

1
2
3
4 **BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

5 **UT 125**

6 In the Matter of

7 QWEST CORPORATION, fka U S WEST
8 Communications, Inc,

9 Application for an Increase in Revenues
10

QWEST'S OPENING BRIEF
SUPPORTING PROPOSAL TO
REBALANCE RATES

11
12 Qwest Corporation ("Qwest") respectfully submits this Opening Brief supporting its
13 proposal to rebalance rates to offset the revenue reduction that results from the lowering of its
14 rates for payphone services in this proceeding. Under applicable law and the Commission's own
15 precedent, the Commission clearly has the authority to reopen this case and to adjust other rates
16 to offset the revenue reduction that results from approving lower rates for payphone services.
17 The Commission's authority derives both from the court's remand order and from ORS 756.568.
18 In fact, not only does the Commission have the authority to rebalance rates as requested by
19 Qwest, it must do in order to provide Qwest with the opportunity to recover its authorized
20 revenue requirement. If the Commission were to adjust only Qwest's rates for payphone services
21 without adjusting other rates to offset the revenue reduction, it would engage in impermissible
22 single-issue ratemaking.

23 **I. BACKGROUND**

24 **A. Qwest's Current Filing**

25 The current proceedings in this docket are intended to implement the remand of
26 Commission Order No. 01-810 (the "Order") as required by the Court of Appeals' decision in

1 *Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Or.
2 App. 94, 100 P.3d 776 (2004), and the subsequent Judgment Remanding Case to Public Utility
3 Commission entered by the Marion County Circuit Court in Case No. 02C12247 on or about
4 May 19, 2005. The Court of Appeals' decision determined that the Order was unlawful in that
5 (1) the Commission's evaluation of rates for Public Access Lines ("PAL") did not comply with
6 certain federal requirements for those rates and (2) the Commission did not adequately consider
7 whether Qwest's proposed rates for a service known as CustomNet were subject to the same
8 federal requirements. The court reversed and remanded the Order to the Commission for further
9 consideration.

10 On March 31, 2006, pursuant to the schedule established by the Commission in this
11 proceeding, Qwest filed proposed rates for Public Access Lines and Fraud Protection (formerly
12 known as CustomNet), in order to comply with the federal requirements for those rates as
13 mandated by the Court of Appeals' decision on judicial review of the Order. These proposed
14 rates are lower than those the Commission approved in the Order. The lower payphone service
15 rates result in a revenue reduction for Qwest in the amount of approximately \$1 million per year,
16 based upon the test year units utilized in the Order. In order to offset the revenue reduction that
17 would result from approval of the new payphone service rates in this docket, Qwest's March 31,
18 2006 filing proposes to increase the rate for Residential Caller ID by \$0.60.

19 **B. Procedural History of Order No. 01-810**

20 **1. Order No. 01-810**

21 After establishing Qwest's revenue requirement in Phase I of this docket, the Commission
22 ordered a rate design to achieve the targeted revenue reduction in Order No. 01-810, issued
23 September 14, 2001. While the parties had resolved many issues relating to rate design before
24 the hearing, several issues were presented to the Commission for a decision. Only one of those
25 issues is relevant at this time, the rates for certain payphone services (discussed in the Order
26 under "Issue 11: Local Business Access Services" at pp. 48-56).

1 Qwest and Commission Staff agreed upon the rates for Public Access Lines. Northwest
2 Payphone Association, now known as Northwest Public Communications Council (referred to
3 hereinafter as "NPCC"), opposed the PAL rates proposed by Qwest and Staff, arguing that lower
4 rates were required by 47 U.S.C. § 276 and certain FCC orders referred to as the "FCC Payphone
5 Orders." NPCC argued that the PAL rates proposed by Qwest and Staff did not satisfy the
6 requirements of the "new services test," as mandated by the FCC Payphone Orders, and that
7 Qwest did not submit adequate cost information to the Commission. The Commission decided
8 to adopt the rates proposed by Qwest and Staff, concluding that they met the requirements of
9 Section 276 and the FCC Payphone Orders, and that Qwest had submitted adequate cost
10 information. Order at 56.

