]

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[16] ATG notes that the Washington Utilities and Transportation Commission (WUTC), which investigated per location pricing, found that a similar location pricing structure for Centrex Plus, which bundled lines and features, discriminated against resellers and was an impermissible restriction on resale. We decline to base any portion of our decision on an assertedly "similar" pricing structure.

ATG urges the Commission to order Qwest to make revenue neutral revisions to its Centrex Plus pricing using volume discounts based on the number of lines in a particular wire center rather than at a customer location.

Qwest's Response. Qwest contends that ATG's argument is based on the incorrect assumption that its tariff imposes impermissible restrictions on resale.

History of Per Location Pricing. Qwest denies that it added the per location pricing feature to its Centrex Plus pricing when resellers started obtaining volume discounts through aggregation of smaller customers at multiple locations. On the contrary, Centrex Plus was designed with per location pricing all across Qwest's territory. Per location pricing was not added to thwart resale.

Legal Considerations. Qwest asserts that its pricing structure for Centrex Plus imposes no conditions or additional terms whatsoever on the resale of the product. Any CLEC can purchase Centrex Plus service for resale on the same terms and conditions that Qwest offers the product for sale to its retail customers, except that the CLEC could qualify for an additional discount under 47 USC §251(c)(4). If a CLEC has a customer that qualifies for the per location volume discount, the CLEC would receive that pricing structure and could compete for the customer. The per location volume discount is also available to CLECs that can aggregate smaller customers at one location.

ATG cites the FCC's Local Competition Order for the proposition that certain restrictions on resale are presumptively unreasonable. Qwest counters that the sorts of restrictions that the FCC considered in that order were situations in which a service offered for sale to retail customers would not be made available to resellers on the same terms and conditions.

The FCC stated that it is "presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal demand." Local Competition Order at 15,971. Earlier in the same order, the FCC stated that incumbent local exchange carriers "also seek to limit reseller end user eligibility to purchase resold incumbent LEC high volume offerings to those eligible to receive such offerings directly from the incumbent LEC." *Id.* at 15,966. Applied to Centrex Plus service, the FCC would consider it unreasonable for Qwest to extend per location discounts to a reseller only if a reseller's individual end user also qualified for the discount. Qwest's tariff imposes no such restrictions, or any other restriction relating to Centrex Plus resale.

The FCC also addressed volume discounts in the Texas order. It is clear from the discussion in the order that the FCC was addressing a type of resale restriction not found in the Centrex Plus pricing structure (refusal to allow aggregation of end users) and that the FCC did not invalidate as an unreasonable restriction on resale the sort of per location pricing that Qwest offers.

Cost Justification for Per Location Pricing. ATG's challenge to per location pricing rests on the assertion by its expert, Dr. Nina Cornell, that Qwest's proposed volume discounts are not based on costs saved by serving a given customer location in volume. ATG is wrong, according to Qwest. Qwest can use alternative loop technologies to serve customers with 50 or more lines, such as T-1 or higher capacity service instead of copper loops, realizing cost savings through such economies of scale.

Dr. Cornell asserts that Qwest's costs are based on the density of a vicinity or neighborhood, not the number of customers at a given location. This assertion, according to Qwest, is mistaken. Qwest's overall costs of service may be higher in a sparsely populated area than in a densely populated one. However, the cost to serve an access line at a particular customer location may still change depending on the number of lines that a customer subscribes to at the location. The forward looking cost of serving a customer with one or two telephone lines will be based on the cost of individual loops, since that is how such customers are actually served. On the other hand, the forward looking cost of serving a customer with 50 to 300 lines at one location will be based on the most efficient technology, which may be a large copper cable with many pairs, a T-1 circuit delivered over two copper pairs, or a T-1 or a DS-3 circuit delivered over a fiber optic loop. The per line cost of serving such customers is much lower than over an individual copper loop.

Qwest's cost of serving multiple lines at a single location is lower than serving customers at multiple locations. ATG claims that Qwest's witness testified that the most efficient way to serve a specific large customer could be through a T-1, a concentrator system, or a large copper cable; ATG takes this statement as contrary to Qwest's cost study, which assumed use of a T-1 to serve Centrex Plus customers with more than 50 lines at one location. Qwest's cost study is based on the least cost forward looking technology that would serve that customer. Qwest contends that it is not contrary to that study to suggest that in the field there may be more than one efficient way to serve a customer.

ATG's examples of price breaks not divisible by 24 show that some specific service configurations may be more efficient than others, if customers do not later add lines at a location. They do not disprove the general principle that the forward looking cost of service per line decreases with the number of lines at a single location.

ATG also mischaracterizes the testimony in stating that Qwest's witness David Teitzel, "admitted that it was technically feasible and could be efficient to serve a small customer in a dense neighborhood by demuxing a T-1, taking it out of a building on copper loops to a nearby manhole, and splicing it into smaller premise next door." Qwest's witness actually said it was technically possible but not the norm. The witness also noted that he is not an engineer. This testimony does not support ATG's testimony that T-1s can be used economically to serve small customers in dense neighborhoods.

Qwest notes that the Commission is setting rates for Qwest's retail services in this proceeding, so it is appropriate to compare the rates for different retail services, since that is what Qwest's retail customers do. Centrex Plus was developed as a

competitive alternative to customer owned PBX systems. Centrex Plus provides features similar to a PBX system, such as intercom dialing and a variety of features, but as a central office based system. A customer considering purchasing a PBX system has a relatively large number of access lines at a given location. Such a customer will compare the cost of a PBX system to Centrex Plus service. PBX systems are cost effective only where there are a large number of access lines at one location. Centrex Plus also offers per location volume discounts as a competitive alternative to PBX systems. Elimination of the per location requirement to obtain the volume discount would distort the pricing relationship of Centrex Plus to its competitive retail alternative. Eliminating the requirement would also destroy the relationship between Qwest's cost of providing the service and the price.

Qwest asserts that there is nothing anticompetitive about its per location discount pricing. Qwest notes that Centrex resellers such as ATG compete with Qwest for the sale of basic business lines with feature packages. Such retail services are priced above the prices that Centrex resellers are able to charge based on the current pricing of Centrex Plus.

Qwest maintains that the per location volume discount does not impede Centrex resale. Centrex resellers compete for small customers with whom they have a significant pricing advantage. If a customer wanted to obtain a comparable level of service from Qwest as from a Centrex reseller, the customer would likely purchase either a basic business line with separate features or with a feature package. The CustomChoice package for business customers includes a line and approximately 20 features for about $55. Centrex customers, including resellers, pay less per line than do basic business service customers with a comparable level of features. Centrex resellers are also able to offer customers both interLATA and intraLATA toll service. Centrex resellers have a significant pricing advantage over Qwest in competing for the small and medium sized business customers. Qwest contends that Centrex resellers such as ATG have been able to leverage their pricing advantage to capture a significant amount of the market for smaller business customers in Oregon.

Qwest cites the following figures as proof that Centrex resellers, including ATG, have successfully captured business customers in Oregon. In December 1995, 16,192 Centrex lines were resold; in December 1996, the number of resold Centrex lines was 25,489; in December 1997, the number was 38,304, and in April 1998, the number rose to 41,138. Qwest asserts that this is a significant level of competition for business customers. Currently, there are approximately 20,000 resold basic lines, excluding Centrex, in Oregon, and competitors have purchased another 50,000 unbundled loops in Oregon.

Qwest urges the Commission to evaluate the significance of the issues ATG raises in Qwest's overall rate design, since no other Centrex reseller has appeared and since ATG itself has expressed to the Commission its intention of converting its resold Centrex lines to ATG facilities rather than pursuing a resale strategy. This growth in Centrex resale occurred under per location pricing. During the time period in question, the Commission ordered Qwest to impose a surcharge of $5.40 per month on each resold

Centrex line. Order No. 98-372. Despite these conditions, Qwest argues that Centrex resale flourished. Qwest contends that there is no basis to assert that per location pricing is anticompetitive.

Qwest believes that CLECs currently do not have the 65,000 lines or fewer that ATG asserts but approximately 120,000 access lines to business customers, representing over 23 percent of the business access lines.

Discussion and Resolution. ***History of Per Location Pricing.*** Although ATG has tried to show that Qwest's introduction of per location pricing had an anticompetitive motive, we consider this issue irrelevant for purposes of the rate case. Here we are deciding whether Qwest's rates are just and reasonable as proposed. Corporate thinking from before the Telecommunications Act does not weigh in that decision, nor does discussion about Centrex Prime, a different service from Centrex Plus.

Legal Considerations. ATG contends that Qwest's per location volume discounts restrict resale in violation of the Telecommunications Act. ATG is mistaken. As Qwest has argued, nothing in its tariff restricts resale of Centrex Plus service. Resellers purchase Centrex Plus service on exactly the same footing as any other purchaser. Again, as Qwest has noted, the passage from the Local Competition Order that ATG cites prohibits refusal to allow resellers to aggregate customers for volume discounts. Qwest does not refuse to allow aggregation of customers. The Texas order also speaks to a prohibition on aggregating customers, which is not the case here. We conclude that Qwest's per location volume discount pricing scheme is not in violation of the Act or FCC orders.

Nor is Qwest's scheme in violation of state law. ORS 759.455(g) prohibits a telecommunications utility from discriminating in favor of itself or an affiliate in the provision and pricing of, or extension of credit for, any telephone service. As noted, Qwest's tariff allows anyone to purchase Centrex Plus service under the same terms and conditions. This is not a provision that discriminates in favor of Qwest or an affiliate. ORS 759.455(i) prohibits the imposition of unreasonable or discriminatory restrictions on network elements or the resale of a telecommunications utility's service. Again, Qwest's tariff contains no such restrictions.

Absent a showing that Qwest's per location volume discount pricing scheme violates the Act, the presumption that Qwest's pricing scheme is unreasonable disappears. ATG mounts a disparate impact argument about the effect of Qwest's pricing scheme, but the scheme is in violation of no law or order.

Cost Justification. As to the impact of the scheme, ATG makes two types of argument. First, ATG contends that the scheme is not cost based. ATG's point is to show that the per location volume discount pricing structure keeps resellers from enjoying the large discounts associated with having 100 customers or more. ATG makes assumptions about Qwest's cost structure that Qwest successfully refutes. ATG goes into considerable detail to attack Qwest's forward looking T-1 based technology for larger users and use of embedded or existing technology for smaller users. We agree with

Qwest that there is nothing amiss about using a mix of actual and forward looking technologies to determine a rate design for a service. Moreover, we note that for larger volume customers Qwest mentions other service delivery options than the T-1 (DS-3, for instance) that may have different divisibility properties; ATG has not addressed this possibility but limits its attack to the T-1 properties. ATG has not shown that line volume at a single location is unrelated to cost.

Effect on Competition. ATG also argues that Qwest's per location volume discount disadvantages resellers. ATG does this by attacking Qwest's figures on competition and resale, but does not show specifically how resellers are disadvantaged by the per location pricing. Qwest's figures show that the market for resale of telecommunications services is far from moribund.[17] ATG has not shown that resellers are actually disadvantaged by per location volume discount pricing.

In terms of its marketing strategy, Qwest has shown that its per location volume discount pricing structure allows it to compete with PBX service. The context for this pricing structure shows it to be a reasonable competitive response on Qwest's part.

We conclude that Qwest's per location volume discount does not violate either federal or state law. It has not been shown to have a deleterious impact on Centrex Plus resellers. The per location volume discounts should be left in place.

ISSUE 9: EXTENDED AREA SERVICE

Background

Extended Area Service (EAS) allows Qwest telephone customers to call nearby telephone exchanges for a monthly flat fee rather than incurring long distance charges per call. Exchanges that have EAS capability are grouped by rate band. Charges vary by rate band and are lowest in the most populous bands. There are currently five rate bands.

EAS service is approved by the Commission after a town has shown that a community of interest exists between it and another town. Qwest offers EAS service on a flat or measured basis. EAS is essentially a replacement for toll service. Once EAS routes are in place, customers have no practical alternative to using EAS service, either measured or flat rated, for their calling.

[17] Qwest proposes a figure of 120,000 for CLEC lines in Oregon. We cannot determine whether these are resold lines or not; hence, we do not know whether this figure directly refutes ATG's assertion of 65,000 resold lines. For our disposition of this issue, this matter is not critical.

Party Positions

Only Staff and Qwest addressed this issue. Qwest proposes a reduction in EAS measured service for residential and business service customers to 3 cents per minute from 5 cents per minute, because the current price is well above cost, as represented by a UM 844 price floor. Staff agrees with this proposal.

