

IN THE COURT OF APPEALS OF THE STATE OF OREGON

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL,

Petitioner,

v.

QWEST CORPORATION, fka U.S. West Communications, Inc. and PUBLIC

UTILITY

COMMISSION OF OREGON,

Respondents.

Public Utility Commission of Oregon

UT125

A166810

Amended

**PETITION FOR JUDICIAL REVIEW OF ORDER
OF THE PUBLIC UTILITY COMMISSION OF OREGON**

Petitioner seeks judicial review of the Public Utility Commission of Oregon's Order No. 17-471, dated November 16, 2017. A copy of the Order is attached.

The parties to this proceeding before the Court of Appeals are:

Petitioner:

Northwest Public Communications Council
21420 NW Nicholas Ct #13
Hillsboro, OR 97124

Respondents:

Qwest Corporation, fka U.S. West Communications
c/o Lawrence Reichman
Perkins Coie LLP
1120 NW Couch St #10
Portland, OR 97209

Public Utility Commission of Oregon
201 High Street SE, Suite 100
Salem, OR 97301

Petitioner Northwest Public Communications Council is represented by:

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Respondent Qwest Corporation is represented by:

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Respondent Public Utility Commission of Oregon is represented by:

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Petitioner seeks review of the Public Utility Commission's Final Order, PUC 17-473 dated November 16, 2017, in case number UT 125 denying Petitioner's Motion to Show Cause, or, alternatively, to Clarify Order No. 07-497.

Petitioner is a party to the proceedings in UT 125.

Petitioner is willing to stipulate to shorten the record. Petitioner requests inclusion of the following documents from Case No. UT 125: Public Utility Commission Orders Nos. 96-094, 96-107, 96-183, 97-171, 00-190, 00-191, 01-810, 02-009, 06-515, and 07-497; Advice Nos. 1668, Advice 1806, 1935, and 1946; and the Letter from L. Reichman to Hearings Division, including its Attachment "A" (March 31, 2006), as well as the following documents from Case No. DR 26/UC 600: the Letters to the Federal Communications Commission dated April 10, 1997 and April 11, 1997 from counsel for the Coalition of Regional Bell Operating Companies, the responsive brief of the PUC Staff in response to

NPCC's motion for summary judgment in Docket DR 26/UC 600, FCC Order FCC 13-24 dated February 27, 2013.

Pursuant to ORS 183.482(8)(a), (b) and (c), Petitioner requests that the Court of Appeals reverse Public Utility Commission Order No. 17-473 to grant Petitioner's Motion to Show Cause, or, alternatively, Clarify Order No. 07-497 by ordering the calculation and payment of additional refunds as prayed by Petitioner to make the interim rates compliant with the FCC and PUC Orders.

The Public Utility Commission has failed and refused to comply with the Court of Appeals remand requiring that the PAL and fraud protection rates adopted in Order 01-810 that replaced all interim PAL and fraud protection rates in effect since May 1, 1996 it reversed and remanded to be made compliant with the federal requirements including the new services test.

The PUC does not have discretion to do other than Comply with the Remand and to require Qwest to comply with: (i) the Court of Appeals remand; (ii) the requirement that all payphone rates comply with the new services test effective April 15, 1997 in accordance with the Telecommunications Act as amended in 1996; or (iii) the PUC's orders that refunds be allocated to ratepayers based on the difference between the "final rate" set November 15, 2007 and any higher interim rate as required by Orders 00-190 and 00-191 the result of

settlement agreements; and the settlement agreement embodied therein as those orders and the obligations thereunder have been interpreted in Order 06-515, a final non appealable order. In the alternative, Petitioner requests that the Court of Appeals reverse Order No. 17-471 because the PUC Order and Opinion has erroneous factual statements and interpretations of law.

This appeal is timely and otherwise properly before the Court of Appeals because it is being filed within 60 judicial days of the effective date of the PUC final Order entered on November 16, 2017.

Dated this 9th day of February, 2018.