11 The other disputed payphone rate issue related to CustomNet. This is a feature that
12 provides a type of call screening that customers subscribe to for both PALs and other access
13 lines. Order at 50, 56. NPCC argued that rate for CustomNet was subject to the new services
14 test; both Qwest and Staff argued that it was not. The Commission decided that CustomNet was
15 not subject to the new services test, and approved the rate proposed by Qwest and Staff. Order at
16 56.

17 NPCC sought reconsideration of the Order, and the Commission denied reconsideration
18 in its Order No. 02-009 (Order Nos. 01-810 and 02-009 are collectively referred to as the
19 "Orders").

20 **2. Judicial review of the Orders**

21 **a. The Marion County Circuit Court decision**

22 NPCC sought judicial review of the Orders pursuant to *former* ORS 756.580 (*repealed by*
23 2005 Or. Laws ch. 638, § 21) by filing a Complaint in Marion County Circuit Court on or about
24 March 8, 2002 (Case No. 02C12247). NPCC claimed that the Orders were based on erroneous
25 legal conclusions and asked the court to set aside the findings and orders of the Commission.
26

1 Following briefing and an oral argument, the Circuit Court entered a Judgment on October 1,
2 2002, affirming the Orders.

3 **b. The Court of Appeals' decision**

4 NPCC appealed the Circuit Court's judgment to the Oregon Court of Appeals (Case
5 No. A119640). Following briefing and oral argument, on November 10, 2004, the Court of
6 Appeals issued a decision reversing and remanding the Circuit Court's judgment with
7 instructions to remand the Orders to the Commission for reconsideration. *Northwest Public*
8 *Communications Council v. Public Utility Commission of Oregon*, 196 Or. App. 94, 100 P.3d
9 776 (2004). With respect to NPCC's challenge to the PAL rates the Commission approved, the
10 Court of Appeals held that section 276 and the FCC Payphone Orders require the Commission to
11 "focus on [Qwest's] cost of providing the specific payphone service at issue" and that the
12 Commission erred by not examining Qwest's cost of providing the service. 196 Or. App. at 97.¹
13 The concurring opinion discussed the detailed cost information the new services test requires the
14 Commission to review on remand regarding both Qwest's direct and allowable overhead cost of
15 providing the payphone services. 196 Or. App. at 106-08.² The court required the Commission
16 to "reconsider its order in light of the New Services Test and other relevant FCC orders." 196
17 Or. App. at 100. The Court of Appeals entered its appellate judgment on January 28, 2005.

18 **c. The Marion County Judgment remanding the case**

19 Complying with the Court of Appeals' decision, on or about May 19, 2005, the Marion
20 County Circuit Court entered its Judgment Remanding Case to Public Utility Commission. The
21

22 ¹ The majority opinion did not specifically address the standard of review; however, the
23 concurring opinion clarified that the basis of the court's decision is that the Commission's order was
24 "unlawful." 196 Or. App. at 100-01, 106-08. *Former* ORS 756.594, applicable to judicial review of the
Order, required the courts to review the Order to determine if it was "unreasonable or unlawful."

25 ² The majority opinion did not discuss CustomNet separately from PAL, but its decision clearly
26 requires the Commission on remand to consider application of the new services test to CustomNet. The
concurring opinion would specifically require the Commission to reconsider whether the new services test
applies to CustomNet, and set forth several issues the Commission should address. 196 Or. App at 108.

1 court remanded the matter to the Commission "for reconsideration consistent with the opinion of
2 the Oregon Court of Appeals . . ."

3 Neither the Court of Appeals nor the Circuit Court placed any limits on the Commission's
4 proceedings or permissible actions on remand.

5 **C. Staff Opposes Qwest's Proposal To Raise a Rate To Offset the Revenue
6 Reduction Resulting From the Decrease in Payphone Service Rates**

7 During the pre-hearing conference on March 13, 2006, the parties identified as an issue to
8 be resolved in this proceeding whether and to what extent other Qwest rates should be adjusted
9 because of the recalculation of rates for PAL and Fraud Protection in this docket. The
10 Administrative Law Judge questioned whether that issue should be bifurcated from issues
11 regarding the calculation of revised rates for PAL and Fraud Protection. After Qwest made its
12 March 31, 2006 filing, Commission Staff informed Qwest that it opposed Qwest's proposal to
13 raise any other rate to offset the revenue reduction resulting from Qwest's proposed decrease in
14 payphone service rates. The parties agreed to present this issue to the Commission for resolution
15 as a threshold issue in the current proceeding, and the Commission adopted this proposal in the
16 Ruling dated May 1, 2006.