Qwest proposes to simplify the EAS pricing structure, reducing the current five price bands to three. Staff also proposes to reduce the number of price bands from five to three, but structures its bands differently. Qwest agrees to Staff's rate band structure. Staff combined Bands A and B into one rate, Bands C and D into one rate, and left Band E at one rate.

Qwest's proposal for reducing EAS rates results in a revenue reduction of $22.718 million.[18] Staff's proposal reduces EAS rates by $11.321 million, approximately half the level proposed by Qwest. Qwest proposes a 57.4 percent reduction for EAS rates; Staff proposes a reduction of 28 percent. The differences between Qwest's and Staff's proposals are a function of the difference between their proposals for residential basic service rates (*see* Issue 12 below). Staff's proposal raises residential rates $10.371 million less than Qwest's and lowers EAS rates $10.442 million less than Qwest's. Staff makes no further argument in support of its position on EAS rate design.

Qwest argues that a significant price decrease for EAS rates is appropriate at this time. Qwest points out that the percentage reduction in EAS service should be comparable to the level of reduction in toll rates, since EAS replaces toll service. Qwest's proposed toll rate reduction is 42.3 percent.

Qwest also argues that in this docket, the Commission has a unique opportunity to rationalize EAS pricing and bring it closer to cost. EAS calling replaces what would otherwise be intraLATA toll calls. The conversion of network facilities to accommodate a new EAS route also imposes costs on carriers like Qwest. Accordingly, the Commission has traditionally viewed EAS rates as a mechanism to keep an incumbent local exchange carrier indifferent, from a revenue perspective, to the conversion. EAS rates have thus been determined based on the net toll revenue that an incumbent local exchange carrier would forgo as a result of the conversion as well as the costs of the conversion. The revenue neutral conversion process has been based on intraLATA toll prices that have been substantially higher than current prices or the toll prices proposed in this case.

Qwest also urges the Commission to use this opportunity of Qwest's last general rate case in Oregon to establish EAS rates that make sense from customers'

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[18] Staff notes that Qwest's rate design presented incorrect current EAS flat rates, which resulted in an understatement of Qwest's revenue reduction for EAS of $954,731 and an overstatement of its ISDN-BRS reduction by $176,646. Qwest notes that it does not dispute the Staff calculation, which is hereby accepted. Thus, Qwest's proposed EAS rate reduction is actually $22.718 million, not the $21.8 million figure Qwest used in its briefs.

perspectives and in light of Qwest's entire rate structure. According to Qwest, the Commission need not be concerned with the size of the reduction from previous EAS rates that were established to keep Qwest revenue neutral in an EAS conversion. Implementation of an overall revenue reduction will ensure that Qwest's revenue requirement is met. Adopting Qwest's proposed EAS rates will reduce local service rates for all Oregon customers. Qwest argues that the Commission should adopt its proposal for EAS rates, as amended by Staff's proposed rate band structure, along with Qwest's proposed residential basic service rates.

Discussion and Resolution

Our choice in this issue is whether to raise residential rates by $1.00 in Rate Group 1, $2.00 in Rate Group 2, and $3.00 in Rate Group 3 and lower EAS rates by $22.7 million (Qwest's proposal); or raise residential rates not at all in Rate Group 1, by $1.00 in Rate Group 2, and $2.00 in Rate Group 3, and lower EAS rates by $11.3 million (Staff's proposal). Because we have chosen Staff's proposal for Residential Local Exchange Service, Issue 12, and the issues are linked, we choose Staff's proposal, including Staff's proposed rate band structure, here as well.

ISSUE 11: LOCAL BUSINESS ACCESS SERVICES

Party Positions

In connection with its UM 731 (Universal Service) compliance filing pursuant to Order No. 00-312, effective April 30, 2001, Qwest proposed significant reductions to basic business rates and deaveraging of those rates into rate groups, matching the deaveraging structure that the Commission had ordered for UNE loop rates. Advice No. 1844, acknowledged March 12, 2001.[19] Qwest's proposal here maintains the deaveraged rate structure and introduces a number of other changes in business local exchange service rates, including a further small decrease in those rates. Staff generally agrees with all of Qwest's proposed changes except that Staff proposes that rates for business basic service in Rate Groups 2 and 3 should be the same.

Staff's proposal decreases Qwest's annual revenues for local business access services by $1.3 million. Qwest's proposal decreases them by $1.2 million. Staff agrees with Qwest's original proposal to reduce annual revenues from Public Access Line

[19] In UM 731, Qwest filed reductions in business rates that decrease annual revenues by $15.4 million. In its compliance filing, the company proposed a one party flat simple business (1FB) access line rate of $26.40 per month in Rate Group 1. In effect, Qwest proposed to reduce the simple business access line rate by an average of $4.47 (14 percent) from the current $30.87 rate. Qwest proposes to remove the current distinction between simple and complex business lines by treating them all as 1FB lines. Qwest also proposed to continue to charge a higher rate for PBX lines than for 1FB lines. This reduces the complex line rate to the same level proposed for simple lines, $26.40, a reduction of $8.37 (24 percent) from the current $34.77 rate. Most PBX trunk rates are reduced to $28.40, effectively reducing the rate by $6.37 (18 percent) from the current rate of $34.77.

(PAL) services by $13,000.[20] Staff's proposal eliminates the PAL flat rate with measured usage after 300 calls and reduces PAL rates to equal the Staff proposed one party flat business rates for all three rate groups.

NWPA also joined this issue, arguing that Qwest's, and by implication Staff's, public access line (PAL) rates are inconsistent with the FCC Payphone Orders. NWPA contends that PAL rates are subject to the "new services test," requiring that rates be cost based with a reasonable contribution to overhead.[21]

Staff. Staff's proposal reduces monthly rates for local business access service customers by approximately 2 percent. Business one party flat (1FB) rates for both Rate Groups 1 and 2 drop by 40 cents, and Rate Group 3 rates drop by $2.35, or 8 percent. This reduction makes rates in Rate Group 2 and 3 equal. The total annual revenue effect of these reductions is $1.4 million. Staff proposes to reduce business access line rates because they are too far above the universal service benchmark.

Staff's proposal also reduces monthly recurring rates for flat rate PAL service in all three rate groups by 8 to 20 percent. This proposal makes flat PAL rates equal to the proposed 1FB rates for all three rate groups. Staff also proposes to eliminate the PAL Flat Rate with Measured Usage after 300 calls. The total annual revenue effect of these rate reductions is about $13,000.

Qwest. Qwest and Staff generally agree on Qwest's proposed changes except that Staff proposes that rates for business basic service in Rate Groups 2 and 3 should be the same. Qwest believes that the Commission should not retreat from the extent of deaveraging that it has already approved and should maintain a deaveraging of retail rates that matches the deaveraging of loop rates. The deaveraging of loop rates reflects actual cost differences in the three rate groups. Qwest argues that retaining cost based distinctions among the three rate groups will aid the development of facilities based competition in those areas.

Qwest has proposed a change in the price for PAL service, making the rates for PAL access line service consistent with business line rates. Qwest argues that PAL service is provided to business customers (Payphone Service Providers, PSPs) and is the functional equivalent of business line service.[22] Staff and Qwest agree on Qwest's rate design for PAL services except that Staff proposes the same rates for Rate Groups 2 and 3.

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[20] Qwest filed a revised UT 125 rate spread on March 19, 2001, that differs slightly from its original proposal.

[21] Qwest's Advice No. 1844 reduces PAL rates by $0.3 million, or 14 percent. However, the flat PAL rate is reduced to the same level as 1FB lines, $26.40, a reduction of $8.37 or 24 percent from the current $34.77 rate. This is the service to which PAL subscribers are likely to migrate.

[22] Qwest notes that in Order No. 90-920, Docket UT 85, the Commission found that measured PAL access lines are identical to measured business service lines and should be priced the same.

NWPA. NWPA argues that Qwest's proposed rates for pay telephone access service impermissibly exceed the rates allowable under Section 276 of the Telecommunications Act of 1996.

Payphone Rates and the New Services Test. The FCC issued the Payphone Orders in 1996 and 1997,[23] determining that incumbent local exchange carriers (ILECs) must set their rates for pay telephone access services so as to be cost based, consistent with the requirements of Section 276, nondiscriminatory, and consistent with Computer III guidelines.[24] The Computer III tariffing guidelines incorporate the "new services test." Order on Reconsideration at 163. "The new services test is a cost based test that establishes the direct cost of providing the new service as a price floor. LECs then add a reasonable level of overhead costs to derive the overall price of the new service." *In the Matter of Local Exchange Carriers Payphone Functions and Features*, Mem. Op. & Order, CC Docket No. 97-140, 12 FCC Rcd. 17,996 (1997), ¶ 2 (FCC 97-392, rel. Oct. 29, 1997) (Payphone Features Order). The FCC required ILECs to file studies supporting these costs with state commissions in 1997. Bureau Waiver Order at ¶19.

According to NWPA, Qwest had two duties regarding its PAL rates under the new services test: to file studies showing direct and overhead costs for PAL with the Oregon Commission, and to set PAL rates based on these costs. Qwest did neither and has never, according to NWPA, set its Oregon PAL rates according to the new services test. NWPA believes that Qwest's failure to produce and file cost support data is in itself sufficient for this Commission to reject Qwest's proposed PAL rates.

Qwest has also failed to meet its second duty under the new services test, according to NWPA, which is to calculate its rates based on the appropriate cost data. Instead, NWPA argues that Qwest has set PAL rates according to different criteria and methodologies that have nothing to do with the new services test. For instance, Qwest adds contribution and market driven return costs to its PAL rates. Further, NWPA contends that Qwest sets its PAL rates based on the rates for business local exchange service, whereas there are substantial differences between PAL and business local exchange service and their rates are set by different mechanisms. NWPA would like the Commission to require engineering studies, time and wage studies, and other cost accounting studies from Qwest to comply with the new services test.[25]

CustomNet and the New Services Test. The above arguments apply to access service rates. With respect to payphone features, NWPA argues that these rates

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[23] Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 20,541 (1996) (Report and Order); Order on Reconsideration, 11 FCC Rcd. 21,233 (1996); Order, 12 FCC Rcd. 20,997 (1997) (Bureau Waiver Order); Order, 12 FCC Rcd. 21,370 (1997) (second Bureau Waiver Order).

[24] These four characteristics of rates are what NWPA refers to as the FCC's four part test.

[25] NWPA also argues that it is impermissible to set PAL rates based on business line rates because that would discourage widespread deployment of payphones. NWPA further argues that setting PAL rates at business rates ignores the new services test methodology required by law. We disagree with these contentions; *see* Resolution, below.

should also be set according to the new services test. NWPA focuses its argument on CustomNet, a kind of call screening. Qwest has denied that CustomNet is subject to the new services test, has refused to provide relevant cost data, and, according to NWPA, has set rates for this service according to prohibited criteria.

NWPA argues that the new services test applies to any unbundled features ILECs provide to their own payphone services. Order on Reconsideration at ¶163. Qwest provides CustomNet to its own Basic PAL lines ordered by its payphone division; NWPA concludes that CustomNet is therefore subject to the new services test.

NWPA also argues that usage patterns establish CustomNet as a payphone feature, based on confidential numbers. CustomNet places restrictions on a line to prevent someone charging a long distance call to the payphone number. PSPs order CustomNet because that feature is essential to avoid fraudulent charges, as Qwest's network is currently configured.

NWPA asserts that Qwest has failed to file cost data for CustomNet, although it is a payphone feature. Qwest maintains that it has not prepared cost data because it has not proposed price changes for CustomNet. NWPA argues that this does not excuse Qwest from compliance with the requirements of the Payphone Orders. NWPA argues that the limited cost information available shows that Qwest imposes an enormous overhead loading on CustomNet service.

Discriminatory Rates. Further, NWPA contends that Qwest's pay telephone access service rates are discriminatory. First, NWPA asserts that the rates recover certain interstate costs twice. For each PAL line sold Qwest receives a subscriber line charge (SLC, also called a customer access line charge (CALC) and an end user common line (EUCL)) and a primary interexchange carrier charge (PICC). Qwest has not lowered its proposed PAL rates to reflect that these charges recover nontraffic sensitive interstate costs of PAL service, giving Qwest a double recovery of these costs.

NWPA argues that the FCC has already recognized that ILECs must reduce PAL rates to account for these charges so that ILECs do not recover their costs twice. *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 15 FCC Rcd. 9,978 (2000) (Wisconsin Order), the FCC directed certain ILECs to demonstrate that in setting their PAL rates they have taken into account other sources of revenue (SLC, PICC, and carrier common line (CCL) charges) that are used to recover the cost of the facilities involved to avoid double recovery. Wisconsin Order at ¶12.

