STOEL RIVES LLP
ATTORNEYS AT LAW

600 University Street, Suite 3600
Seattle, Washington 98101
main 206.624.0900
fax 206.386.7500
www.stoel.com

TIMOTHY J. O'CONNELL
*Direct (206) 386-7562*
tjoconnell@stoel.com

December 17, 2009

**VIA ELECTRONIC MAIL AND FEDEX**

Public Utilities Commission of Oregon
Attention: Filing Center
550 Capitol Street N.E., Suite 215
Salem, OR 97301-2551

**Re:** ***Joint Application of Verizon Communications Inc. and Frontier Communications Corporation for an Order Declining to Assert Jurisdiction Over, or, in the Alternative, Approving the Indirect Transfer of Control of Verizon Northwest Inc.; UM 1431***

Dear Filing Center:

Enclosed for filing are an original and three copies of Applicants' Post-Hearing Brief in Opposition to Adoption of "Most Favored State Commitment" . If you have any questions regarding this filing, please do not hesitate to contact me.

Very truly yours,

John H. Phillips (OSB #065688)
FOR
Timothy J. O'Connell PER WRITTEN AUTHORIZATION

TJO/dld
Enclosures

**BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

**UM 1431**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| VERIZON COMMUNICATIONS INC., and FRONTIER COMMUNICATIONS CORPORATION | ) | **APPLICANTS' POST-HEARING BRIEF IN OPPOSITION TO ADOPTION OF A "MOST FAVORED STATE COMMITMENT"** |
| | ) | |
| Joint Application for an Order Declining to Assert Jurisdiction, or, in the Alternative, to Approve the Indirect Transfer of Control of VERIZON NORTHWEST INC. | ) | |

## I. INTRODUCTION

As explained in the Global Stipulation filed on December 4, 2009, the parties to this proceeding have resolved all the issues except one: Staff's proposal that the Commission impose a "most favored state commitment" on Frontier and Verizon ("Applicants").[1] The parties agreed to present this issue to the Commission for resolution. Global Stipulation ¶ 2. The Commission should not impose such a commitment. As discussed below, a most favored state commitment provision is bad public policy and creates procedural, as well as jurisdictional issues. If the Commission decides to impose such a provision, which the Applicants respectfully submit that it should not do, any such clause should be drafted differently than the one adopted in UM 1416.[2]

[1] Adoption of a most favored state commitment provision was described very briefly in the testimony of Mr. Michael Dougherty. Staff/100, Dougherty/60. Mr. Dougherty offered no rationale for the adoption of such a clause, other than noting that a similar condition had been included in previous Commission orders. Staff/100, Dougherty/50. No other party proffered any other testimony as to why such a condition should be imposed.

[2] If the Commission imposes a most favored state commitment provision, Applicants reserve their rights to challenge the legality of such a clause and any obligation imposed under it.

## II. ARGUMENT

### A. Implementation of a most favored state commitment provision would be bad public policy.

The Commission should not adopt a most favored state commitment provision because it is bad public policy and inequitable to the Applicants. As evidenced by the exhaustive list of conditions agreed to by the parties, the Global Stipulation was the result of extensive good faith negotiations. Various parties proposed numerous alternative conditions, and Applicants opposed many of them. Nevertheless, Applicants agreed to the conditions set forth in the carefully-considered Global Stipulation only from a desire to eliminate any controversy among the parties in Oregon that the appropriate standard was satisfied – to ensure that the transaction is "in the public interest [and] do[es] no harm." Like any such agreement, the resulting compromises reflect a process of give and take – a process that, by itself, resulted in a Global Stipulation that does no harm to Oregon ratepayers.

If different considerations are presented in different states, where priorities are or may be different, different compromises will result. For example, as Citizens' Utility Board witness Jenks testified at the hearing, "different states have various needs" (Tr. 43:16-19 and 45: 4-6 (noting that "West Virginia may be looking for, substantially, basic telephone infrastructure, and we may be looking for something different ...")).[3] Indeed, as the Administrative Law Judge recognized through questions at the hearing, a most favored state commitment clause's ability to bring in varying conditions from states with different priorities could ultimately impose too heavy of a burden on the transaction:

[3] Moreover, certain of the parties that could participate in settlements in other states did not participate in the Oregon docket; as a result, settlements and orders in those other dockets could lead to inconsistent provisions when added to Oregon.

> because of the fact that the states have different priorities, it would seem that it might put pressure on the whole deal because the overall level of priorities would then become like a rising tide that floats all boats and then may be beyond the scope of the ability of the transaction to accomplish.

Tr. 45: 13-18.

A most favored state commitment provision ignores these different priorities and state-specific negotiations and considerations. It also is one-sided in that it does not *eliminate* conditions that Applicants have agreed to in Oregon and that are reflected in the Global Stipulation if, for example, a different state imposes *fewer or less onerous* obligations. Accordingly, adoption of such a provision can only result in the unfair and one-sided alteration of the negotiated settlement by the parties. This constitutes bad policy and should be rejected.