17 **II. ARGUMENT**

18 **A. Qwest Is Entitled To Offset the Revenue Reduction Resulting From the
19 Decrease in Payphone Service Rates**

20 Qwest does not think there is room for serious doubt that Qwest is entitled to offset any
21 revenue reduction that would result from lowering its rates for PAL and Fraud Protection in this
22 docket, should the Commission agree that is required by the courts' remand, by raising some
23 other rate(s). The Court of Appeals decided that the Order is "unlawful" and remanded the Order
24 to the Commission for reconsideration. Thus, the Order is no longer effective and the
25 Commission must conduct further proceedings and reconsider its decision before it may affirm
26 or modify the rate design it approved in the Order. "Traditionally, agencies and courts have
drawn a direct analogy between court reversal of an agency action and appellate court reversal of

1 a trial court action. In each case, the legal status reverts back to the status quo ante unless and
2 until the agency or trial court conducts a new proceeding on remand." Pierce, ADMINISTRATIVE
3 LAW TREATISE, § 7.13 at 519 (4th Ed. 2002).

4 The Court of Appeals determined that the Commission's Order is unlawful because the
5 Commission failed to correctly apply federal requirements in approving Qwest's rates for
6 payphone services. Thus, the Commission's approval of Qwest's rates for payphone services in
7 Docket UT 125 is not effective.³ Since the determination of those rates impacts all of Qwest's
8 other regulated rates in the traditional rate design context in which the Commission issued the
9 Order, Qwest's entire rate design cannot be final until the Commission conducts the remand
10 proceeding, determines the appropriate level of payphone rates, and then completes the rate
11 design by taking into consideration the revenue impact of any new payphone service rates. If the
12 Commission decides that lower PAL and Fraud Protection rates than it originally approved in the
13 Order are required by the new services test, the Commission will need to evaluate Qwest's entire
14 rate design to ensure that it provides Qwest the opportunity to earn its allowed rate of return.

15 As the Commission well knows, rate design is a balancing process in which individual
16 rates are adjusted with the goal of achieving a rate design that provides a regulated company the
17 opportunity to earn its allowed revenue requirement. The adjustment of each rate affects the
18 overall revenue picture and may require adjustments to other rates so that the utility is neither
19 deprived of the opportunity to earn its allowed return nor over-compensated for its services. For
20 the sake of consistency, adjustments are based upon the volume of services during a "test year,"
21
22

23
24 ³ Given the Court of Appeals' decision that the Order is unlawful and the courts' orders remanding
25 the Order for reconsideration, the present status of all of the rates the Commission approved in the Order
26 may be unclear. However, Qwest's proposal is limited and prospective only; Qwest is not at this time
seeking to revise any of the rates the Commission approved in the Order other than those addressed in its
March 31, 2006 filing, nor is Qwest claiming at this time that the rates it charged its customers since those
rates became effective in 2002 are subject to refund or surcharge in any manner.

1 which is the same period for which the overall revenue requirement was determined. In this
2 case, the test year is March 1997 through February 1998.

3 The Court of Appeals recognized that this is the basis upon which the Commission
4 proceeded in the Orders:

5 In the first phase of the proceeding, it established the rate of return that
6 Qwest was entitled to receive on its property that is used or useful for
7 providing regulated services in Oregon (Qwest's rate base). In the second
8 phase, the PUC evaluated the rates that Qwest proposed for its various
9 services and made appropriate adjustments so that, as a package, they
10 would provide it the opportunity to earn that return. One consequence of
11 following the traditional method is that reducing the rates for one service
12 is likely to require raising the rates for another. That is necessary in order
13 to provide Qwest an opportunity to earn the intended rate of return on its
14 rate base as a whole.

15 196 Or. App. at 96.