Second, NWPA contends that the nature of these federal charges show that they create double recovery for Qwest. They recover the interstate costs of the local loop that are not traffic sensitive. Qwest's PAL costs are not separated by jurisdiction in this proceeding, so they include both interstate and intrastate local loop costs. By collecting the federal charges plus the PAL rate, Qwest recovers the interstate loop costs twice. The fact that Qwest applies these federal charges equally to local exchange services and PAL is irrelevant, according to NWPA.

NWPA contends that Qwest discriminates against its competitors by collecting interstate costs twice. Thus, it can offer higher payphone commission payments than its competitors. As a result, competing payphone providers are subsidizing Qwest's payphone operations. NWPA urges the Commission to require Qwest to adjust its PAL rates to eliminate this double recovery.

NWPA also argues that Qwest's rates and practices regarding CustomNet are discriminatory, including Qwest's markup and its refusal to disclose cost data. NWPA asserts that these practices discriminate against competitive payphone providers and erode their ability to provide viable competition with Qwest's payphone service.

Public Policy. In addition to the assertion that Qwest's payphone service rates fail to comply with the new services test, NWPA alleges that Qwest's rates are inconsistent with Section 276 of the Act, which states the objectives of increasing competition and widespread deployment of payphones. NWPA contends that Qwest's high CustomNet rates hurt independent payphone providers and undercut these objectives. Further, NWPA asserts that Qwest's rates are not cost based, because they are market driven and contain too much overhead loading.

NWPA concludes that the Commission should reject Qwest's payphone access line and features rates because they do not meet each element of the FCC's four part test. NWPA then proposes two approaches according to which the Commission can set Qwest's payphone access and features rates on the evidence available. We do not discuss these proposals here because we decide this issue against NWPA, but note that one of them suggests using UNEs as a basis for setting payphone service rates.

Qwest's Response to NWPA. ***Payphone Rates and the New Services Test.*** In response to NWPA's arguments, Qwest contends that its payphone rates are cost based and provide a reasonable level of contribution to overhead costs and therefore comply with all federal requirements. Therefore, according to Qwest, the Commission should reject NWPA's arguments that PAL rates should be set equivalent to UNE rates.

PAL, according to Qwest, is a retail service, not a wholesale service. UNE pricing principles therefore do not apply to PAL. However, if a PSP is also a competitive local exchange carrier (CLEC), that provider may obtain the UNEs necessary to provide payphone service at the UM 844 UNE rates, or it may obtain a PAL for resale at prices that reflect a wholesale discount. A provider can also obtain UNE or wholesale rates through another CLEC. It is therefore not necessary, according to Qwest, for the Commission to set the retail price for PAL equal to the UNE price for payphone providers to obtain that level of pricing.

Qwest also maintains that the proposed PAL rates satisfy the new services test. The FCC requires rates for payphone services to be cost based and to comply with the new services test. The new services test establishes the direct cost of providing the new service as a price floor. LECs may then add a reasonable level of overhead costs to derive the price of the service.

NWPA argues that Qwest's level of overhead costs are unknown and that Qwest's proposed PAL rates cannot, for that reason, meet the new services test. Qwest notes that the FCC has relied on cost to price ratios to establish the amount of overhead in rates. *See* Payphone Features Order at ¶6. Qwest states that its proposed rates for flat PAL, PAL message line, and PAL measured services range from 26 percent to 91 percent above their direct costs, as approved by the Commission in UM 773. UM 773 costs are a reasonable approximation of direct costs as that term is used in the new services test, Qwest contends.

As to the level of overhead loading of which NWPA complains, Qwest points out that in the Payphone Features Order, the FCC required an explanation of Bell Atlantic's overhead loadings because it determined that, based on cost/price ratios, the overhead loadings did not appear to be reasonable. The FCC and state commissions have determined that a wide range of overhead loading is reasonable, including overhead loading that results in rates 4.8 times direct costs and 30 percent above direct costs. Payphone Features Order at ¶11 n 39, 13; Petition Filed by the Independent Payphone Ass'n of New York, Inc., Case 99-C-1684, 2000 NY PUC LEXIS 832 (NYPSC Oct. 12, 2000) at 8-9.

Qwest maintains that the studies NWPA asks for are unnecessary burdens. None of the things NWPA lists are necessary to ensure that proposed PAL rates are consistent with the new services test, which requires only a showing that the rates for a service include direct costs plus reasonable overhead. Qwest asserts that neither the FCC nor the state commissions prescribe the type of evidence necessary to determine whether PAL rates satisfy the new services test. Qwest notes that the FCC allowed state commissions to determine whether state tariffs comply with FCC guidelines. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, CC Docket No. 96-238, 11 FCC Rcd. 21,233 (FCC 96-439 rel. Nov. 8, 1996), ¶163. Qwest argues that the evidence it submitted demonstrates that its proposed PAL rates are consistent with the new services test.

NWPA charges that Qwest includes impermissible elements in its PAL rates, including market driven return and contribution. NWPA asserts that these elements are inappropriate because PAL rates should be cost based. Qwest contends that cost based does not mean limited to costs. For instance, UNE rates are required to be "based on the cost" of providing the UNE and "may include a reasonable profit." 47 USC §252(d)(1). NWPA's reasoning would price retail PAL service below wholesale UNEs.

According to Qwest, NWPA's interpretation of the law ignores the purpose behind the new services test. *In the Matter of Amendments of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Order on Further Reconsideration, CC Docket No. 89-79, 6 FCC Rcd. 4,524 (FCC 91-186 rel. July 11, 1991) (ONA Order), the FCC described the new services test as a "flexible cost based approach to pricing new services." ONA Order at ¶38. The

purpose of the new services test is to ensure that "initial prices for 'new' services [are] not unreasonably high." *Id.* at ¶39. The FCC continued:

> Because we believe that the public interest will be served by providing LECs with an adequate incentive to innovate, we conclude that a flexible cost based approach is the best way of controlling both excessive pricing and discrimination. As NYNEX recognizes, a cost based upper bound can preserve carriers' incentives to innovate, if it permits them to earn a return on their total new investment commensurate with the risk they assume.
> *Id.* at ¶41.

On the basis of the ONA Order, Qwest argues that the Commission has leeway to determine whether Qwest's proposed rates are reasonable under the new services test, including consideration of an appropriate level of contribution or return.

CustomNet and the New Services Test. Qwest next argues that the new services test does not apply to CustomNet, contrary to NWPA's position. Qwest argues that CustomNet is an individual retail tariffed service described in Section 10 of PUC Oregon No. 29, Exchange and Network Services.[26] CustomNet is available to any customer that subscribes to an individual line under a single uniform service order code (USOC); it is not provided exclusively to PSPs. Over 37 percent of the lines with CustomNet serve customers other than PSPs. To price CustomNet in accordance with the new services test for PSPs, Qwest might be required to separate a service that is provided under a single USOC into at least two categories, CustomNet for PSPs and CustomNet for all other customers. This solution would be impractical and is not required under the new services test, which only governs lines and features provided exclusively to PSPs. In the Payphone Features Order at ¶15, the FCC expressly referred to GTE's call screening service as an "unbundled, payphone specific feature." Qwest argues that CustomNet is not payphone specific. It is instead an independent product available to any class of subscriber. Accordingly, the new services test does not apply to CustomNet, according to Qwest. Moreover, Qwest argues that NWPA has failed to provide evidence that any payphone service price is inconsistent with the new services test. Finally, with respect to CustomNet, Qwest states that it provided no cost data for CustomNet in this proceeding because no change is proposed for CustomNet rates.

Discriminatory Rates. Qwest also maintains that NWPA's reliance on the Wisconsin Order is misplaced. That order did not issue from the full FCC, it applies only to the specific LECs in Wisconsin that are named in the order, and a stay of the order has been requested.

Additionally, Qwest argues that its proposed PAL rates are not discriminatory. NWPA claims that collection of federal line charges such as SLC

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[26] Qwest requests that we take official notice of this tariff. We do so in accordance with OAR 860-014-0050.

on public access lines is discriminatory because Qwest can use the proceeds from its double recovery to offer higher payphone commission payments than its competitors. The only support for this position, according to Qwest, is NWPA's speculation that Qwest would gain a financial advantage through the ability to offer lower rates and/or higher commission payments than NWPA members. Qwest urges us to disregard this assertion as mere speculation. Qwest notes that it is required to assess the federal charges. Qwest imposes them on all access lines, including lines it provides to its own payphone division. Accordingly, these charges are not discriminatory. Qwest also responds that the application of SLC is exactly the same for local exchange services as it is for PAL services.

Discussion and Resolution

For business access services other than payphone rates, Qwest and Staff propose nearly identical rates and no other party addresses the issues. Staff wishes, however, to set rates in Rate Groups 2 and 3 equal to each other, whereas Qwest wishes to retain three rate groups. Qwest argues that retaining cost based distinctions among the three rate groups will aid the development of facilities based competition in those areas. We agree with Qwest on this issue and adopt Qwest's proposed rates.

Payphone Rates and New Services Test. For payphone service rates, we first address NWPA's arguments that Qwest must set rates consistent with the new services test and the FCC's four part test. We note that the FCC's test requires that payphone rates be cost based, consistent with Section 276 (that is, must encourage deployment of payphones), nondiscriminatory, and consistent with Computer III guidelines (that is, must pass the new services test). The new services test requires that rates be cost based with reasonable overhead. Therefore, the test really states that rates be cost based, nondiscriminatory, and consistent with increasing competition for payphones.

NWPA asserts that in order to comply with the new services test, Qwest must submit studies and cost data. We disagree. We find NWPA's reading of FCC requirements to be overly formal. The FCC requires only that rates be cost based and in compliance with the new services test. The new services test requires a showing that rates for a service include direct costs and reasonable overhead. Beyond that, the FCC has not specified what kind of evidence is necessary to determine whether PAL rates satisfy the new services test.

We conclude that UM 773 costs are a reasonable approximation of direct costs. Qwest has used the UM 773 costs to figure its direct costs. Qwest's rates for payphone services range from 26 percent to 91 percent above direct costs. Like the FCC, we find that the cost to price ratio is sufficient to allow us to infer the overhead on payphone rates. Payphone Features Order at ¶6. Further, we find that this overhead is reasonable. As Qwest has pointed out, the FCC and state commissions have determined that a range of overhead loading up to 4.8 times direct costs is reasonable.

We agree with Qwest's arguments about the meaning of cost based rates. This phrase does not mean that rates must be set at cost. This conclusion renders moot NWPA's arguments about the inclusion of contribution and market driven return. We conclude that Qwest's PAL rates satisfy the new services test. We address the rest of the FCC test below.

CustomNet and the New Services Test. We next address the argument about whether CustomNet is subject to the new services test. We conclude that it is not. CustomNet is a service available to any class of subscriber, as Qwest has pointed out. It is a retail tariffed service that may be purchased by any customer with an individual line under a single USOC. Over 37 percent of the lines with CustomNet serve customers other than PSPs. The new services test applies to payphone specific features;[27] CustomNet is not payphone specific. This conclusion makes it unnecessary to address NWPA's arguments about cost data and overhead for CustomNet.

Discriminatory Rates. We agree with Qwest that we should not rely on the Wisconsin Order, which applied to specifically named ILECs and not to Qwest. Moreover, a stay has been requested on that order. We conclude that the Wisconsin Order is not binding on us.

We reject the remainder of NWPA's argument on the issue of discriminatory rates. Qwest assesses the federal charges on all access lines, including the lines it provides to its own payphone division. This is not discriminatory behavior. NWPA has not provided evidence that Qwest uses the proceeds from its recovery of the federal charges to gain a competitive advantage over NWPA members.

Public Policy. Finally, NWPA argues that Qwest's proposed PAL rates are inconsistent with Section 276 of the Act because they do not increase competition and serve the widespread deployment of payphones. NWPA has not shown that the rates as proposed, which represent an overall reduction of current rates, hinder competition. In fact, evidence in the case shows that the number of payphones operated by NWPA members in Oregon increased approximately 24 percent from 1997 to 2000, when NWPA provided its data request response. The number of payphones operated by NWPA members in 1997 is within 3 percent of the total number of PAL lines recorded in the test year. We reject this argument.

For payphone rates, we adopt Qwest's proposal.

[27] In the Payphone Features Order, the FCC determined that GTE's selective class of call screening service is subject to the new services test, describing it as a payphone specific feature. At ¶15.

