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December 21, 2007

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

Subject: In the Matter of Payphone Access Line Rates – CC Docket No. 96-128

Dear Ms. Dortch:

The tortured procedural history of Qwest's payphone access line ("PAL") rate case in Oregon is unlike that of any RBOC in any other state in the union. Remarkably, it took Qwest and the Oregon Public Utility Commission ("OPUC") over **11 years of unbroken litigation** to implement the New Services Test ("NST") pursuant to this Commission's 1996 and 1997 orders in Docket 96-128. On behalf of the Northwest Public Communications Council ("NPCC") we enclose the OPUC Order entered on November 15, 2007 ("Final Order") that *finally* concludes¹ the rate case commenced in 1995 that was the procedural vehicle the OPUC used to review whether Qwest's pre-existing² PAL rates³ complied with the NST. Ultimately, the OPUC and the Oregon courts rejected the PAL rates that Qwest had on file on April 15, 1997 (and May 19, 1997) and instead approved rates under the NST that were substantially less than *half* of Qwest's pre-existing PAL rates.

What makes Oregon unique is that, at the time the FCC adopted its requirements for pricing of PAL and Fraud Protection in 1996 and 1997, Qwest's rates for these services were *already under investigation* by the OPUC and were considered to be interim and subject to refund under state law. Thus, Qwest was effectively

¹ Although the Final Order is still subject to a reconsideration and appeal in theory, such further actions are unlikely because the Final Order was entered into pursuant to a stipulation by the interested parties.

² "Pre-existing" rates refers to rates that were on file before Qwest was required to comply with the NST; i.e., April 15, 1997—extended to May 19, 1997 for RBOCs that relied on the 1997 Waiver Order. See n.9 *infra*.

³ As well as screening, or "Fraud Protection," rates.



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precluded from implementing PAL or Fraud Protection rate revisions in Oregon by either the January 15, 1997, deadline set by the FCC or within the 45 day waiver period between April 4 and May 19, 1997. NPCC pursued its objections to Qwest's preexisting PAL and Fraud Protection rates through the Oregon rate case, since that was the OPUC's process for review of Qwest's rates. This situation existed in no other states.

Briefly, the salient facts of the Oregon PAL and Fraud Protection rate case are:

1. On the date of passage of Section 276 of the Telecommunications Act, Qwest was operating under an alternative form of regulation ("AFOR") in Oregon. The OPUC terminated Qwest's AFOR effective May 1, 1996 and commenced a rate case.⁴
2. As of May 1, 1996, Qwest's PAL and Fraud Protection rates became interim rates subject to refund under Oregon law.⁵ The PAL and Fraud Protection rates remained interim for years due to protracted litigation before the OPUC and Oregon Courts.
3. As of January 15, 1997, when RBOCs were obligated to file PAL and Fraud Protection rates consistent with Section 276, this Commission's orders, and the new services test, Qwest's existing PAL and Fraud Protection rates were already under investigation by the OPUC and were still interim.
4. In 1995 through 1997, the OPUC advised NPCC that all issues regarding Qwest's PAL and Fraud Protection rates, whether under the NST or otherwise, should be taken up in Qwest's rate case, OPUC Docket No. UT-125.
5. On information and belief, the OPUC also advised Qwest to take up PAL and Fraud Protection rate issues under the NST in Docket No. UT-125. Consistent with that likely advice, Qwest did not file any basic PAL or Fraud Protection rates or costs between June 1, 1996 and May 19, 1997.
6. On May 19, 1997, the OPUC entered an order holding that Qwest's PAL and Fraud Protection rates would remain as **"interim" and subject to refund** pending further investigation in its Docket No. UT-125. OPUC Order No. 97-171 (May 19, 1997).

⁴ OPUC Order No. 96-107.

⁵ *Id.*



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7. The first time **ever** that Qwest filed proposed PAL and Fraud Protection rates and costs with the OPUC purportedly in compliance with this Commission's orders and the NST was not until March of 2003.

8. On September 14, 2001, the OPUC entered Order No. 01-810, approving Qwest's proposed PAL and Fraud Protection rates, with minor changes and largely rejecting NPCC's arguments that Qwest's proposed PAL and Fraud Protection rates did not comply with the new services test or Section 276.