16 There is no reason to think that the court did not expect the Commission to continue to
17 apply these overall principles in the remand proceeding. Neither the Court of Appeals nor the
18 Circuit Court decision expressly circumscribed any issues that the Commission should consider
19 on remand, nor should they have done so because ratemaking is a "legislative function" in which
20 the Commission has "broad discretion in selecting policies and methods." *American Can Co. v.*
21 *Lobdell*, 55 Or. App. 451, 463, 638 P.2d 1152 (1982). The courts simply remanded the Order for
22 "reconsideration." If certain rates are revised upon reconsideration, the Commission must make
23 adjustments to other rates approved in the Order to compensate for the revenue impact of these
24 adjustments. If the Commission does not do so, it will unlawfully deprive Qwest of the
25 opportunity to earn its authorized return.

26 The Commission has already faced this issue in combined Docket Nos. DR 10/UE
88/UM 989, involving ratemaking for PGE. In early phases of those proceedings, the
Commission decided that the applicable statutes entitled PGE to earn both a return of, as well a
return on, PGE's undepreciated investment in retired Trojan assets. Based upon this and other
assumptions, the Commission approved new rates for PGE in its rate case, Docket UE 88, in

1 Order No. 95-322. On judicial review of the Commission's orders, the Court of Appeals decided
2 that PGE was not entitled to earn a return on this investment under Oregon law, reversed the
3 Commission's decision, and remanded the rate case order to the Commission for further
4 consideration. *Citizens' Utility Board v. PUC*, 154 Or. App. 702, 717, 962 P.2d 744 (1998).

5 When the rate case and related proceedings were back in front of the Commission on
6 remand from the courts, the parties disputed the scope of the Commission's authority. The ALJ
7 asked the parties to comment on the following issue: "[Should the Commission] determine how
8 the courts' opinions in the appeals of these cases [DR 10, UE 88 and UM 989] affect the rate
9 decisions made by the Commission, in their entirety, or whether the Commission's inquiry is
10 more ministerial, and involves only determining the charges customers paid to PGE for interest
11 on PGE's investment in Trojan?" Ruling, DR 10/UE 88/UM 989 (Aug, 31, 2004) at 6 (attached
12 as Appendix A to Order No. 04-597)(the "Ruling"). Some parties argued that the Commission's
13 task was limited to determining the amount of charges customers paid for a return on PGE's
14 Trojan investment and to removing those charges from PGE's rates. Other parties argued that the
15 Commission was required to reopen the proceeding, take additional evidence, and engage in
16 ratemaking. In particular, "Staff argued that that a broader scope of inquiry is consistent with
17 general principles of ratemaking. Staff notes, '[d]etermining how the courts' opinions in the
18 remanded cases affect the rate decisions made by the Commission in their entirety' is consistent
19 with general ratemaking policy that prohibits 'single-issue rate cases' in favor of a comprehensive
20 analysis of the just and reasonableness of rates." Ruling at 7. Further, "Staff advises, '[i]t is the
21 end result of the PUC's order that must be tested for validity,' meaning the Commission and
22 courts evaluate the just and reasonableness of rates by examining them in their entirety. . . .
23 Staff asserts that the remand orders authorize the Commission to reexamine the end result of rate
24 decisions in UE 88 and UM 989, rather than culling out a single component of these rates."
25 Ruling at 11.

1 The ALJ decided that the Commission not only had the authority, but also was required,
2 to reopen the record and to take additional evidence. The ALJ agreed with Staff and ruled that
3 the courts' remand orders "require the Commission to establish 'just and reasonable' rates in these
4 remand proceedings, a task that necessarily entails ratemaking." Ruling at 14.

5 Further proceedings upon remand will effectively rescind or amend the
6 prior orders that are remanded—that, after all, is the point of a remand. In
7 order to address issues responsive to the Court of Appeals' interpretation
8 of ORS 757.355 not previously raised in UE 88, the Commission must
9 take and consider new evidence. . . . In any case, ORS 756.568
authorizes the Commission to consider additional evidence, with no
restrictions on the scope and nature of such evidence, in the course of
rescinding, suspending or amending an order.