ISSUE 12: RESIDENTIAL LOCAL EXCHANGE SERVICE

Party Positions

AARP, Qwest, and Staff took positions on this issue. Qwest proposes to deaverage residential local exchange rates into three Rate Groups on the same basis that the Commission used to deaverage the loop UNE. Qwest proposes an increase in basic residential rates (currently $12.80) of $1.00 in Rate Group 1, $2.00 in Rate Group 2, and $3.00 in Rate Group 3. Qwest proposes to price the second residential line $1.00 below the price of the initial residential line. Qwest also proposes to increase one party measured residential (1MR) access line recurring rates by $2.2 million (from the current $6.37 per month to $9.50 in Rate Group 1, $10.50 in Rate Group 2, and $11.50 in Rate Group 3). Qwest's proposal on this issue would increase annual revenues by $11.49 million.

Staff proposes deaveraging on the same basis as Qwest. Staff also proposes no rate increase for Rate Group 1 or 1MR, an increase of $1.00 for Rate Group 2, and an increase of $2.00 for Rate Group 3, for an overall revenue increase of $1.12 million.

AARP opposes any increase in basic residential rates.

AARP. AARP argues that no rate increase is appropriate for residential local exchange service in the context of this case. According to AARP, Qwest bases its pricing proposal on the $21.00 benchmark for local service that resulted from Docket UM 731. Staff bases its increase in the UM 844 price floors in combination with consideration of the $21.00 benchmark. AARP contends that both approaches erroneously use the output of cost proxy models that were designed for other purposes, and both associate the outcome of these cost modeling processes with the underlying cost of basic residential service and therefore with the rates charged for basic residential service. AARP argues that neither the $21.00 benchmark nor the UM 844 price floors are appropriate costing mechanisms for ratemaking purposes.

AARP argues that there is no cost basis for an increase in basic local service rates in the face of a $91 million rate decrease.[28] AARP maintains that neither Staff nor Qwest has shown that residential rates, separately or combined, do not cover their costs. Without such a showing, AARP argues, there is no justification for increasing residential basic exchange rates.

AARP argues that the UM 844 price floor is not equivalent to the cost of underlying residential basic exchange rates, because the price floor includes 100 percent of the loop cost. Residential basic service is only one service that Qwest offers, and AARP contends that it is not appropriate to assign all of the loop cost to a single rate

[28] AARP derives this figure by adding the $64.2 million decrease from the stipulation adopted in Order No. 00-190 to the $26.7 million business service rate decrease in UM 731.

element such as the residential basic rate. The costs should be spread across all the services that use the loop.

AARP also contends that that the $21.00 benchmark does not justify raising basic residential rates because it does not measure the cost of a single rate element or service. The benchmark is the output of the FCC Synthesis Model, and Commission Staff adjusted the model only for usage or traffic sensitive costs (local and interstate access). The entire cost of the loop, which includes the fixed or shared costs associated with other services offered by Qwest, is still in the model. AARP contends that the $21.00 benchmark is based on an aggregate that should be allocated among the services carried across the loop, including switched access, vertical services (such as Caller ID), and intraLATA or interstate toll services. The cost results of the benchmark study therefore, according to AARP, do not equate with the price of just one service, residential basic service.

AARP refers to several orders from other state commissions that conclude that loop cost should not be allocated entirely to residential rates.[29] Moreover, according to AARP, the rate should not be measured against the benchmark. The Commission uses the benchmark to determine when specific support for the provision of basic service pursuant to the universal service goals of SB 622 is necessary. It is not a rate setting mechanism.

AARP additionally maintains that there is no legal mandate to raise residential rates to the $21.00 benchmark. The purpose of the universal service fund was to provide explicit support for provision of basic service where the cost of providing basic service exceeds a Commission established benchmark (Order No. 00-265 at 2). SB 622, according to AARP, was also designed to move the telecommunications sectors in the direction of reduced regulation by providing for an alternative form of regulation. The regulatory purpose of the benchmark is not for use in setting rates but instead to determine the amount of explicit support necessary to bridge the gap between price and cost in high cost areas. Even if SB 622 implied that a rate element below $21.00 should be increased, which AARP believes is not the case, the Commission should recognize that the cost model used to arrive at the $21.00 benchmark was not appropriate for ratemaking and that there is no mandate to raise any rate immediately.

The benchmark, according to AARP, is a guideline rather than a mandated target. Using the benchmark to set rates contradicts the universal service and affordability goals of the Act and of UM 731. The goals of the Act include making telecommunications rates affordable and service widespread and promoting or advancing consumer subscribership to telecommunications services. AARP argues that an increase

[29] *See In the Matter of the Identification of All Subsidies in the Existing Rates of Qwest Corporation*, New Mexico Public Regulation Commission, Utility Case No. 3325 (2000); *U S WEST Communications, Inc., v. Washington Utilities and Transportation Commission, Fifteenth Supplemental Order, Commission Decision and Order Rejecting Tariff Revisions; Requiring Refiling*, Docket No. UT 905200, at 95 (1996), aff'd 949 P2d 1337 (1998); 4 Code of Colorado Regulations 723-30-4.2(a)(iv); FCC 96-98, Docket No. 96-45.

in residential rates, given any income elasticity or price elasticity, will decrease the number of customers subscribing to basic service. Further, AARP contends that the universal service fund does not subsidize residential rates and that there is therefore no reason to raise basic rates to compensate for the loss of a subsidy.

AARP argues that the proposal Staff and Qwest offer results in a net decrease or no increase to the residential class because rate increases for certain services are offset by the elimination of or decrease in rates of other services. However, AARP contends that some customers will experience an increase because they do not purchase the offsetting features or Qwest toll service. The better proposal, in AARP's view, is to ensure a rate decrease, or at least no rate increase, for all customers and not just those that purchase the correct bundle of features and services.

Finally, AARP argues that rates need not be increased to encourage competition for residential customers. According to AARP, there is no competition for residential customers. When competition develops, increasing rates could encourage competition. But at present, competition for residential rates is unlikely in the foreseeable future. Moreover, according to AARP, there is no mandate to deaverage retail rates. In fact, long distance and wireless plans are moving toward flat rates, not deaveraged rates.

Qwest. Qwest contends that its proposed increases in local service rates are mandated by ORS 759.425 and would bring the company into compliance with Section 254 of the Act. Section 254 requires states to use mechanisms that specifically and predictably advance universal service. This has generally been understood to require that subsidies be explicit rather than implicit. ORS 759.425 requires the Commission to establish and implement a universal service fund. ORS 759.425(3)(a) requires that the universal service fund provide "explicit support to an eligible telecommunications carrier that is equal to the difference between the cost of providing basic telephone service and the benchmark."

ORS 759.425(3)(c) provides that "the commission shall seek to limit the difference between the price a telecommunications utility may charge for basic telephone service and the benchmark." In UM 731, Order No. 00-312, at 22, the Commission set the benchmark at $21.00. Qwest lowered its rates for basic business service in a revenue neutral filing in April 2001, and this case presents the first chance for the Commission to implement ORS 759.425(3)(c) with respect to residential service. Qwest urges the Commission to make a modest increase in the rate for residential basic service to start moving that price toward the universal service benchmark. Qwest argues that only its proposal meets the legislative mandate of moving prices for basic service toward the benchmark.

According to Qwest, Staff has failed to examine the relationship between the price for residential basic service and the universal service benchmark. Qwest also believes that Staff's proposals are inconsistent. On the one hand, Staff proposes to reduce rates for business basic service by 40 cents in Rate Groups 1 and 2 and by $2.35 in Rate Group 3, because business basic rates too far exceed the universal service benchmark. Staff also justifies its proposed increase in residential rates for Rate

Groups 2 and 3 because the increase would bring those rates closer to the universal service benchmark. But Staff proposes no increase for residential basic service rates in Rate Group 1, although that group includes over 90 percent of Qwest's residential customers. Instead of examining the relationship between the residential basic service rates and the benchmark in Rate Group 1, however, Qwest argues that Staff focused on the relationship between the current rate and the price floors in ORS 759.410. This focus is in error, according to Qwest, because the price floors do not apply to basic service.

Qwest asserts that AARP performed an incorrect analysis comparing the price for residential basic service to the universal service benchmark. AARP compares not the flat residential basic service rate of $12.80 but rather the sum of all revenues supported by the loop: basic services, EAS, features, access, intrastate toll, and the revenue from the CCL and federal support amounts. Performing that comparison, AARP concludes that the Commission need not adjust the price of residential basic service because it nearly equals the benchmark.

Qwest argues that AARP's analysis is based on an incorrect reading of the statute. ORS 759.425(3)(c) requires the Commission to compare "the price a telecommunications utility may charge for basic telephone service" with the benchmark. As required by ORS 759.425(2)(a), the Commission has defined "basic telephone service" by rule, OAR 860-032-0190. That definition specifically excludes EAS, intrastate toll, and custom calling features, but AARP includes revenue from these nonbasic services in the price for basic service, in comparing the price for basic service with the universal service benchmark.

In response to AARP's contention that there is no competition in the residential local exchange service market, Qwest notes that competitive local exchange carriers serve over 10,000 residential customers in Oregon. Furthermore, Qwest argues that developing competitive alternatives for residential customers is an express goal of the Act. Qwest points out that AARP's expert witness agreed that a higher price for residential service gives competitors a better likelihood of achieving a higher margin, which is important to a competitor entering a market.

Staff. Staff argues for an increase in basic local service rates in Rate Groups 2 and 3 because these rates are below the UM 844 price floor and an increase will move them closer to the benchmark. Staff argues that the Commission should not increase rates in Rate Group 1, nor should it increase 1MR rates, because the present rates exceed the price floor.[30] Staff argues that we should increase the nonrecurring residential line charge because that would move the rate closer to the TSLRIC. Staff

[30] The Commission has not established price floors for retail services such as 1MR, but Qwest presented a proposed price floor of $16.62 for this service. Staff calculated, using Qwest data, total revenue of $17.44, which includes the $6.37 monthly fixed charge, the $4.35 subscriber line charge (which increased to $5.00 on July 1, 2001), plus $6.72 of monthly usage revenue calculated based in Qwest's exhibit. The average monthly usage revenue is calculated by 224 minutes times 3 cents per minute. This calculation uses the same methodology Qwest has used throughout the case.

acknowledges that the Commission is not required to price basic service above a price floor, according to ORS 759.420(4).

Staff argues that the UM 731 benchmark is only a guideline and that no party suggests that rates should be raised to $21.00 in this proceeding. Staff asserts that its proposal does seek to limit the difference between the price a telecommunications utility may charge for basic telephone service and the benchmark, as ORS 759.425(3)(c) mandates. Staff characterizes the differences among the parties as a disagreement on the appropriate increase in this proceeding. According to Staff, the Commission has discretion to adopt any of the three residential basic rate proposals. The parties simply have different opinions on whether and how far rates should move and in which rate group or groups. Staff urges the Commission to adopt Staff's proposal, because it most appropriately balances the interest of customers with Commission policies and goals.

Discussion and Resolution

ORS 759.425(3)(c) provides that "the commission shall seek to limit the difference between the price a telecommunications utility may charge for basic telephone service and the benchmark." OAR 860-032-0190(2) defines basic telephone service:

> "Basic telephone service" means retail telecommunications service that is single party, has voice grade or equivalent transmission parameters and tone-dialing capability, provides local exchange calling, and gives customers access to but does not include:
>
> (a) Extended area service (EAS);
>
> (b) Long distance service;
>
> (c) Relay service for the hearing and speech impaired;
>
> (d) Operator service such as call completion assistance, special billing arrangements, service and trouble assistance, and billing inquiry;
>
> (e) Directory assistance; and
>
> (f) Emergency 9-1-1 service, including E-9-1-1 where available.

It is clear from the above statute and rule that AARP's arguments about the benchmark are misplaced. First, it is irrelevant how the benchmark is calculated. ORS 759.425 requires us to seek to limit the difference between the price of basic service and the benchmark. Thus, the benchmark is a given and not subject to scrutiny in this proceeding. AARP's comparison of other than basic service elements with the benchmark is also misplaced; the rule above excludes from basic service elements AARP would include in comparing price to benchmark.

AARP's remaining arguments have to do with policy. There is nothing to prevent this Commission from raising residential rates in the context of an overall rate decrease (which, for purposes of this docket, amounts to a revenue reduction of $64.2 million, not $91 million). Since the advent of competitors with the Bell Operating Companies, public utility commissions have had to balance the tasks of promoting competition and keeping residential service rates affordable. These tasks may well involve raising some rates to encourage competition (or to meet a statutory guideline, as in this docket) and lowering others to keep the competitive field level.