CORPORATE LAWYERS PC

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CERTIFICATE OF SERVICE

I hereby certify that I electronically Filed and Served a copy of the foregoing Petition to Review the Decision of Court of Appeals and Decision consolidated as one document as requested as follows:

Service was by: Mailing Hand Delivery Email E Filing ORAP Rule

The Respondent:

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I further certify that upon review, all parties are registered with E-filing at the State of Oregon Electronic Filing System and that the Amended Petition for Review was filed by Email and by E-filing.

E-Filing:
ATTN: Records Section
State Court Administrator
Supreme Court Building
1163 State Street
Salem, OR 97301-2563

FEBRUARY 9, 2018

/s/ Frank G. Patrick
Frank G. Patrick, OSB 760228
Attorney for Appellant

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON**

UT 125

In the Matter of

QWEST CORPORATION, fka
U S WEST COMMUNICATIONS, INC.

ORDER

DISPOSITION: MOTION TO SHOW CAUSE OR, ALTERNATIVELY,
CLARIFY ORDER NO. 07-497, DENIED; DOCKET CLOSED

I. INTRODUCTION

In this order we deny the motion of Northwest Public Communication Council (NPCC) asking the Commission to order Qwest Corporation (Qwest) to refund overcharges alleged to have occurred between 1996 and 2003.

II. BACKGROUND

A. The Parties

NPCC is a trade association that represents companies providing public payphone services. Qwest is a former regional Bell Operating Company and local exchange carrier, previously referred to as U S WEST Communications, Inc. in this docket.¹ NPCC's payphone service providers (PSPs) use Qwest's services in Oregon and pay Qwest rates determined by the Commission.

B. Procedural History

To provide a proper context to address NPCC's motions, we very briefly summarize relevant decisions of this Commission and the Federal Communications Commission (FCC). We divide our discussion into two parts: (1) our review of Qwest's rates in docket UT 125 and the FCC's payphone orders; and (2) NPCC's complaint against Qwest in dockets DR 26/ UC 600.

¹ Qwest Corporation is a wholly-owned subsidiary of CenturyLink QC and does business under the name CenturyLink, but it retains its own corporate identity for legal and regulatory purposes.

1. *Docket UT 125 and the FCC Payphone Orders*

We opened docket UT 125 in 1995 to examine rates for Qwest's telecommunication services, including the company's public access lines (PAL) and fraud protection services (CustomNet). During the pendency of that general rate review, the FCC issued orders to implement the Telecommunications Act of 1996 (the Act). Of note here, the FCC found that payphone rates were to comply with the so-called "new services test"— which required rates to be based on the actual cost of providing the service, plus reasonable overhead costs. The FCC required local exchange carriers to file new services test-compliant tariffs with state commissions with an effective date no later than April 15, 1997. Carriers were permitted a 45-day extension for filing, subject to a refund obligation, under the FCC's waiver order.² Qwest filed new PAL rates on April 15, 1997, and therefore, as discussed below, did not need to avail itself of the 45-day extension granted by the waiver. We approved those rates with an effective date of April 15, 1997, and NPCC did not appeal this approval. For years thereafter, it was unclear whether those April 15, 1997, rates met the FCC standards, but they ultimately have been found to comply with the new services test standard.

We bifurcated the UT 125 rate case into two phases: (1) revenue requirement; and (2) rate design. In the revenue requirement phase, we issued Order Nos. 00-190 and 00-191, approving a settlement among Qwest, Staff and other parties (revenue requirement stipulation). These orders established revenue requirement figures and ordered refunds, which Qwest issued in late 2000 to certain customers, including PSPs. The PSPs continued to seek additional refunds which depended upon the outcome of pending FCC decisions.

In the rate design phase, we issued Order Nos. 01-810 and 02-009 establishing the final rate design to implement the stipulated revenue requirement. The rates established in this phase did not include refunds. NPCC appealed the rate design orders. In 2004, the Oregon Court of Appeals remanded the rate design orders with directions to consider whether the approved rates relating to payphones complied with the new services test.³ While NPCC's appeal was pending, Qwest lowered its PAL rates in March 2003 and its CustomNet rates in August 2003 (Advice Nos. 1935 and 1946). In 2007, we adopted, in Order No. 07-497, a stipulation in which all parties unequivocally agreed that those rates were compliant with the new services test.