10 Ruling at 16.

11 The ALJ concluded that "the Commission must engage in ratemaking . . . to determine
12 end rates that comply with all pertinent statutes. . . . Finding rates established by Order No. 02-
13 227 to be unjust and unreasonable, the Circuit Court remanded Order No. 02-227 to the
14 Commission for further proceedings consistent with its opinion. As discussed herein, the opinion
15 calls for existing rates to be adjusted according to rate determinations made pursuant to the
16 remand of DR 10 and UE 88." Ruling at 17. The ALJ summarized the issue to be determined on
17 reconsideration as: "What rates would have been approved in UE 88 if ORS 757.355 had been
18 interpreted to prohibit a return on Trojan?" Ruling at 18.

19 The Commission affirmed the ALJ's Ruling, holding that "A proper review of rates
20 established in UE 88 may not focus on costs attributable to earnings on Trojan, an isolated rate
21 component, without considering whether other factors offset this amount. Doing so would
22 constitute single-issue ratemaking, which is prohibited." Order No. 04-597 at 6.

23 Thus, it is abundantly clear that the Commission has the authority to reopen the rate case
24 to consider Qwest's overall rate design. As in the PGE case, the Court of Appeals reversed the
25 Commission's rate case order on the ground that it did not comply with applicable law.
26 Accordingly, just as in the PGE case, the Commission must now re-open the rate case in this

1 remand proceeding in order to establish overall rates for Qwest that are just and reasonable. In
2 this case, just and reasonable rates are those designed to implement the revenue requirement the
3 Commission approved for Qwest. Whereas in the PGE case the Commission was required to
4 reconsider an issue that related to the utility's revenue requirement, its reasoning applies with
5 equal force to its reconsideration in this case of a rate design issue. If the Commission, on
6 remand, were to adjust only the rates for payphone services, it would improperly engage in
7 single-issue ratemaking.

8 The issue for the Commission on remand is: "What rates would have been approved in
9 UT 125 if the Commission had correctly applied the new services test to payphone service
10 rates?" It should be beyond dispute that if the Commission had authorized lower rates for
11 payphone services in the Order, it would have authorized some other rate(s) to be higher so that
12 the rate design matched the authorized revenue requirement. The result should be no different at
13 this stage of the case, where the courts have sent the Order back to the Commission to reconsider
14 certain rates. The Commission clearly has the authority, and the obligation, to re-open this case
15 pursuant to the remand order to take evidence concerning what other rate(s) it should adjust to
16 offset the revenue reduction that results from approval of lower payphone service rates in this
17 proceeding. Nothing in the courts' remand orders otherwise limits the scope of the Commission's
18 actions on remand.

19 Moreover, even if the Commission did not have the authority to re-open the rate case
20 pursuant to the remand order, which it clearly does, the Commission undeniably may consider
21 any additional evidence in amending an order pursuant to ORS 756.568, just as the Commission
22 decided in the PGE case. ORS 756.598 provides: "The Public Utility Commission may *at any*
23 *time . . .* amend any order made by the commission." With this language, the legislature has
24 given the Commission very broad authority to amend its orders at any time, subject to providing
25 notice and the opportunity to be heard. This statute makes clear beyond any doubt that the
26 Commission may amend the Order to adjust other rates in this proceeding.

1 This does not mean, however, that the Commission's proceedings on remand need to be
2 extensive or time-consuming to accomplish the purpose of rebalancing rates. Because the
3 amount that will be rebalanced, approximately \$1 million, is relatively small, the Commission
4 may increase the rate for only one or a handful of services. In fact, Qwest has proposed raising
5 the rate for only one service, Residential Caller ID, and the rate increase is relatively modest,
6 from \$5.00 to \$5.60. Qwest does not assert that the Commission should re-open any revenue
7 requirement issues. That phase of the case was resolved by a stipulation which the Commission
8 approved, and no party appealed that order. Finally, the Commission does not need to reconsider
9 any rate design issues that were disputed in Phase II, but as to which no party filed an appeal.
10 Thus, the Commission may accomplish the rebalancing that Qwest seeks with relatively little
11 effort or burden.

