

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

UM 1354

In the Matter of	)	
	)	
QWEST CORPORATION	)	ORDER
	)	
Petition for Approval of Price Plan Pursuant	)	
to ORS 759.255.	)	

**DISPOSITION: MOTION TO DISMISS DENIED**

In this Order, the Commission denies a Joint Motion to Dismiss Qwest’s Petition (Motion) filed by the Citizens’ Utility Board of Oregon (CUB); Telecommunications Ratepayers Association for Cost-Based and Equitable Rates (TRACER); XO Communications Services, Inc. (XO); Time Warner Telecom of Oregon LLC (TWT); Covad Communications Company (Covad); Integra Telecom of Oregon, Inc. (Integra); and McLeodUSA Telecommunications Services, Inc. (McLeod) (collectively “Joint Movants”).

The Motion was filed in response to Qwest Corporation’s Petition for Approval of a Price Plan Pursuant to ORS 757.255 (Petition). Although Qwest subsequently amended the Petition after the Motion was filed, the Joint Movants continue to rely on their arguments in opposition and seek a Commission ruling on the Motion. Consequently, all of the statements set forth below, many of which were filed prior to the time of the amended Petition, are considered as if they refer to the amended Petition.

**Petition.** On October 26, 2007, Qwest Corporation (Qwest) filed a Petition for Approval of Price Plan Pursuant to ORS 759.255. CUB filed a Notice of Intervention and Waiver of Paper Service pursuant to ORS 774.180. Pursuant to rulings of the Administrative Law Judge (ALJ) granting petitions to intervene, the following entities became parties to this proceeding: TRACER, XO, TWT, Covad, Integra, McLeod, the Oregon Telecommunications Association (OTA)<sup>1</sup> and Verizon Northwest Inc.

**Amended Petition.** On February 11, 2008, Qwest filed an Amended Petition for Approval of Price Plan Pursuant to ORS 759.255 (Amended Petition), which superseded the original Petition, including the proposed price plan. At a procedural conference held on February 15, 2008, Joint Movants and Staff waived the opportunity

---

<sup>1</sup> On February 20, 2008, OTA asked that its status be changed from being a party to that of an interested person. We grant that request as part of this Order.

to file further pleadings with respect to the Amended Petition, asserting that they would rely on their prior argument and comments with respect to the original Petition.

The essential elements of the Amended Petition's price plan (Price Plan) are summarized as follows:

1. *Primary Line Basic Service* (residential single party flat rate local exchange service; residential single party measured local exchange service, including local exchange usage; business single party flat rate local exchange service; and business single party measured local exchange service, including local exchange usage). The first line per location for all residential and business customers would be price capped at \$2.00 above the current monthly price, and Qwest would be permitted to adjust monthly prices upward or downward between the new price caps and applicable price floors. Nonrecurring charges would be capped at current levels. Qwest would not require these services to be bundled with other services. To avoid causing significant price increases for certain retail local exchange service, the following basic business services in Rate Group 3 would not be included in the Price Plan: business single party flat rate local exchange service; business single party measured local exchange service, including local exchange usage; and private branch exchange (PBX) service, all of which would continue to be priced pursuant to ORS 759.425(2)(a).<sup>2</sup> Finally, Qwest proposes to eliminate the "two free call" allowance for directory assistance, but asserts that it will continue to offer the current Telephone Assistance Plans: OTAP, Tribal Lifeline and Link-up.

2. *Public Access Line (PAL)*. PAL service would continue to be regulated by the Commission pursuant to federal requirements.

3. *Switched Access*. Rates for intrastate switched access would be capped at current rates, subject to Commission adjustment of price caps required by FCC action.

4. *EAS*. EAS capped at current rates. Qwest would not be required to establish new or expanded EAS routes as long as it operated under the Price Plan.