2. *Dockets DR 26 / UC 600*

Meanwhile, in May 2001, while the rate design phase of docket UT 125 was pending, NPCC filed a complaint asking us to order Qwest to pay refunds to NPCC members. NPCC stated that Qwest's rates that went into effect on April 15, 1997, did not comply with the new services test and that Qwest was required to pay refunds under the waiver order. We denied

² *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, DA 97-805, 12 FCCR 21,370 (Apr 15, 1997). For additional background information, see *Northwest. Pub. Commc'ns Council v. Qwest Corp.*, 279 Or. App. 626, 628-642 (2016); *reconsideration den'd* (Mar 9, 2017).

³ *Nw. Public Commc'ns Council v. Public Utility Commission of Oregon*, 196 Or. App. 94 (2004).

NPCC's complaint, finding that the refund obligation in the waiver order had not been triggered.⁴ The Court of Appeals recently affirmed our finding, stating that Qwest had no refund obligation under the FCC waiver order because Qwest did not rely on the FCC waiver order in filing rates but instead relied on rates that we had approved.⁵

Central to NPCC's argument here, the Court relied on a 2013 FCC order that finally explained in more detail the refund obligation from the FCC's waiver order. The Court noted that the FCC order made clear that the waiver order did not address the applicability of refunds where a carrier filed tariffs after the extension period, or did not file new tariffs and instead relied on existing rates or only filed cost studies for existing rates.

III. DISCUSSION

A. Overview

NPCC contends that from 1996 to 2003, Qwest charged and collected rates for payphone service, specifically for public access lines (PAL) and fraud protection services (CustomNet) that were unlawfully high. NPCC's filing is a two part motion. First, NPCC asks us to order Qwest to show cause that it is in compliance with orders we previously issued in this docket.⁶ In particular, because we stated in an earlier order that Qwest agreed to accept the risk that it might lose on appeal and then be required to make further refunds, NPCC argues that Qwest assumed the obligation to refund overpayments to its ratepayers. In the alternative, NPCC asks that we amend Order No. 07-497 to expressly require Qwest to issue refunds. NPCC alleges that we have the power and the responsibility to require Qwest to fully refund PSPs for overcharges. Qwest filed a response to the Show Cause Motion and NPCC filed a reply.

B. Procedural Arguments

1. Parties' Positions

Qwest raises two primary procedural objections to NPCC's requests. Qwest first argues that NPCC's motion is improper, because this docket is inactive and there are no issues that require a ruling. Qwest states that if NPCC wishes to pursue a claim, it must file a new complaint pursuant to ORS 756.500 clearly stating the basis for its claims and allowing Qwest the opportunity to defend itself.

Second, Qwest states that the final order in this docket was issued in November 2007, twelve years after it was opened, with NPCC participating actively throughout. Qwest emphasizes that no party appealed the 2007 order and this docket has been inactive and effectively closed

⁴ *In Re Northwest Public Commc'ns Council v. Qwest Corp.*, Docket Nos. DR 26/UC 600, Order No. 11-504 at 8-9 (Dec 15, 2011) ("Contrary to NPCC's assertions, the *Waiver Order* did not require that intrastate payphone tariffs be reviewed and conclusively determined to be [new services test-] compliant by May 19, 1997. The order required only that [a local exchange carrier] be able to certify that it had effective state tariffs that met FCC requirements, Qwest made such certification on May 20, 1997.") (emphasis in original).

⁵ *Nw. Pub. Commc'ns Council v. Qwest Corp.*, 279 Or. App. at 647 (2016).

⁶ NPCC asserts that Qwest is in violation of Order Nos. 96-107, 00-190, 00-191, 06-515, and 07-497 as well as the Act and state law.

since 2007. Qwest reasons that, by not asking for additional refunds when final rates for payphone services were set in 2006-2007, NPCC waived any claim it might have had for additional refunds.

NPCC responds that its motions must be addressed in this proceeding, not only because they seek relief directly related to orders issued in or referred to in docket UT 125, but also because the central issue is whether Qwest is required to issue refunds for the over collection of unlawful rates. NPCC offers that it would stipulate to a procedure that allows Qwest and Staff to present evidence to aid in the resolution of NPCC's motion.