Moreover, a most favored state commitment provision leaves open the possibility that the final settlement reached here could be reopened. It thus creates uncertainty regarding the benefits the settlement offers to Oregon because any party could terminate its participation in the settlement if it is changed through such a clause.

**B. A most favored state commitment provision would create procedural and jurisdictional issues.**

In addition to being bad policy, adoption of a most favored state commitment provision would create procedural and jurisdictional issues. For example, modifications arising from the operation of such a clause could lead to procedural problems under Oregon's Administrative Procedures Act ("APA"). The Global Stipulation is supported not only by the agreement of the parties, but the underlying testimony accepted into evidence at the hearing. There would be no such evidentiary support for any new term imported into the Commission's approval of the transaction through a most favored state commitment provision. With a lack of such evidence, any such order could not "disclose a rational relationship between the facts and the legal

conclusion reached." *Chase Gardens, Inc. v. Oregon Public Utility Commission*, 88 P.2d 1087 (Or. App. 1994). Thus, adoption of such a clause could lead to a modification that is procedural deficient and reversible under the APA.

Potential modifications under a most favored state commitment provision also could lead to questions as to whether the Commission exceeded the "no harm" standard that all parties agree governs this docket. Specifically, the parties have negotiated a Global Stipulation that resolves identified harms in Oregon. If the Commission were to go beyond that stipulation and reach to a provision imposed or agreed to from another state, it could lead to questions as to whether the Commission was attempting to resolve a harm not identified under the record of this docket or imposing a condition crafted under a law of a different state.

**C. The most favored state commitment provision from UM 1416 should not be adopted here.**

If the Commission decides to implement a most favored state commitment provision, which the Applicants respectfully submit it should not do, certain language used in such a clause from UM 1416 should not be adopted here. Specifically, condition (r) from Order No. 09-169 specifies that the Commission may adopt commitments or conditions from other states related to addressing harms of the transaction if:

> The commitment or condition does not result in the combined company being required to provide a "net benefit" and either: (a) the Commission or Staff had not previously identified the harm to Oregon ratepayers or (b) the commitments or conditions in a final order of another state are more effective at preventing a harm previously identified by the Commission or Staff.

Both (a) and (b) pose a number of problems. Subsection (a) fails to take into account the different priorities that different states may have, as discussed above. For example, (a) would allow the Commission to consider imposing a condition adopted in West Virginia, even though the transaction is being implemented in a much different way in West Virginia than in Oregon.

On systems, Frontier is using transferred data on its systems to serve customers in West Virginia rather than simply using replications of existing Verizon systems that it will acquire from Verizon to serve Oregon customers. Thus, the West Virginia systems situation is much different than that presented in Oregon, and is not something that should lead to adoption of new conditions in Oregon.

And subsection (b) would allow the Commission to impose a condition later on the same harm that the Commission or Staff identified here, but that involved a different solution. Obviously, the parties have worked hard here to develop proposals to counteract perceived harms, and those proposals should not be disturbed by mechanisms adopted in another state.

If the Commission rejects the above arguments and adopts a most favored state commitment provision, it should modify the clause adopted in UM 1416 to mitigate its bad (and unlawful) effect. Applicants propose the following modifications to remedy the problems outlined above (with the bolded and strike-through markings indicating changes from the clause adopted in UM 1416):

> The commitment or condition does not result in the combined company being required to provide a "net benefit" and ~~either~~: (a) the Commission or Staff had not previously identified the harm to Oregon ratepayers; ~~or~~ (b) **the transaction is not being implemented in the other state differently than in Oregon; and (c) the harm identified in the other state is not primarily applicable to that state.** ~~the commitments or conditions in a final order of another state are more effective at preventing a harm previously identified by the Commission or Staff~~.

Also, the implementation process for the most favored state commitment provision adopted in UM 1416 is too long and cumbersome, and could unnecessarily impact the timing of the closing of the transaction. If the Commission adopts such a clause, it should also include an expedited schedule to evaluate any proposed additional conditions. Specifically, the schedule for considering any comments on provisions from another state should allow the Commission a

period of twenty (20) days from the entry of the order in the other state to decide whether to take any action. If the Commission fails to act during this time period, no additional conditions from that state will be imposed.

## III. CONCLUSION

For all the foregoing reasons, the Commission should not adopt a most favored state commitment provision. It should approve the Global Stipulation without such an additional condition, and also approve the transaction.

Respectfully submitted, December 17, 2009.


STOEL RIVES LLP

John H. Ridley (OSB #065688)

By: PER WRITTEN AUTHORIZATION (12/17/09)
Timothy J. O'Connell, OSB No. 931439
Jason Johns, OSB No. 077000

600 University Street, Suite 3600
Seattle, WA 98101
Telephone: (206) 628-0900
Facsimile: (206) 386-7500
Email: tjoconnell@stoel.com

VERIZON NORTHWEST INC.

John H. Ridley (OSB #065688)

By: PER WRITTEN AUTHORIZATION (12/17/09)
Gregory M. Romano
General Counsel

1800 41st Street, WA0105GC
Everett, WA 98201
Telephone: (425) 261-5460
Facsimile: (425) 252-4913
Email: gregory.m.romano@verizon.com
*Admitted pro hac vice*

FRONTIER COMMUNICATIONS CORP.