5. *Other Regulated Retail Services*. Other currently regulated retail services not addressed above would be price listed, subject to a total system long run incremental cost price floor for nonessential functions of providing the service and charges for essential functions used in providing the service.<sup>3</sup>

---

<sup>2</sup> Amended Petition, at 9-10. Basic residential services are not subject to price floors, and therefore this exclusion applies only to the business services listed above. See ORS 759.255(4).

<sup>3</sup> See Amended Petition, footnote 10, at 9-10, for Qwest's explanatory comments regarding "essential" and "nonessential" functions and their pricing methodologies and regulatory constraints.

6. *Packages.* Qwest would be able to offer packages that included primary line basic service and EAS at any price subject only to ORS 759.255(4) price floors for each service included in the package--i.e., no package could be offered for less than the sum of the price floors of all of the regulated services included in the package.

7. *Notice of Price Changes.* Qwest would file tariffs for changes in price-capped services at least 30 days prior to the effective date of the changes. All other regulated services would be price listed, and Qwest would provide one day's notice prior to the effective date of any price change. Customers would be give at least 30 days' notice of price increases for services they are purchasing at the time of the price increase; no 30-days' notice would be given for decreases on tariffed retail services.

**Qwest's Comments Regarding Regulatory and Legal Requirements.**

To implement its Price Plan under ORS 759.255(5), Qwest requests that the Commission waive as necessary, in whole or in part, Qwest's compliance with ORS 759.120 (accounting requirements), ORS 759.125 (accounts and records), ORS 759.130 (accounts, balance sheets and audits), ORS 759.135 (depreciation accounts), ORS 759.180-200 (hearings on reasonableness of rates, promotions, suspension of rates, notice of schedule changes, price listing, amortization and filed rates), ORS 759.215 (public access to schedules), ORS 759.220 (joint rates and classifications), ORS 759.285 (charging rates based on cost of property not currently providing service) and ORS 759.300-393 (issuance of securities and transactions of utilities), except as to ORS 759.182 and ORS 759.215(1), under which Qwest will make promotions for primary line basic service and other regulated services and make rate schedules available to the public.<sup>4</sup>

Qwest further states that under its Price Plan it would still be able to petition for exemption from regulation under ORS 759.052 with respect to specific services and retain the ability to enter into special contracts for primary line basic service and other regulated services under ORS 759.250, and to file rate schedules for promotions for primary line basic service and other regulated services under ORS 759.182.<sup>5</sup>

**Motion to Dismiss.** Joint Movants filed their Motion on January 10, 2008. Joint Movants review the legislative and regulatory history of price cap regulation in Oregon and make two primary arguments in support of their assertion that "Qwest's Petition must be dismissed with prejudice."<sup>6</sup>

First, Joint Movants claim that the Commission lacks authority to grant the Petition because, under ORS 759.410, Qwest's election of price cap regulation is permanent. It is therefore impossible for Qwest to "opt out of price cap regulation either with or without the Commission's approval...[T]hat statute does not authorize the Commission to waive Qwest's compliance with ORS 759.405 *et seq.*" The Commission

---

<sup>4</sup> *Id.*, at 11-12.

<sup>5</sup> *Id.*, at 12.

<sup>6</sup> Motion, at 6.

itself concluded that it lacked authority to reexamine Qwest's rates for nonbasic services as a result of Qwest's election under ORS 759.410.<sup>7</sup> Joint Movants assert that the plain language of the statute supports their interpretation,<sup>8</sup> and that, even if Qwest could alternate freely between alternate forms of price cap regulation, ORS 759.255(5) does not authorize the Commission to waive the requirements of ORS 759.405 *et seq.*<sup>9</sup>