9. The NPCC appealed the OPUC's Order No. 01-810 and, on November 10, 2004, the Oregon Court of Appeals entered a decision reversing and remanding OPUC Order No. 01-810.⁶ Consistent with NPCC's arguments, the Court of Appeals held that Qwest's proposed PAL and Fraud Protection rates were unlawful in that they did not comply with Section 276, the NST, or this Commission's orders.⁷

10. Pursuant to the Court of Appeals remand, on March 31, 2006, Qwest filed its proposed PAL and Fraud Protection rates in OPUC Docket No. UT-125.

11. After further OPUC Staff investigation, Qwest, the OPUC Staff, and NPCC entered into a stipulation approving Qwest's 2006 proposed PAL and Fraud Protection rates.

12. Pursuant to the parties' stipulation, the OPUC entered the attached Final Order on November 15, 2007.

13. The attached Final Order concludes over 11 years of continuous litigation regarding Qwest's PAL and Fraud Protection rates and represents the **first order of the OPUC ever** that has approved Qwest's PAL and Fraud Protection rates that has not been overturned on appeal.⁸

The review of PAL and Fraud Protection rates in Oregon was extraordinarily slow for a number of reasons, most of which had nothing to do with the NST. The important fact, however, is that Qwest's rates exceeded the NST limits by a factor of three on April 15, 1997 and for many, many, years thereafter.

⁶ *Northwest Public Comm's Council v. PUC*, 100 P.3d 776 (2004).

⁷ Up until this point, the OPUC did not agree that Fraud Protection was subject to the NST.

⁸ As noted above, the Final Order remains appealable but no party remains that is likely to challenge it.



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The OPUC must still resolve the NPCC's related, long-standing complaint for refunds. But the OPUC has been holding the refund complaint in abeyance for over two years while it awaits guidance from the FCC regarding proper interpretation of the FCC's 1997 "Waiver Order."⁹ The OPUC requested this guidance in a November 23, 2005 letter to the FCC.

The FCC should take into account the Final Order and the unique facts of the Oregon rate case when ruling on the pending petitions in this docket by payphone associations seeking refunds from RBOCs. Under the circumstances presented in Oregon, the only outcome consistent with Section 276 and the Waiver Order is for the FCC to order Qwest to pay refunds of PAL and Fraud Protection overcharges retroactive to April 15, 1997.

Very truly yours,

Brooks E. Harlow, P.C.

cc: Ms. Pamela Arluk (via e-mail)
Mr. Daniel Gonzales (via e-mail)
Ms. Diane Griffin Holland (via e-mail)
Mr. Christopher Killion (via e-mail)
Mr. Al Lewis (via e-mail)
Ms. Tamara Priess (via e-mail)
Ms. Dana Shaffer (via e-mail)
Ms. Paula Silberthau (via e-mail)
Mr. Don Stockdale (via e-mail)

⁹ The "Waiver Order" was entered on April 15, 1997 in this docket. *In Re Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd. 21370 (April 15, 1997). More complete discussions of the history of both Qwest's Oregon PAL rate case and the NPCC's refund complaint can be found in prior comments and ex parte filings by NPCC.

EXHIBIT A

OREGON PUBLIC UTILITY COMMISSION
NOVEMBER 15, 2007 FINAL ORDER
UT-125

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UT 125

RECEIVED

NOV 19 2007

MILLER NASH LLP

In the Matter of)
)
 QWEST CORPORATION, fka U S WEST)
 COMMUNICATIONS, INC.)
)
 Application for an Increase in Revenues.)

ORDER

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.

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.

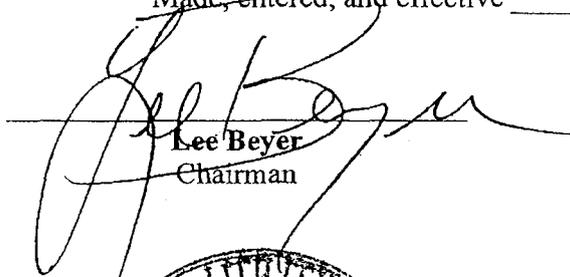
Appeals in its remand order. We therefore adopt the Stipulation and accept it and the supporting testimony and exhibits into the record in this docket.

ORDER

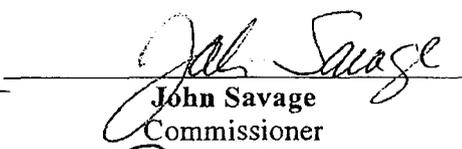
IT IS ORDERED that:

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 15 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.