AARP has not shown that the rates proposed either by Qwest or by Staff are unaffordable. We note that from January 1984 until March 1993, rates for residential basic service exceeded $12.80, climbing as high as $16.05 in the 1986-87 period. Rates for residential service have not increased since 1993. What Qwest now proposes is an increase of 8 percent in Rate Group 1, 16 percent in Rate Group 2, and 23 percent in Rate Group 3. Staff proposes an increase of 8 percent in Rate Group 2 and 16 percent in Rate Group 3. We do not believe that these increases, the first in nine years, render basic telephone service unaffordable. For those customers to whom the increase presents a hardship, there are options. There are sources of public support, such as the Oregon Telephone Assistance Program, and there is the option of the 1MR rate at $6.37. Moreover, we find that the reductions in EAS prices and vertical services will benefit most ratepayers, such that their overall bill will increase little if at all.

As to AARP's policy argument that there is no competition for residential basic service in Oregon, the record shows that local service competition is beginning here and we wish to encourage it. Raising prices to improve the margin for potential competitors is one way to do so. AARP has not convinced us that we may not raise residential rates in this proceeding.

The next issue confronting us is whether to do so. ORS 759.425(3)(c) directs us to "seek to limit the difference between the price a telecommunications utility may charge for basic telephone service and the benchmark." We considered the meaning of this phrase in Order No. 00-312 (UM 731). In that order, at 22, we stated:

> Use of the phrase "seek to limit," rather than "shall eliminate," is an indication that the legislature understood the flexibility we need, in both time and method, to replace implicit supports with explicit supports as the industry embraces competition. We intend to rebalance telephone rates after this order issues. We will address issues about how rates should be structured in those proceedings. We will seek to minimize the difference between the price for basic telephone service and the benchmark. However, we must keep in mind other considerations, such as the affordability of basic telephone rates – ORS 759.425 (SB 622) also directs us to ensure that basic telephone service is available at a reasonable and affordable rate.

The language of ORS 759.425 is a guideline for our rate setting and leaves us flexibility to meet our goal of affordable basic service as well. For this reason, we elect Staff's proposal, which raises rates in two rate groups and leaves then unchanged in Rate Group 1, the group containing about 90 percent of Qwest's ratepayers. We find that Staff's proposal is well balanced and takes into consideration costs as well as movement toward the benchmark. Thus, we seek to limit the difference between basic service rates and the benchmark by modest increases in less urban rate groups. We note again that ratepayers will benefit in this case from reductions in many other categories. We adopt Staff's local exchange rate proposal in its entirety.

ORDER

IT IS ORDERED that:

1. Advice No. 1849, filed by Qwest on November 15, 2000, including Attachment B and Transmittal No. 2000-007-PL, Revisions to the Access Service Tariff, Private Line Transport Services Tariff, and the Exchange and Network Service Tariff and Price List; and the modified portion of Attachment B filed on March 19, 2001, are permanently suspended.

2. Qwest shall file by October 12, 2001, revised rate schedules consistent with the findings of fact and conclusions of law in this order, to be effective no later than January 1, 2002.

Made, entered, and effective ______________________________.

______________________________	______________________________
Roy Hemmingway Chairman	**Lee Beyer** Commissioner
	______________________________
	Joan H. Smith Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.

ENTERED 09/11/06

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 125

In the Matter of QWEST CORPORATION, fka U S WEST COMMUNICATIONS, INC. Application for an Increase in Revenues.	)))))))	ORDER

DISPOSITION: QWEST RATE REBALANCING PROPOSAL DENIED

Introduction

The current proceedings in this docket are intended to implement the remand of Order Nos. 01-810 and 02-009 required by the Court of Appeals' decision in *Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Or. App. 94, 100 P.3d 776 (2004) and the subsequent judgment of the Marion County Circuit Court[1] remanding the case to the Public Utility Commission of Oregon (Commission).

Procedural History

On April 14, 2000, the Public Utility Commission of Oregon (Commission) entered Order No. 00-190, adopting a Stipulation between U S WEST Communications, Inc. (now Qwest Corporation) (Qwest or the Company), and the Public Utility Commission Staff (Staff) in the revenue requirement phase (Phase I) of this docket. Among other things, the Stipulation obligated Qwest to implement customer refunds of approximately $240 million and a going-forward rate reduction of approximately $63 million annually.

On September 14, 2001, the Commission entered Order No. 01-810, establishing a rate design for the stipulated revenue requirement approved in Order No. 00-190.[2] As part of Order No. 01-810, the Commission approved revised rates for

[1] The Circuit Court's remand was entered in Case No. 02C12247 on or about May 19, 2005.

[2] Order No. 01-810 also established permanent price caps and price floors for Qwest. Pursuant to Senate Bill 622, now codified as ORS 759.400 *et seq.*, telecommunications utilities were given the option to replace traditional rate of return regulation with price cap regulation. Qwest elected price cap regulation

public access lines (PAL) and CustomNet service, adopting rate recommendations proposed by Qwest and agreed to by Staff. The Northwest Payphone Association (now, the Northwest Public Communications Council or "NPCC") opposed the PAL and CustomNet rates adopted by the Commission, arguing that the rates were not developed in compliance with Section 276 of the Telecommunications Act of 1996.[3]

On November 13, 2001, NPCC filed an application for reconsideration of Order No. 01-810. On January 8, 2002, the Commission entered Order No. 02-009 denying NPCC's application for reconsideration.

NPCC appealed Order Nos. 01-810 and 02-009 (hereafter also, "the rate design orders") to Marion County Circuit Court. On October 1, 2002, the Court entered a judgment affirming the Commission's orders. NPCC thereafter filed an appeal with the Oregon Court of Appeals.

On November 10, 2004, the Court of Appeals entered a decision reversing and remanding Order Nos. 01-810 and 02-009. The Court determined that the rate design orders were unlawful in that: (1) the Commission's rates for PAL did not comply with certain federal requirements, and (2) the Commission did not adequately consider whether Qwest's proposed rates for CustomNet were subject to the same federal requirements.[4]

On March 13, 2006, the presiding Administrative Law Judge (ALJ) convened a telephone conference to establish procedures necessary to comply with the Court's remand. During the conference, Qwest indicated that it would file proposed PAL and Fraud Protection (formerly CustomNet) rates (jointly "payphone service rates") to comply with the Court's decision. Qwest also indicated that it would seek to adjust other Qwest rates because of the recalculation of payphone service rates.

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effective December 30, 1999. Qwest's initial price caps were the rates in effect at the time the utility elected price cap regulation. Pursuant to ORS 759.415, those price caps were superseded by rates established in Qwest's pending rate case. In other words, the price caps established in Order No. 01-810 entered in Phase II of this docket became the permanent price caps under the law. *See* Order No. 01-810 at 3.

[3] NPCC argued that the PAL and CustomNet rates proposed by Qwest did not satisfy the requirements of the "New Services Test," as mandated by the FCC's Payphone Orders. NPCC also argued that Qwest did not submit adequate cost information to the Commission. *See* Order No. 01-810 at 50-56.

[4] While NPCC's appeal was pending, Qwest filed Advice Nos. 1935 and 1946. Those filings became effective on March 17 and August 28, 2003, respectively, and significantly reduced Qwest's PAL rates. In fact, the proposed payphone service rates Qwest has filed in this case are the same rates approved in Advice Nos. 1935 and 1946 already in effect.

On March 31, 2006, Qwest filed its proposed PAL and Fraud Protection rates. It alleges that the lower payphone service rates reduce Qwest's revenues by approximately $1 million per year.[5] To offset the reduction, Qwest proposes to increase the rate for residential Caller ID service by $0.60 per month.

On April 25, 2006, Qwest filed a letter on behalf of the parties requesting that the Commission decide, as a threshold matter, whether Qwest may raise any customer rates to offset reduced revenues resulting from a Commission decision approving lower payphone service rates. On May 1, 2006, the ALJ issued a Ruling adopting the parties' procedural proposal.

Opening Briefs

On May 19, 2006, Qwest and Staff filed opening briefs addressing Qwest's proposal to "rebalance" rates to offset the anticipated reduction in payphone service rates. NPCC did not file an opening brief.

Qwest argues that the Court of Appeal's remand order and ORS 756.568 authorize the Commission to reopen this case and to adjust other rates to offset the alleged revenue reduction that results from approving lower rates for payphone services. It further maintains that the Commission must rebalance rates in order to provide the Company with the opportunity to recover its authorized revenue requirement and to avoid "impermissible single-issue ratemaking" that would occur if the Commission were to adjust only Qwest's rates for payphone services.[6]

Staff advances the following arguments in opposition to Qwest's proposal to rebalance rates:

a. Qwest's proposal to raise its residential caller ID service to offset lower PAL rates assumes that the Oregon Court of Appeals reversed all aspects of the Commission's Order No. 01-810. The Court's decision, however, is limited to applying federal law to payphone services (PAL and CustomNet) and does not impact other aspects of Order No. 01-810.

b. Because Qwest seeks to implement PAL rates in this case that are identical to its existing PAL rates, there is no rate difference to offset. Qwest voluntarily lowered its current PAL rates in Advice No. 1935 more than a year before the Court of

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[5] Qwest's calculation is based upon the test year billing units utilized in Order No. 01-810.

[6] Qwest Opening Brief at 1.

Appeals issued its opinion in this matter. Having done so, Qwest cannot argue that the Court of Appeals decision now warrants rebalancing of customer rates.[7]

c. The price caps established in Order No. 01-810 were the last and only opportunity for the Commission to adjust Qwest's price caps for non-basic services such as residential Caller ID service. If Qwest contends that Order No. 01-810 is not a final order because of the Court of Appeals' decision, then the effective price caps must be the rates Qwest was charging when it elected price cap regulation in December 1999. However, because Qwest has been operating under the price caps established in Order No. 01-810, not the price caps in effect when it elected price cap regulation, a number of complex problems arise.[8]

d. Qwest's attempt to raise its residential Caller ID service is unlawful under ORS 759.410 and OAR 860-032-0190(4), which provide that Qwest cannot charge more than the established price caps for non-basic services. Having elected price cap regulation, Qwest cannot prospectively raise rates for non-basic services above the price caps established in Phase II. Qwest's proposal to increase residential Caller ID rates in this case must therefore be regarded not as a "prospective" rate increase, but rather as an unlawful attempt to treat Order No. 01-810 as "interim" in violation of the filed rate doctrine.

ALJ Memorandum/Proposed Decision. After reviewing the arguments advanced by the parties in their opening briefs, the ALJ issued a Memorandum dated June 7, 2006. The ALJ observed that the briefs filed by the parties did not address whether the Stipulation approved in Phase I of this docket precluded Qwest's rate rebalancing proposal. The ALJ prepared a proposed decision addressing the issue and provided the parties with an opportunity to address the matter in their reply briefs.

Reply Briefs. On June 23, 2006, the parties filed reply briefs. Qwest challenges the arguments advanced by Staff. As discussed more fully below, Qwest also maintains that the Phase I Stipulation is not applicable to matters before the Commission as a result of the Court's remand. Staff reiterates the arguments in its opening brief and concurs that Qwest's rebalancing proposal is not permitted under the Stipulation.[9]

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[7] Staff also states that, by electing price cap regulation, Qwest opted out of traditional revenue requirement regulation and instead chose to have pricing flexibility for non-basic services limited only by "price caps" and "price floors." It asserts that Qwest cannot exercise its pricing flexibility (*i.e.,* to lower PAL rates) and then maintain that it should receive an offsetting revenue increase by way of raising an established "price cap" for its residential Caller ID service.

[8] For example, Staff states that the rates Qwest charged for analog Private Line service were below the price floors when the Company elected price cap regulation. Thus, if Qwest contends that Order No. 01-810 is not final, then it has been charging unlawful rates for analog Private Line service. *See* Order No. 01-810 at 16-17.