Second, Joint Movants assert that, notwithstanding the fact that Qwest's Petition was filed pursuant to the statute authorizing price cap regulation (ORS 759.255), Qwest is effectively seeking deregulation via a path clearly never intended by the Legislature. The elimination of most price caps is not a new "price plan"; rather, ORS 759.255 authorizes a plan in which "the commission regulates prices charged by the utility" and exempts from rate of return regulation the prices approved under the plan. Absent evidence of contrary intent (of which Joint Movants assert there is none), the specific language of the statute controls.<sup>10</sup> Joint Movants cite Qwest's own past efforts at deregulation in docket UX 29 and prior testimony before the Legislature as indicative that Qwest's Petition is "disingenuous at best."<sup>11</sup>

**Qwest's Response.** Qwest filed a Response to Joint Motion to Dismiss (Response) on January 24, 2008. First, Qwest contends that Joint Movants failed to articulate any standard applicable to a motion to dismiss, but appear to argue that the Commission lacks jurisdiction to hear the Petition because it "lacks authority to grant Qwest's Petition."<sup>12</sup> Thus, Qwest argues, Joint Movants have failed to meet their substantial burden under Oregon Rules of Civil Procedure (ORCP) 21 A(1) or A(8).

Qwest further argues that its 1999 Price Cap election is not permanent and irrevocable; because such an interpretation would "lead to an absurd and unconstitutional result."<sup>13</sup> Qwest asserts that it may opt out of price cap regulation as a matter of statutory interpretation and describes the various standards for statutory construction as applied to the present circumstances.<sup>14</sup> Furthermore, statutes that may be ambiguous require the courts to choose the interpretation that will avoid constitutional difficulties, such as those that would arise if Joint Movants' interpretation were adopted. Consequently, "a carrier that has made an election under ORS 759.410 may withdraw that election and choose to be subject to an alternative regulatory program under ORS Chapter 759."<sup>15</sup> Qwest asserts that it would be subject to price caps only so long as it is subject to ORS 759.410 and, by petitioning for a price plan under ORS 759.255, Qwest may be permitted to opt out of its prior ORS 759.410 election. Contrary to Joint Movants'

---

<sup>7</sup> Motion, at 6-7, citing Order No. 06-515 in docket UT 125.

<sup>8</sup> *Id.*, at 8-10.

<sup>9</sup> *Id.*, at 11.

<sup>10</sup> *Id.*, at 11-14.

<sup>11</sup> *Id.*, at 15-16.

<sup>12</sup> Response, at 2-3, citing Motion, at 6.

<sup>13</sup> *Id.*, at 3.

<sup>14</sup> *Id.*, at 4-8.

<sup>15</sup> *Id.*, at 8-10.

assertions, Qwest claims that no waiver would be necessary under ORS 759.255 because Qwest would no longer be operating under ORS 759.410.<sup>16</sup>

Finally, Qwest claims that it does not seek deregulation: some rates would be capped and some would be subject to price floors, and the Commission would retain the ability to review rate increases and other modifications to the Price Plan upon evaluation of market conditions. The Commission may waive some, but not all, regulatory requirements under the Price Plan; this is not full deregulation. Finally, because Qwest does not seek deregulation, legislative intent regarding ORS 759.255 is irrelevant.<sup>17</sup>

**Staff's Reply Brief.** On January 31, 2007, the Commission staff (Staff) submitted a Reply Brief (Reply) to both the Motion and Response. Staff concluded that Qwest could move from its current form of regulation under ORS 759.410 to the price plan delineated under ORS 759.255 and that, on its face, the Petition did not clearly deregulate any service.

Staff agrees with Qwest that a plain reading of ORS 759.405 *et seq.* allows Qwest to opt out of price cap regulation under ORS 759.410 if the Commission approves another price plan under ORS 759.255.