NPCC also maintains that the Commission has broad express and implied authority to issue orders to show cause and to amend its previous orders. NPCC believes its motions are proper because it seeks to enforce or amend orders issued in this docket and a complaint is not required.

NPCC also asserts that it did not and cannot waive Qwest's refund obligations and the Commission may amend an order at any time pursuant to ORS 756.568.

2. *Resolution*

Although our statutory authority over ratemaking matters is broad and includes the authority to amend prior orders⁷ and require refunds in certain circumstances,⁸ under the "filed rate doctrine," when the Commission issues an order not subject to refund, those rates are lawful when not under appeal.⁹ Consequently, in light of NPCC's failure to seek the additional refunds when final rates for payphone services were set, those rates became the lawful, established rates upon the passing of the final date on which the Commission order could be appealed.¹⁰

C. *Substantive Arguments*

1. *Parties' Positions*

NPCC asserts that from April 15, 1997, and at least through August 28, 2003, Qwest charged and collected rates from PSPs that significantly exceeded the rates that we determined in Order No. 07-497 to be new service test-compliant. NPCC believes that Qwest is obligated to refund the difference between the unlawful, interim rates it charged to its PSP ratepayers beginning effective May 1, 1996, and the final, NST-compliant rates approved by the Commission. NPCC supports its arguments by linking our various orders to conclude: (1) Order No. 96-107 made all Qwest's rates interim subject to refund from May 1, 1996;

⁷ ORS 756.568.

⁸ *Gearhart v. PUC*, 356 Or. 216, 244-246 (2014) (citing ORS 756.040 for broad statutory ratemaking authority, and concluding that the Commission may order refunds on remand to correct a legal error).

⁹ *Dreyer et al v. Portland General Electric Company*, 338 Or. 489, 113P3d 435 (2005).

¹⁰ *Nw. Pub. Commc'ns Council v. Qwest Corp.*, *supra*, was limited to addressing the question of the triggering of the FCC waiver request, not whether the rates were otherwise compliant.

(2) Order No. 00-190 adopted the revenue requirement stipulation in which Qwest recognized its potential to be obligated to pay additional refunds; (3) Order No. 06-515 provided that the revenue requirement stipulation applied to Order No. 01-810; and (4) Order No. 07-497 established final, NST-compliant PAL and CustomNet rates.

Qwest responds that NPCC has waived its right to seek refunds because it stipulated in 2007 that the proposed resolution of this case complied with all federal requirements and satisfied the Court of Appeals remand. Qwest also contends that NPCC's claims are barred by issue preclusion and claim preclusion, explaining that NPCC filed—and lost—four separate lawsuits seeking refunds from Qwest.

NPCC replies that Qwest mischaracterizes the stipulation because NPCC never disputed that Qwest's 2006 PAL and CustomNet rates were lawful going forward, but that NPCC has always firmly maintained that Qwest owes refunds to PSPs for the rates charged from 1996 to 2003. NPCC also contends that, although the Court of Appeals in 2016 ruled that Qwest did not owe refunds based on the FCC waiver order, the Court made clear that the Commission could order refunds pursuant to other orders, and that is what NPCC seeks here.

Qwest also points to Order No. 00-190 that ordered refunds and asserts that order fully resolved all of Qwest's refund liability. NPCC maintains that the refund from Order No. 00-190 is not at issue, because that was a refund that Qwest made in 2000 to avoid having to make the same refund at some future date, and that order does not release Qwest from making additional, different refunds based on the new service test and related orders. NPCC also notes that the Commission's Order No. 06-515 recognized that Qwest may be required to make refunds in addition to those set forth in the stipulation because of an appeal. NPCC concludes that it is undisputed that Qwest's rates prior to 2003 were not new service test-complaint and the Commission should order Qwest to show cause why it is not in violation of the FCC's new service test orders, or in the alternative, clarify that Qwest must issue refunds to the PSPs for any overcharges it made.