[9] NPCC also filed a reply brief relating to Staff's comments regarding the filed rate doctrine. NPCC takes the position that the state filed rate doctrine does not apply to PAL rates because the FCC preempted

Commission Decision

I. The Stipulation. The ALJ's Memorandum/Proposed Decision interprets Paragraph 5 of the Phase I Stipulation to encompass the reduction in payphone rates that will likely be required as a result of the Court-ordered remand in this docket. The ALJ also found that the Stipulation precluded Qwest's proposal to offset the payphone rate reduction with an increase in Caller ID rates. The Commission concurs with the ALJ's interpretation of the Stipulation for the reasons set forth below:

1. Paragraph 5. Paragraph 5 of the Stipulation details the rights and obligations of the parties in the event the Stipulation is reversed or modified on appeal. It provides:

> Appeal of the Commission's Order. The parties recognize that the Commission's order implementing the terms of this Stipulation may be subject to suit pursuant to ORS 756.580 by any party aggrieved by the terms of said order (hereinafter in this paragraph 5 referred to as an 'appeal'). In the event of such appeal, the parties shall advocate that the court(s) should affirm said order. Despite the pendency of any such appeal, U S WEST agrees to implement the terms of Paragraphs 1 and 2 of this Stipulation, forty-five days after the Commission has finally disposed of any motions requesting rehearing and/or reconsideration of the order implementing the terms of this Stipulation. The parties further recognize that the order adopting the terms of this Stipulation may be reversed and/or modified on appeal. The parties further recognize that U S WEST's obligation to refund monies to customers and to reduce its ongoing rates may be modified on appeal, either by the issuing of a judgment incorporating or requiring different refunds or rate reductions, or by the Court of Appeals refusing to dismiss the Appellate Litigation. In the event that an order implementing the terms of this Stipulation is reversed or modified on appeal, the parties agree that U S WEST will be entitled to a credit for refunds and rate reductions made under Paragraphs 1 and 2 of this Stipulation against any such increased refund and/or rate reduction obligation imposed by a judgment reversing or modifying the order adopting the terms of this Stipulation or any subsequent order. Notwithstanding anything herein to the contrary, the parties understand that U S WEST

Qwest's PAL rates in 1996. Accordingly, NPCC requests that any Commission decision based on the filed rate doctrine be narrow in scope and address only residential caller ID service.

> does not waive its rights, if any, to seek recovery of any overpayments – whether in the form of surcharges or rate increases – in the event that U S WEST's refund and/or rate reduction obligation is reduced by a judgment reversing or modifying the order adopting the terms of this Stipulation or any other order. It is the intent of the parties to this Stipulation that the Commission's order implementing the terms of this Stipulation contain provisions implementing the terms of this Paragraph 5 and, in the event that the order does not contain provisions implementing this Paragraph 5, the order will be deemed to be materially different from the terms of this Stipulation.

2. Paragraph 5 encompasses NPCC's appeal of Order Nos. 01-810 and 02-009. Qwest argues that Paragraph 5 of the Stipulation encompasses only appeals of Order No. 00-190 adopting the Stipulation and does not apply to appeals of the rate design orders entered in Phase II of this docket (Order Nos. 01-810 and 02-009). In advancing this argument, Qwest appears to focus on the first four sentences of Paragraph 5, which variously refer to "the Commission's order implementing the terms of this Stipulation," "the order implementing the terms of this Stipulation," and "the order adopting the terms of this Stipulation."[10] While it might be possible to read those sentences to relate to Order No. 00-190, the fifth and sixth sentences of Paragraph 5 cannot be so narrowly construed.[11] Those sentences clearly encompass not only an appeal of Order No. 00-190 adopting the Stipulation, but also *an appeal of any subsequent Commission order implementing the terms of the Stipulation*.

Thus, the relevant inquiry for purposes of analyzing Paragraph 5 is whether the rate design orders entered in Phase II of this docket are orders "implementing the terms of the Stipulation." If so, then any increased rate reduction obligation imposed on Qwest as a result of NPCC's successful appeal of the Commission's rate design orders is governed by Paragraph 5. As discussed below, the terms of that paragraph limit Qwest

[10] Qwest also states that the Stipulation is entitled "Stipulation to Resolve Matters on Appeal," suggesting that Paragraph 5 was intended to address only the litigation pending at the time Order No. 00-190 was entered. Qwest Reply Brief at 10. This interpretation is refuted by the language in Paragraph 5 encompassing any order implementing the Stipulation.

[11] As noted, the fifth and sixth sentences provide:

> The parties further recognize that U S WEST's obligation to refund monies to customers and to reduce its ongoing rates may be modified on appeal, either by the issuing of a judgment incorporating or requiring different refunds or rate reductions, or by the Court of Appeals refusing to dismiss the Appellate Litigation. In the event that *an order implementing the terms of this Stipulation* is reversed or modified on appeal, the parties agree that U S WEST will be entitled to a credit for refunds and rate reductions made under Paragraphs 1 and 2 of this Stipulation against any such increased refund and/or rate reduction obligation imposed by a judgment reversing or modifying the order adopting the terms of this Stipulation *or any subsequent order*. (Emphasis supplied.)

to a credit for refunds and rate reductions made pursuant to the Stipulation, and do not authorize Qwest to increase customer rates to offset additional revenue reductions resulting from the Court of Appeals' decision.

3. <u>Order Nos. 01-810 and 02-009, entered in the rate design phase of this docket, are orders "implementing" the rate reductions in the Stipulation</u>. Not surprisingly, Qwest maintains that the Commission's Phase II rate design orders cannot be considered "an order implementing the terms of the Stipulation." It argues that the term "rate reductions" in Paragraph 5 is limited to the $63 million overall rate reduction approved in Order No. 00-190, and cannot be construed to include reductions in specific customer rates required as a result of the appeal of the rate design orders. Qwest states:

> Paragraph 5 provides that in the event an order adopting the terms of the Stipulation is reversed and/or modified on appeal, Qwest's 'obligation to refund monies to customers and to reduce its ongoing rates may be modified on appeal, either by the issuing of a judgment incorporating or requiring different refunds or rate reductions.' The 'obligation . . . to reduce its ongoing rates' referenced in this sentence can reasonably be construed only as the *overall amount of the revenue reduction* agreed to in the Stipulation, because that is the only rate reduction addressed by the Stipulation. Thus, when this sentence identifies the possibility that a judgment in an appeal of an order adopting the Stipulation may require 'different . . . rate reductions' or an increase in Qwest's 'rate reduction obligation,' the only rate reduction possibly referenced is the overall amount of the revenue requirement reduction, *i.e.*, $63 million per year; that language did not refer to a reduction the Commission might make to a rate for a specific service in the future rate design proceedings.[12]

The Commission disagrees with Qwest's contention that the rate design orders entered in this docket are not orders "implementing" the rate reductions included in the Stipulation. Those rate reductions took the form of temporary bill credits for each class of service,[13] and effectively established an interim rate design that remained in effect until the Commission entered Order Nos. 01-810 and 02-009, establishing permanent rates in Phase II of this docket. In other words, the going-forward rate

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[12] Qwest's Reply Brief at 12.

[13] The temporary bill credits are listed in Exhibit B of the Stipulation and resulted in monthly rate reductions of $1.85 for private line service, $2.47 for residential service, $5.93 for simple business service, and $6.68 for complex business service. The carrier common line rate paid by carrier access customers was also reduced.

reductions in the Stipulation were not finally implemented until the rate design was established.

Paragraph 2 of the Stipulation makes clear that the permanent rates established in the rate design phase of this docket were the final step in the process of "implementing" the $63 million rate reduction in the agreement. That paragraph provides, in relevant part:

> a. *Permanent rates, incorporating the $63 million revenue reductions, shall be established in the rate design phase of Docket UT 125*. The parties hereby agree to take all actions necessary in order to conclude the rate design phase of Docket UT 125 as quickly as possible. In order to expedite this process, U S WEST agrees to file its rate design proposal no later than the later of November 15, 1999 or 30 days after the Court of Appeals lifts the stay as described in Paragraph 4(c). (Emphasis supplied.)
>
> b. *Prior to the implementation of the rates described in Paragraph 2(a), above*, U S WEST will give temporary bill credits to its Oregon local service customers who subscribe to the services set forth on Exhibit B and make a temporary rate reduction for its switched access customers on the following terms and conditions. . . . (Emphasis supplied.)

The foregoing language not only undermines Qwest's claim that the "rate reductions" mentioned in Paragraph 5 do not encompass the rates established in the rate design portion of this docket, but also acknowledges the fact that revenue requirement and rate design are inseparably linked. Ironically, Qwest acknowledges this commonly understood regulatory concept in its brief:

> As the Commission well knows, rate design is a balancing process in which individual rates are adjusted with the goal of achieving a rate design that provides a regulated company the opportunity to earn its allowed revenue requirement. The adjustment of each rate affects the overall revenue picture and may require adjustments to other rates so that the utility is neither deprived of the opportunity to earn its allowed return nor over-compensated for its services.[14]

[14] Qwest Opening Brief at 6.

Thus, as Qwest observes, rate design is the process of formulating customer rates that will produce the revenue requirement the Commission has determined to be appropriate. It is, quite simply, the process of "implementing" the approved revenue requirement.[15] For Qwest to maintain that the rate reductions authorized in the revenue requirement phase of this case were not implemented in the rate design phase misconstrues the Stipulation and makes no sense from a regulatory standpoint.[16]

4. <u>The Stipulation does not permit Qwest's rate rebalancing proposal</u>. In its brief, Qwest argues that it did not forego the right to rebalance rates in the event of a judicial decision reversing a Commission order implementing the Stipulation and increasing the amount by which Qwest must reduce its rates. Qwest points out that a waiver of rights must be clear and unequivocal and that nothing in the Stipulation "supports the conclusion that Qwest waived its right to seek rate rebalancing in the current remand proceeding . . . ."[17]

Again, we disagree with Qwest's interpretation of the Stipulation. Paragraph 5 clearly states that Qwest shall only be "entitled to a credit for refunds and rate reductions made under Paragraphs 1 and 2 of [the] Stipulation," in the instance where a subsequent order implementing the Stipulation is reversed and the court imposes an increased refund or rate reduction obligation upon Qwest. With respect to this issue, the ALJ's proposed decision states:

> Whereas paragraph 5 permits Qwest to seek a rate increase in the event a Court determines that Qwest's refund/rate reduction obligation should be *reduced*, it does not provide Qwest with the same opportunity where a Court finds that

---

[15] In a typical utility rate proceeding, the revenue requirement and rate design are addressed in the same Commission order. Qwest's revenue requirement and rate design were addressed separately in this proceeding in order to accommodate special circumstances. By adopting the revenue requirement in the Stipulation, the Commission was able to provide Qwest customers with immediate refunds totalling over $200 million and also eliminate risks associated with pending litigation. As noted, the forward-looking "rate reductions" were administered as temporary bill credits in order to effectuate an interim rate design that would remain in place until final rates could be determined. The bill credits had the effect of immediately reducing customer rates on a going-forward basis, and also prevented Qwest from accruing future refund and interest liabilities while the final rate design was under consideration. See, *e.g.*, Qwest Phase I Post-Hearing Brief, dated February 11, 2000, at 17.

[16] Qwest's position on this issue is also internally inconsistent. On the one hand, Qwest argues that the Commission must respond to the Court's remand by readjusting Qwest's rate design in a manner that will ensure the Company has an opportunity to earn its revenue requirement. On the other hand, for purposes of interpreting the Stipulation, it refuses to acknowledge that the rate design process implements the approved revenue requirement. In other words, Qwest wants the Commission to acknowledge the linkage between rate design and revenue requirement for purposes of implementing the Court's remand, but wants the Commission to ignore that linkage for purposes of interpreting the Stipulation.

[17] Qwest Reply Brief at 13, 15-16.

> Qwest's obligation should be *increased*. In the latter circumstance, Qwest is limited to receiving a credit for refunds and rate reductions already made in accordance with the Stipulation. Conspicuously absent from paragraph 5 is any language indicating that Qwest is entitled to increase rates to offset any *increased* refund or rate reduction obligation resulting from an appeal of the Stipulation or other order. This omission stands in stark contrast to Qwest's specific reservation of rights in the event of a Court decision *reducing* its refund/rate reduction obligation. . . . [T]he language of paragraph 5 makes clear that, by agreeing to accept only a credit for the refunds and rate reductions included in the Stipulation, Qwest deliberately relinquished the right to seek an offsetting revenue increase in the event of an adverse ruling on appeal.[18]

The Commission agrees that the Stipulation does not permit Qwest to seek an offsetting revenue increase where the Company's rate reduction obligation is increased on appeal. Paragraph 5 accomplishes this result by limiting Qwest to a credit for refunds/rate reductions already made by the Company, and further, by deliberately omitting any language preserving Qwest's opportunity to seek recovery for any additional monetary obligations imposed upon the Company by the Court.

Despite Qwest's protestations to the contrary, it made perfect sense from a regulatory standpoint for the Company to agree to forego the prospect of rate rebalancing. As noted in Order No. 00-190, the revenue requirement approved in the Stipulation was the last such determination by the Commission because of Qwest's decision to opt out of traditional rate of return regulation under ORS 759.400 *et seq.* Likewise, the price cap/price floor determinations made in the rate design phase of this docket established permanent rates for Qwest on a going-forward basis. Completing those undertakings was inordinately difficult, entailed a substantial commitment of resources, and consumed several years' time. Qwest's rate rebalancing proposal would require revisiting many of those issues in yet another complex and protracted docket.[19] We cannot imagine that the Commission or any of the parties, including Qwest, would have been willing to agree to any scenario requiring the agency to start all over again if Qwest's refund/rate reduction

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[18] ALJ Memorandum/Proposed Decision at 5.