The statutes are silent as to whether a carrier that has elected and fulfilled the specified mandatory requirements (e.g. infrastructure investment) can opt out of price cap regulation under ORS 759.410....The statutes only provide that once Qwest elected for price cap regulation under ORS 759.410, it was subject to other provisions of that same statutory scheme. Inserting a provision making that election unchangeable would unlawfully insert terms that are not included (footnote omitted)....The plain meaning of [ORS 759.410(7)] is that a carrier that elects for price cap regulation under ORS 759.405 *et seq.* may still seek deregulation of telecommunications services under ORS 759.052.<sup>18</sup>

Staff asserts that its interpretation is consistent with past Commission actions because “permanent price caps only apply to a carrier that is subject to ORS 759.400 *et seq.*...[T]he plain language of the statutes permits a carrier to opt out of regulation under ORS 750.400 *et seq.*, which means that the carrier is no longer subject to those statutes.”<sup>19</sup> Staff states that, by opting out of price caps and into a price plan, Qwest

---

<sup>16</sup> *Id.*, at 12-13.

<sup>17</sup> *Id.*, at 14-15.

<sup>18</sup> Reply, at 3-4.

<sup>19</sup> *Id.*, at 5.

will no longer be subject under ORS 759.410.<sup>20</sup> Staff also acknowledged the potential constitutional infirmities of a decision that would make the opt-in irrevocable.<sup>21</sup>

For the reasons stated in the Motion, general agreement among the parties that ORS 759.255 is not a deregulation statute. Therefore, Staff contends that the question of whether Qwest's proposed Price Plan results in deregulation of some services is a matter that should be resolved within the docket and not via a motion to dismiss.<sup>22</sup> Furthermore, ORS 759.255 expressly provides that the Commission has the authority to set price caps in the manner prescribed in ORS 759.195(5) and is consistent with the legislative history, although the question of price listing essential services is one worthy of exploration within the confines of the case.<sup>23</sup>

**Joint Movants' Reply (Joint Reply).** The Joint Reply filed on February 7, 2008, argues that Staff and Qwest both failed to cite statutory language contrary to their Motion's assertions and rely upon faulty linguistic analysis and a misreading of the statutory language.<sup>24</sup> Joint Movants state that it is the election for price caps that is permanent, not the price caps themselves. They also assert that Qwest has offered no evidence that price caps are interfering with its ability to earn a reasonable rate of return (and that such an argument is inappropriate), that the Legislature intended that Qwest would always be able to obtain deregulation if sufficient competition developed and that price caps encourage efficiency. Joint Movants argue that making Qwest's price cap election permanent is neither absurd nor unconstitutional.<sup>25</sup> Joint Movants also note a lack of evidence that Qwest's costs for providing regulated services are rising and that Qwest has avoided any inference that it is not earning a just and reasonable return and has not sought to have rate of return regulation reimposed.<sup>26</sup>

The Joint Reply reiterates the earlier stated position that ORS 759.255 does not provide the Commission the authority to grant Qwest the relief it seeks because it does not permit deregulation, Qwest's circular logic notwithstanding. ORS 759.255 authorizes only a "plan under which the Commission regulates prices" and exempts from rate of return regulation the price approved under the plan; it does not contemplate a plan where the Commission does not regulate prices.<sup>27</sup> Neither does it, in Joint Movants' view, allow the Commission to waive the requirements of ORS 759.405 *et seq.*, including permanent price caps.<sup>28</sup> Furthermore, Qwest's "claw-back" provisions on some prices do not constitute "regulation" and do not cure the problem.<sup>29</sup>

---

<sup>20</sup> *Id.*, at 6. Staff noted that in Order No. 06-515 cited by Joint Movants, Qwest was seeking to change its price caps within ORS 759.500 *et seq.*

<sup>21</sup> *Id.*, at 7-8.

<sup>22</sup> *Id.*, at 8-9.

<sup>23</sup> *Id.*, at 10-12.

<sup>24</sup> Joint Reply, at 4-7.

<sup>25</sup> *Id.*, at 9.

<sup>26</sup> *Id.*, at 9-10.

<sup>27</sup> *Id.*, at 13.

<sup>28</sup> *Id.*, at 13-15.

<sup>29</sup> *Id.*, at 15-16.