12 **B. Qwest's Election of Price Cap Regulation Does Not Prejudice Qwest's Right**
13 **to Rebalance Rates Because This Rate Case Was Pending When Qwest Made**
14 **its Election Under ORS 759.405**

15 The fact that Qwest has elected price cap regulation under ORS 759.405-.410 does not
16 change this result. As the Commission recognized in the Order, ORS 759.415 allows the price
17 cap for non-basic services to be adjusted in a rate case that was pending when Qwest made its
18 election. Order at 3. The Commission has already recognized that it may adjust the price cap for
19 non-basic services in this docket, notwithstanding Qwest's election of price cap regulation. This
20 is what the Commission did in the Order which was issued in 2001, after Qwest elected price cap
21 regulation in 1999. *Id.* Residential Caller ID is a non-basic service.
22
23
24
25
26

1
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

III. CONCLUSION

For the foregoing reasons, the Commission should issue an order that it will raise other rates to the extent necessary to offset the revenue reduction that will result from approval of lower payphone service rates in this proceeding.

DATED: May 19, 2006.

PERKINS COIE LLP

By 
Lawrence H. Reichman, OSB No. 86083

and

Alex M. Duarte, OSB No. 02045
Qwest Corporation
421 SW Oak Street, Room 810
Portland, OR 97204

Attorneys for Qwest Corporation

1 **CERTIFICATE OF SERVICE**

2 I certify that I have this day served the foregoing document, encaptioned
3 QWEST'S OPENING BRIEF SUPPORTING PROPOSAL TO REBALANCE
4 RATES, by causing a copy to be sent via U.S. Mail and electronic mail to:

5 * Robert Manifold
6 Attorney at Law
7 6993 Via Valverde
8 La Jolla, CA 92037

Lon E. Blake
Regulator Director
Advanced Telcom Inc
730 Second Ave. S, Suite 900
Minneapolis, MN 55042

9 Daniel Foley
10 AT&T Nevada
11 General Attorney & Asst. Gen. Counsel
12 645 E Plumb Lane, B132
13 PO Box 11010
14 Reno, NV 89520

* Lisa F. Rackner
Ater Wynne LLP
222 SW Columbia Street, Suite 1800
Portland, OR 97201-6618

13 * Jason Eisdorfer
14 Energy Program Director
15 Citizens' Utility Board of Oregon
16 610 SW Broadway, Suite 308
17 Portland, OR 97205

* Robert Jenks
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205

17 Mark P. Trincherro
18 Davis Wright Tremaine LLP
19 1300 SW Fifth Avenue, Suite 2300
20 Portland, OR 97201-5682

* Jason W. Jones
Assistant Attorney General
Department of Justice
Regulated Utility and Business Section
1162 Court St., NE
Salem, OR 97301-4096

21 * Karen J. Johnson
22 Corporate Regulatory Attorney
23 Integra Telecom of Oregon Inc.
24 1200 Minnesota Center
25 7760 France Avenue S
26 Bloomington, MN 55435

Carol Wirsbinski
Senior Vice President
Integra Telecom of Oregon Inc.
1200 Minnesota Center
7760 France Avenue S
Bloomington, MN 55435

25 * Brooks Harlow
26 Miller Nash LLP
601 Union Street, Suite 4400
Seattle, WA 98101-2352

David L. Rice
Miller Nash LLP
601 Union Street, Suite 4400
Seattle, WA 98101-2352

1 Randy Linderman
2 Pacific Northwest Payphone
3 1315 NW 185th Avenue, Suite 215
4 Beaverton, OR 97006-1947

* Alex M. Duarte
Corporate Counsel
Qwest Corporation
421 SW Oak Street, Suite 810
Portland, OR 97204

5 * Michael E. Daughtry
6 VP Operations & Reg Contact
7 United Communications Inc.
8 P.O. Box 1191
9 Bend, OR 97709-1191

* Dean Randall
Verizon Northwest Inc.
20575 NW Von Neumann Dr.
MC OR030156
Hillsboro, OR 97006

10 Michel Singer-Nelson
11 Regulatory Attorney
12 Worldcom Inc.
13 707 -17th Street, Suite 4200
14 Denver, CO 80202

15 DATED: May 19, 2006.

16 **PERKINS COIE LLP**

17 By 
18 Lawrence H. Reichman, OSB No. 86083

19 Attorneys for Qwest Corporation

20 *Denotes signatory to Protective Order