[19] We also find that Qwest's rate rebalancing proposal is flawed to the extent that it proposes resetting only residential Caller ID rates. Even if we agreed that rate rebalancing were required, it would be inappropriate to single out only one of Qwest's rates for review. Indeed, Qwest's proposal to limit rebalancing to Caller ID rates would entail the same "single-issue ratemaking" it accuses the Staff of endorsing.

obligations were increased.[20] That being the case, it is perfectly understandable why the Stipulation was drafted to preclude such a result.

6. Summary. The Commission concludes that the Stipulation in this docket does not permit Qwest's rate rebalancing proposal. Under the terms of that agreement, Qwest specifically agreed to accept the risk that subsequent appeals of the Commission's order implementing the Stipulation might result in a situation where Qwest was required to make refunds or rate reductions in addition to those set forth in the Stipulation. The language of the agreement demonstrates that the Company was fully cognizant of the potential consequences of its decision when it executed the Stipulation. Qwest cannot now be heard to complain that it is somehow prejudiced by having to reduce rates in response to a judicial determination without a corresponding offset, especially when that scenario is specifically provided for in the agreement. The simple fact is that Qwest took a calculated risk that did not turn out as expected. Relieving Qwest of the consequences of its agreement by raising other customer rates would contravene the terms of the Stipulation.

II. The Scope of this Proceeding. In addition to the foregoing, we agree with Staff that the Commission is without authority to reexamine Qwest's non-payphone rates in this remand proceeding. As noted above, Senate Bill 622, now codified as ORS 759.400 *et seq.,* allowed telecommunications utilities to opt out of traditional rate of return regulation by electing price cap regulation. In particular, ORS 759.405(1) provides that "[a] telecommunications carrier that elects to be subject to this section and ORS 759.410 shall be subject to the infrastructure investment and price regulation requirements of this section and ORS 759.410 and shall not be subject to any other regulation based on earnings, rates or rate of return." ORS 759.410(2) further provides that "[a] telecommunications carrier that elects to be subject to this section and ORS 759.405 shall be subject to price regulation as provided in this section and shall not be subject to any other retail rate regulation, including but not limited to any form of earnings-based, rate-based or rate of return regulation." For any utility electing price cap regulation, ORS 759.410 instructs the Commission to establish rates for basic services, as well as maximum prices (price caps) and minimum prices (price floors) for non-basic services.

[20] Qwest might contend that Paragraph 5 envisions just such a scenario in the event of a Court decision reducing the Company's refund/rate reduction obligations. But that possibility was extremely unlikely, since Qwest was the only party with an interest in reducing its refund/rate reduction obligation, and it was committed under Paragraph 5 to support the terms of the Stipulation.

Qwest elected price cap regulation effective December 30, 1999.[21] Pursuant to ORS 759.415(1), Qwest's initial price caps were replaced by the permanent price caps established in Qwest's pending rate case; that is, in Order No. 01-810 entered in Phase II of this docket.[22]

Qwest's assertion that the Court's remand obligates the Commission to revisit all of the Company's rates necessarily presumes that the non-payphone service rates approved in Order No. 01-810 are not final and may therefore be revised. We disagree. ORS 756.565 provides that all rates and orders issued by the Commission "shall be in force and shall be prima facie lawful and reasonable, until found otherwise in a proceeding brought for that purpose under ORS 756.610." Subsection (2) of ORS 756.610 further provides that a petitioner seeking judicial review of a Commission order may apply to the Court of Appeals for a stay of the Commission's order pending the final disposition of the appeal.

In this case, no party obtained a stay of Order No. 01-810 establishing permanent rates in this docket, and the only rates challenged on appeal were those relating to payphone services. Absent the issuance of a stay by the Court, the unchallenged rates adopted in Order No. 01-810 became final and unappealable.[23] Thus, the only Qwest rates subject to revision in this remand proceeding are the PAL line and Fraud Protection rates addressed on appeal.

Consistent with this interpretation, the Court of Appeals did not instruct the Commission to revisit all of Qwest's non-payphone rates. Instead, the Court required only that the Commission "reconsider its order in light of the New Services Order and other relevant FCC orders." In other words, the Commission's obligation on remand is limited to ensuring that the rates for payphone services are calculated based upon the federal methodology prescribed by the FCC.

As a practical matter, Qwest's theory that all of its rates remain subject to review could easily result in a scenario whereby its rates – including price caps for non-basic services – are not finalized for years. If, for example, the Commission accepted Qwest's proposal and increased Caller ID rates to offset the reduction in payphone service

[21] To date, Qwest is the only telecommunications utility that has elected into price cap regulation.

[22] As noted above, Qwest's initial price caps were the rates in effect at the time the utility elected price cap regulation. ORS 759.415(1) provides that "[i]n a rate proceeding brought by a telecommunications carrier that elects to be subject to ORS 759.405 and 759.410, or by the Public Utility Commission against an electing telecommunications carrier, prior to January 1, 1999, that is on appeal on September 1, 1999, a final rate for a telecommunications service implemented as a result of the final judgment and order or negotiated settlement shall become the maximum rate for purposes of ORS 759.410." Since UT 125 began prior to January 1, 1999, and because this rate docket was on appeal as of September 1, 1999, the rates established by the Commission in Order No. 01-810 comprise Qwest's permanent price caps.

[23] The revenue requirement determination established in Order No. 00-190 is also final and unappealable. No party ever filed an appeal challenging that determination.

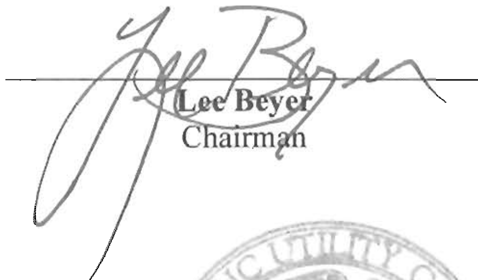
rates, there would be nothing to prevent an appeal of the revised Caller ID rates. A Court decision reversing the Commission's decision on the Caller ID rates would then, under Qwest's theory at least, precipitate still another review of all Qwest rates. This process could continue *ad infinitum*, resulting in a situation where the permanent price caps/floors contemplated by Senate Bill 622 remain in a constant state of limbo. Fortunately, the statutory scheme prevents such an outcome by limiting the Commission's rate review to the payphone service rates that were addressed by the Court on appeal.

III. Other Arguments. Because we have concluded that the Stipulation does not permit Qwest's rate rebalancing proposal, and that the scope of this proceeding is limited to payphone rates, it is unnecessary to address the remaining arguments advanced in this matter.

ORDER

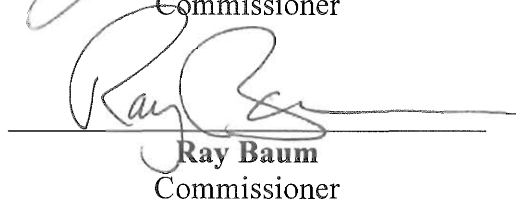
IT IS THEREFORE ORDERED that the request by Qwest Corporation to increase residential Caller ID rates to offset a decrease in payphone service rates resulting from the Court-ordered remand in this docket is denied.

Made, entered, and effective SEP 1 1 2006.



Lee Beyer
Chairman

John Savage
Commissioner



Ray Baum
Commissioner

A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

Oregon

Theodore R. Kulongoski, Governor

Public Utility Commission
550 Capitol St NE, Suite 215
Mailing Address: PO Box 2148
Salem, OR 97308-2148
Consumer Services
1-800-522-2404
Local: (503) 378-6600
Administrative Services
(503) 373-7394

October 15, 2007

OREGON PUBLIC UTILITY COMMISSION
ATTENTION: FILING CENTER
PO BOX 2148
SALEM OR 97308-2148

RE: **Docket No. UT125 PHASE II** - In the Matter of the application of QWEST CORPORATION – Public Access Lines Rates.

Enclosed for electronic filing in the above-captioned docket is the Stipulation between Qwest Corporation, Northwest Public Communications Council and Staff.

/s/ Kay Barnes

Kay Barnes
Regulatory Operations Division
Filing on Behalf of Public Utility Commission Staff
(503) 378-5763
Email: kay.barnes@state.or.us

c: UT 125 Service List - parties

PUBLIC UTILITY COMMISSION OF OREGON

UT 125

STIPULATION

Entered into between Qwest Corporation, Northwest Public Communications Council and Staff

QWEST CORPORATION
UT 125 Phase II—Public Access Line Rates

OCTOBER 15, 2007

1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2 **OF OREGON**

3 UT 125

4 In the Matter of

5 the Application of QWEST CORPORATION for an Increase in Revenues. | STIPULATION

6

7 This Stipulation is entered into for the purpose of resolving the Oregon Court of Appeals
8 remand of Commission Order Nos. 01-810 and 02-009. Specifically, this Stipulation concludes
9 that the rates proposed by Qwest on March 31, 2006, in response to the Court of Appeals
10 remand, comply with federal requirements.

11 PARTIES

12 1. The parties to this Stipulation are the Public Utility Commission of Oregon Staff
13 (Staff), Qwest Corporation (Qwest), and the Northwest Public Communications Council (NPCC)
14 (collectively, the "Parties").

15 BACKGROUND

16 2. On April 14, 2000, the Public Utility Commission of Oregon (Commission) entered
17 Order No. 00-190, adopting a Stipulation between U S WEST Communications, Inc. (now
18 Qwest Corporation), and Staff in the revenue requirement phase (Phase I) of this docket.
19 3. On September 14, 2001, the Commission entered Order No. 01-810 establishing a rate
20 design for the stipulated revenue requirement approved in Order No. 00-190. As part of Order
21 No. 01-810, the Commission approved revised rates for public assess lines (PAL) and
22 CustomNet service, adopting the rate recommendations proposed by Qwest and agreed to by
23 Staff. The Northwest Payphone Association (now, NPCC) opposed the PAL and CustomNet
24 rates adopted by the Commission, arguing that the rates were not developed in compliance with
25 Section 276 of the Telecommunications Act of 1996.
26 ///

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1 4. On November 13, 2001, NPCC filed an application for reconsideration of Order No.
2 01-810. On January 8, 2002, the Commission entered Order No. 02-009 denying NPCC's
3 application for reconsideration.
4 NPCC appealed Order Nos. 01-810 and 02-009 ("the rate design orders") to Marion
5 County Circuit Court. On October 1, 2002, the Court entered a judgment affirming the
6 Commission's orders. NPCC thereafter filed an appeal with the Oregon Court of Appeals.
7 5. On November 10, 2004, the Court of Appeals entered a decision reversing and
8 remanding Order Nos. 01-810 and 02-009. The Court determined that the rate design orders
9 were unlawful in that: (1) the Commission's rates for PAL did not comply with certain federal
10 requirements, and (2) the Commission did not adequately consider whether Qwest's proposed
11 rates for CustomNet were subject to the same federal requirements.
12 6. On March 13, 2006, the presiding Administrative Law Judge (ALJ) convened a
13 telephone conference to establish procedures necessary to comply with the Court's remand.
14 During the conference, Qwest indicated that it would file proposed PAL and Fraud Protection
15 (formerly CustomNet) rates to comply with the Court's decision. Qwest also indicated that it
16 would seek to adjust other Qwest rates because of the recalculation of payphone service rates.
17 7. On March 31, 2006, Qwest filed its proposed PAL and Fraud Protection rates[1]. On
18 April 25, 2006, Qwest filed a letter on behalf of the parties requesting that the Commission
19 decide, as a threshold matter, whether Qwest may raise any customer rates to offset reduced
20 revenues resulting from a Commission decision approving lower PAL and Fraud Protection
21 rates. On September 11, 2006, the Commission entered Order No. 06-515 denying Qwest's
22 proposal to raise residential Caller ID rates to offset a decrease in PAL and Fraud Protection
23 rates resulting from the Court-ordered remand in Docket No. UT 125.
24
25

26 [1] These were the same rates that Qwest submitted in Advice 1935 and that the Commission approved on March 17, 2003.