**Discussion.** Granting a motion to dismiss constitutes a final determination of the proceedings on a petition. It deprives the petitioner the opportunity to be heard and deprives the Commission the opportunity to explore any of the issues affecting the public interest that might have been raised in the petition. The standards for the grant of a motion to dismiss are specific and independent of a petition's particular merits or the utter lack thereof. An ALJ is specifically deprived of authority to issue a ruling granting a motion to dismiss.<sup>30</sup> The Motion has therefore been certified by the ALJ to the Commission for decision. We deny the Motion for the reasons set forth below.

Unless otherwise provided by rule, the ORCP govern all cases before the Commission.<sup>31</sup> Because the Joint Movants did not cite any particular section of the ORCP, we can only assume that it is their intention to apply Rule 21A (1) and, perhaps, (8) to their Motion. Rule 21A, which sets out the standards for our consideration of such motions, states in pertinent part as follows:

Every defense, in law or fact, to a claim for relief in any pleading, whether a complaint, counterclaim, cross-claim or third party claim, shall be asserted in the responsive pleading thereto, except that the following defenses may at the option of the pleader be made by a motion to dismiss:  
(1) lack of jurisdiction over the subject matter....(8) failure to state ultimate facts sufficient to constitute a claim.

Joint Movants' Motion raises two arguments. First, as noted above, the Motion asserts that Qwest's election for price caps under ORS 759.405 *et seq.* is irrevocable and that the Commission therefore lacks the authority to grant the request to elect out of price caps. Second, the Joint Movants argue that because ORS 759.255 does not permit deregulation and Qwest's Price Plan has elements that are deregulated, the Commission lacks the authority to grant that request as well.

We reject Joint Movants' first argument as an incorrect interpretation of the language and intent of ORS 759.405 *et seq.* and adopt Staff's legal conclusions and argument with respect to that issue. By opting out of price caps and into a price plan, Qwest will no longer be subject to ORS 759.410. The Commission therefore has jurisdiction to grant the relief requested in the Amended Petition. Qwest has also stated sufficient facts to support its request for relief.

Joint Movant's second argument rests upon their objections to Qwest's Price Plan in its original, rather than Amended, Petition. In the original Petition, Qwest proposed price ceilings with specific sunset dates for some services, price floors for other services and freedom from regulation altogether for new services. The Price Plan in the Amended Petition eliminates specific sunset dates and proposes at least some form of regulation for every service mentioned in the Petition. The Amended Petition's proposed

---

<sup>30</sup> OAR 860-012-0035(g).

<sup>31</sup> OAR 860-011-0000(3)

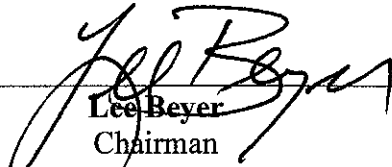
Price Plan therefore does not violate the prohibition on deregulation inherent in meeting the standards of ORS 759.255. We therefore find that the Commission also has subject matter jurisdiction to grant relief under ORS 759.255.

**ORDER**

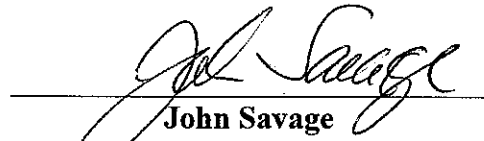
IT IS ORDERED that the Motion to Dismiss filed by the Citizens' Utility Board; Telecommunications Ratepayers Association for Cost-Based and Equitable Rates; XO Communications Services, Inc.; Time Warner Telecom of Oregon LLC; Covad Communications Company; Integra Telecom of Oregon, Inc.; and McLeodUSA Telecommunications Services, Inc., is DENIED.

Made, entered and effective \_\_\_\_\_

FEB 28 2008

  
\_\_\_\_\_  
**Lee Beyer**  
Chairman

  
\_\_\_\_\_  
**Ray Baum**  
Commissioner

  
\_\_\_\_\_  
**John Savage**  
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.