2. *Resolution*

We deny NPCC's motions because, having reviewed NPCC's arguments, our orders in this docket, and the 2016 Court of Appeals opinion on new services test precedent, we find no error in our previous orders or in Qwest's compliance with those orders. First, we will explain our review of the orders in this docket and why we agree, in part, with NPCC's arguments. Second, we will explain our review of the 2016 Court of Appeals opinion relevant to this proceeding, and why we must deny NPCC's motions based on that opinion.

We recognize that the earlier orders in this docket contributed to the long-standing uncertainty over the PAL rates. As NPCC notes, beginning in May 1996, Qwest charged interim rates subject to refund. These interim rates ended with Order No. 00-190 (and two follow-up orders), where we adopted a contested revenue requirement stipulation and ordered refunds in excess of \$200 million.¹¹ In Order No. 00-190, we noted that Qwest may owe

¹¹ Qwest states that it completed its refunds in late 2000, refunding customers \$283 million. Qwest Response at 4 (Mar 24, 2017).

PSPs additional refunds based on the FCC payphone orders, but that it was an issue we could not decide based on that record.¹² Furthermore, in Order No. 01-810 at 55, we stated that “[w]e conclude that Qwest’s PAL rates satisfy the new services test.”

The Court of Appeals has now removed any uncertainty over the PAL rates, and we are convinced that Qwest has no remaining refund liability. In its 2016 opinion, the Court conclusively answered the question of whether Qwest’s 1997 rates satisfied the new services test and whether or not Qwest had used the FCC waiver extension that would trigger refund liability. The Court held that Qwest had no refund obligation under the FCC waiver order because the refund obligation in the waiver order was not triggered.¹³ The Court thus affirmed our finding that Qwest did not avail itself of the extension granted in the FCC waiver order because it had instead made a certification on May 20, 1997, that the tariff in effect in Oregon on April 15, 1997, met all of the FCC requirements.¹⁴ Thus, we can now conclude with certainty that Qwest has no refund liability due to the FCC waiver order.

We can further find that there is no other refund liability from the 1996 interim rates. Our orders in this proceeding (Order Nos. 00-190, 00-191, and 02-068) have comprehensively resolved all refund liability from May 1996 through 2000. We will not reopen the rate case orders in this proceeding. We declined to reopen the rates in Order No. 06-515 when Qwest asked to rebalance its rates due to additional refunds, and we will not reopen those rates now when NPCC asks for additional refunds. The one exception to this finality was the 2004 Court of Appeals remand. However, the remand was satisfied with Order No. 07-497 where we adopted a stipulation between Qwest, NPCC, and Commission Staff “designed to resolve all outstanding issues” with the parties agreeing that Qwest’s rates “satisfy the Court’s remand.” NPCC did not seek rehearing, reconsideration, or appeal of Order No. 07-497.¹⁵

Finally, we address the 2016 Court of Appeals statement that, under the circumstances presented here, a state commission may well find refunds to be appropriate pursuant to sources of authority other than the FCC waiver order.¹⁶ We find no other Commission authority or remedy available to NPCC to pursue refunds for this time period. We find no legal error in our rate setting orders in this docket, and we find there is no other authority available to NPCC to seek refunds here.

IV. ORDER

IT IS ORDERED that

1. The Motion for an Order to Show Cause or, in the Alternative, to Clarify Order No. 07-497 filed by Northwest Public Communications Council is denied;

¹² Order No. 00-190 at 15 (Apr 14, 2000).

¹³ *Nw. Pub. Commc’ns Council v. Qwest Corp.*, 279 Or. App. at 644-5.

¹⁴ Order No. 11-504 at 8 (Dec 15, 2011).

¹⁵ Order No. 07-497 at 2, 4 (Nov 15, 2007).

¹⁶ *Nw. Pub. Commc’ns Council v. Qwest Corporation*, 279 Or. App. at 643.

2. This docket is closed.

Made, entered, and effective NOV 16 2017

Lisa D. Hardie

Lisa D. Hardie
Chair

Stephen M. Bloom

Stephen M. Bloom
Commissioner



Megan W. Decker

Megan W. Decker
Commissioner

A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.