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1 8. As a result of Order No. 06-515, the unresolved issues on remand are whether the
2 PAL and Fraud Protection rates filed on March 31, 2006, comply with the Oregon Court of
3 Appeals remand. Specifically, (1) whether Qwest's proposed PAL rates comply with federal
4 requirements, and (2) whether Qwest's proposed Fraud Protection rates comply with federal
5 requirements.
6 9. Since Order No. 06-515 was entered, Staff has performed a cost review of the rates
7 proposed by Qwest on March 31, 2006. In addition, the Parties have held several settlement
8 conferences to discuss whether the proposed rates are consistent with the Court of Appeals
9 remand and federal requirements.
10 AGREEMENT
11 10. The Parties agree that Qwest's proposed PAL rates filed on March 31, 2006, comply
12 with federal requirements. The Parties further agree that the proposed PAL rates, filed on March
13 31, 2006, satisfy the Court of Appeals Remand Order.
14 11. The Parties agree that Qwest's proposed Fraud Protection rates filed on March 31,
15 2006, comply with federal requirements. The Parties further agree that the proposed Fraud
16 Protection rates, filed on March 31, 2006, satisfy the Court of Appeals Remand Order.
17 12. The written testimony of Staff, which is attached hereto, will be received in evidence
18 pursuant to this Stipulation without requiring any Stipulating Party to lay a foundation for its
19 admission.
20 13. The Parties agree that this Stipulation represents a compromise in the positions of the
21 Parties. As such, conduct, statements and documents disclosed in the negotiation of the
22 Stipulation shall not be admissible as evidence in this or any other proceeding.
23 14. This Stipulation will be offered into the record of this proceeding as evidence
24 pursuant to OAR 860-14-0085. The Parties agree to support this Stipulation throughout this
25 proceeding and any appeal, provide witnesses, if necessary, to sponsor this Stipulation at the
26

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1 hearing and recommend that the Commission issue an order adopting settlements contained
2 herein.
3 15. The Parties have negotiated this Stipulation as an integrated document. If the
4 Commission rejects all or any material portion of this Stipulation, or imposes additional material
5 conditions in approving this Stipulation, any party disadvantaged by such action shall have the
6 rights provided in OAR 860-14-0085 and shall be entitled to seek reconsideration or appeal of
7 the Commission's Order.
8 16. By entering into this Stipulation, no party shall be deemed to have approved,
9 admitted, or consented to the facts, principles, methods, or theories employed by any other party
10 in arriving at the terms of this Stipulation including those set forth in the written testimony of
11 Staff submitted in support of this Stipulation, other than those specifically identified in the body
12 of this Stipulation. No party shall be deemed to have agreed that any provision of this
13 Stipulation is appropriate for resolving issues in any other proceeding.
14 17. The Stipulation may be executed in counterparts and each signed counterpart shall
15 constitute an original document.
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1 This Stipulation is entered into by each party on the date entered below such party's

2 signature.

3 QWEST CORPORATION

4

5 Dated: ______________________

6 By: ______________________
Print name

7

8 Signed: ______________________

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL (NPCC)

Dated: ______________________

By: ______________________
Print name

Signed: ______________________

9

10 PUBLIC UTILITY COMMISSION STAFF

11 Dated: 10/10/07

12 By: Jason Jones
Print name

13

14 Signed:

15

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Department of Justice
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1 This Stipulation is entered into by each party on the date entered below such party's

2 signature.

3 QWEST CORPORATION

4

5 Dated: 10/10/07

6 By: Alex M. Duarte

7 Print name Corporate Counsel

8 Signed: [signature]

9

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL (NPCC)

Dated: ______________________

By: ______________________

Print name

Signed: ______________________

10 PUBLIC UTILITY COMMISSION STAFF

11 Dated: ______________________

12 By: ______________________

Print name

13

14 Signed: ______________________

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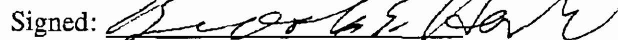
1 This Stipulation is entered into by each party on the date entered below such party's
2 signature.

3 QWEST CORPORATION	NORTHWEST PUBLIC COMMUNICATIONS COUNCIL (NPCC)
5 Dated: ______________	Dated: 10/10/07
6 By: ______________	By: BROOKS E. HARLOW
7 Print name	Print name
8 Signed: ______________	Signed: 

10 PUBLIC UTILITY COMMISSION STAFF

11 Dated: ______________

12 By: ______________

13 Print name

14 Signed: ______________

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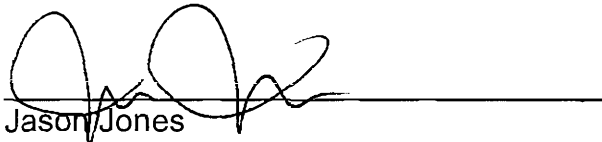
CERTIFICATE OF SERVICE

UT 125

I certify that I have this day served the foregoing document upon all parties of record in this proceeding by delivering a copy in person or by mailing a copy properly addressed with first class postage prepaid, or by electronic mail pursuant to OAR 860-13-0070, to the following parties or attorneys of parties.

Dated at Salem, Oregon, this 15th day of October, 2007.



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UT 125
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ORDER NO. 07-497

ENTERED 11/15/07

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 125

In the Matter of	)	
	)	
QWEST CORPORATION, fka U S WEST COMMUNICATIONS, INC.	)	ORDER
	)	
Application for an Increase in Revenues.	)	

DISPOSITION: STIPULATION ADOPTED

Procedural History

On April 14, 2000, the Public Utility Commission of Oregon (Commission) entered Order No. 00-190, adopting a Stipulation between U S WEST Communications, Inc., now known as Qwest Corporation (Qwest), and the Commission Staff (Staff) in the revenue requirement phase (Phase I) of this docket.

On September 14, 2001, the Commission entered Order No. 01-810 establishing a rate design for the stipulated revenue requirement approved in Order No. 00-190. As part of Order No. 01-810, the Commission approved revised rates for public access lines (PAL) and CustomNet service, adopting the rate recommendations proposed by Qwest and agreed to by Staff. The Northwest Payphone Association, now known as Northwest Public Communications Council (NPCC), opposed the PAL and CustomNet rates adopted by the Commission, arguing that the rates were not developed in compliance with Section 276 of the Telecommunications Act of 1996.

On November 13, 2001, NPCC filed an application for reconsideration of Order No. 01-810. On January 8, 2002, the Commission entered Order No. 02-009 denying NPCC's application for reconsideration.

NPCC appealed Order Nos. 01-810 and 02-009 ("the rate design orders") to Marion County Circuit Court (Circuit Court). On October 1, 2002, the Circuit Court entered a judgment affirming the Commission's orders. NPCC thereafter filed an appeal with the Oregon Court of Appeals (Court).

On November 10, 2004, the Court entered a decision reversing and remanding Order Nos. 01-810 and 02-009.[1] The Court determined that the rate design orders were unlawful in that: (1) the Commission's rates for PAL did not comply with certain federal requirements, and (2) the Commission did not adequately consider whether Qwest's proposed rates for CustomNet were subject to the same federal requirements.

On March 13, 2006, the presiding Administrative Law Judge (ALJ) convened a telephone conference to establish procedures necessary to comply with the Court's remand. During the conference, Qwest indicated that it would file proposed PAL and Fraud Protection (formerly CustomNet) rates to comply with the Court's decision. Qwest also indicated that it would seek to adjust other Qwest rates because of the recalculation of payphone service rates.

On March 31, 2006, Qwest filed its proposed PAL and Fraud Protection rates. On April 25, 2006, Qwest filed a letter on behalf of the parties requesting that the Commission decide, as a threshold matter, whether Qwest may raise any customer rates to offset reduced revenues resulting from a Commission decision approving lower PAL and Fraud Protection rates. On September 11, 2006, the Commission entered Order No. 06-515 denying Qwest's proposal to raise residential Caller ID rates to offset a decrease in PAL and Fraud Protection rates resulting from the Court-ordered remand in docket UT 125.

As a result of Order No. 06-515, the unresolved issues on remand are whether the PAL and Fraud Protection rates filed on March 31, 2006, comply with the Court's remand to develop rates in compliance with applicable federal requirements, and in particular, the new services test prescribed by the Federal Communications Commission (FCC).

Stipulation

Since Order No. 06-515 was entered, Staff has performed a cost review of the rates proposed by Qwest on March 31, 2006. In addition, a number of settlement conferences have been held to discuss whether the proposed rates are consistent with the Court's remand and applicable federal requirements.

On October 15, 2007, Qwest, NPCC, and Staff (collectively, the "Parties"), filed a Stipulation designed to resolve all outstanding issues. The parties agree that Qwest's proposed PAL and Fraud Protection rates filed on March 31, 2006, comply with federal requirements and satisfy the Court's remand. In support of this determination, the parties offer into evidence the testimony and exhibits of Staff witness John Reynolds.

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[1] *Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Or. App. 94, 100 P.3d 776 (2004). The judgment of the Marion County Circuit Court effectuating the remand was entered in Case No. 02C12247 on or about May 19, 2005.

Mr. Reynolds reviewed Qwest's proposed rates to ensure that the methodology used to develop those rates was consistent with requirements in the FCC's new services test.[2] Specifically, Mr. Reynolds found:

(a) The proposed rates do not recover more than direct costs plus a just and reasonable amount of overhead;

(b) The cost studies used to develop the proposed rates employ Qwest's Integrated Cost Model (ICM), September 26, 2002, version. The ICM is a forward-looking cost model used by Qwest in current UNE filings and is consistent with the total service long run incremental cost (TSLRIC) method used in determining UNE costs;

(c) Inputs used in the ICM cost study are consistent with those used in other current cost studies. Qwest used current (2002) input costs rather than input costs associated with earlier UNE dockets. To account for the difference between those costs, Qwest weighted the input investment by a "benchmark" ratio of approved UNE rates to the September 2002 study-calculated rates;

(d) The overhead cost methodology is the same as is used in other Qwest studies and is consistent with the method used in UNE pricing;

(e) To avoid double recovery, Qwest deducted the subscriber line charge (SLC) from the cost calculations to determine the tariff rate;

(f) Certain additional "retail" costs, such as billing and sales expense, were appropriately included.

The calculations supporting Mr. Reynolds' analysis of Qwest's proposed rates are set forth in Confidential Staff Exhibit 2. The calculations disclose that the annual revenue generated by Qwest's proposed rates is very nearly the same as the forward looking cost computed by Mr. Reynolds.[3] The Commission concurs with the analysis set forth in Mr. Reynolds' testimony and exhibits, and agrees with his conclusion that Qwest's proposed PAL and Fraud Protection Rates satisfy the requirements of the new services test.

Commission Decision

The Commission has reviewed the Stipulation, together with the testimony and exhibits filed in support of the agreement. Based upon our examination, we find that Qwest's proposed PAL and Fraud Protection rates filed March 31, 2006, are in compliance with applicable federal requirements, including the new services test, as mandated by the Court of

[2] The requirements of the new services test are detailed on pp. 2-3 of Mr. Reynolds' testimony.

[3] *See* Confidential Exhibit Staff/2, Reynolds/1, Line 6.

Appeals in its remand order. We therefore adopt the Stipulation and accept it and the supporting testimony and exhibits into the record in this docket.

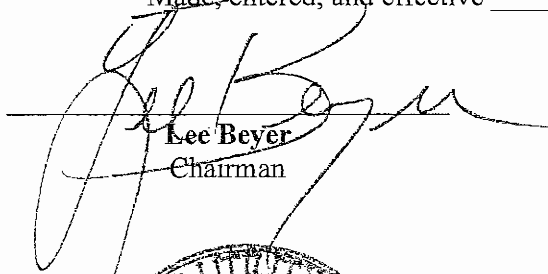
ORDER

IT IS ORDERED that:

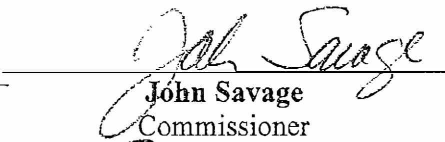
1. The Stipulation entered into among Qwest Corporation, Northwest Public Communications Council, and the Public Utility Commission of Oregon Staff is adopted.

2. The Public Access Line rates and Fraud Protection rates filed by Qwest Corporation on March 31, 2006, comply with applicable federal requirements and satisfy the remand of Order Nos. 01-810 and 02-009 mandated by the Oregon Court of Appeals in *Northwest Public Communications Council v. Public Utility Commission of Oregon.*

Made, ~~entered, and~~ effective NOV 1 5 2007.

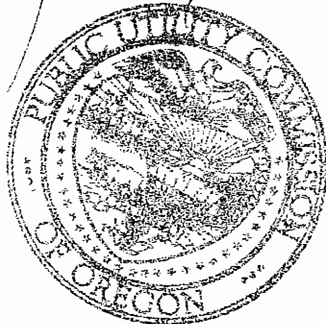


Lee Beyer
Chairman



John Savage
Commissioner

Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.