John H. Ridley (OSB #065688)

By: PER WRITTEN AUTHORIZATION (12/17/09)
Charles L. Best, OSB No. 78142

1631 NE Broadway, Suite 538
Portland, OR 97232
Telephone: (503) 287-7160
Facsimile: (503) 287-7160
E-mail: chuck@charleslbest.com

# UM 1431
# CERTIFICATE OF SERVICE

I hereby certify that I have this day served this document upon all of the following parties, as follows:

**Public Utilities Commission of Oregon**
Attention: Filing Center
550 Capitol Street N.E., Suite 215
Salem, OR 97301-2551
PUC.FilingCenter@state.or.us
**VIA FEDERAL EXPRESS & EMAIL**

**Michael T. Weirich**
Department of Justice
1162 Court Street NE
Salem, OR 97301-4096
michael.weirich@state.or.us
**VIA EMAIL & FEDERAL EXPRESS**

**Charles L. Best**
Attorney at Law
1631 NE Broadway, Suite 538
Portland, OR 97232-1425
chuck@charleslbest.com
**VIA EMAIL & FEDERAL EXPRESS**

**Kevin L. Saville**
Frontier Communications of America, Inc.
2378 Wilshire Blvd.
Mound, MN 55364
kevin.saville@frontiercorp.com
**VIA EMAIL & FEDERAL EXPRESS**

**I.**

**G. Catriona McCracken**
Staff Attorney
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
catriona@oregoncub.org
**VIA EMAIL & FEDERAL EXPRESS**

**Bob Jenks**
Executive Director
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
bob@oregoncub.org
**VIA EMAIL & FEDERAL EXPRESS**

**Gordon Feighner**
Utility Analyst
Citizens' Utility Board of Oregon
610 SW Broadway, Suite 308
Portland, OR 97205
gordon@oregoncub.org
**VIA EMAIL & FEDERAL EXPRESS**

**Mark P. Trinchero**
Davis Wright Tremaine LLP
1300 SW Fifth Avenue, Suite 2300
Portland, OR 97201
marktrinchero@dwt.com
**VIA EMAIL & FEDERAL EXPRESS**

**Gregory J. Kopta**
Davis Wright Tremaine LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-1688
gregkopta@dwt.com
**VIA EMAIL & FEDERAL EXPRESS**

**Lisa F. Rackner**
**Adam Lowney**
McDowell & Rackner
520 SW 6th Street, Suite 830
Portland, OR 97204
lisa@mcd-law.com
**VIA EMAIL & FEDERAL EXPRESS**

**Katherine K. Mudge**
Director State Affairs & ILEC Relations
7000 N. Mopac Expwy 2nd Fl
Austin, TX 78731
kmudge@covad.com
**VIA EMAIL & REGULAR U.S. MAIL**

**Dennis Ahlers**
IntegraTelecom
6160 Golden Hills Dr.
Golden Valley, MN 55416-1020
ddahlers@integratelecom.com
**VIA EMAIL & REGULAR U.S. MAIL**

**Lyndall Nipps**
VP Regulatory Affairs
TW Telecom of Oregon LLC
845 Camino Sur
Palm Springs, CA 92262-4157
Lyndall.Nipps@twtelecom.com
**VIA EMAIL & REGULAR U.S. MAIL**

**Rex Knowles**
XO Communications Services
7050 Union Park Ave., Suite 400
Midvale, UT 84047
rex.knowles@xo.com
**VIA EMAIL & REGULAR U.S. MAIL**

**Scott Rubin**
Attorney/Consultant
333 Oaklane
Bloomsburg, PA 17815
scott@publicutilityhome.com
**VIA EMAIL & FEDERAL EXPRESS**

**Andrew Fisher**
One Comcast Center
Philadelphia, PA 19103
andrew_fisher@comcast.com
**VIA EMAIL & REGULAR U.S. MAIL**

**Ray Egelhoff**
Business Manager
P.O. Box 2330
Everett, WA 98213
rayegelhoff@ibew89.com
**VIA EMAIL & REGULAR U.S. MAIL**

**Michael Dougherty**
OPUC
P.O. Box 2148
Salem, OR 97308-2148
michael.dougherty@state.or.us
**VIA EMAIL & REGULAR U.S. MAIL**

**Eugene M. Eng**
20575 NW Von Neumann Dr.
Suite 105 MC OR 030156
Hillsboro, OR 97006
Eugene.Eng@verizon.com
**VIA EMAIL & REGULAR U.S. MAIL**

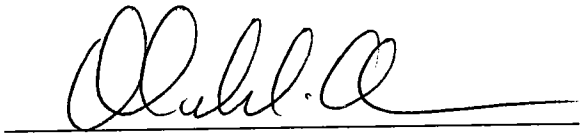
**Paul Hays**
Attorney at Law
Carney, Buckley, Hays & Marsh
1500 SW First Ave., Suite 105
Portland, OR 97201
pchayslaw@comcast.net
**VIA EMAIL & REGULAR U.S. MAIL**

**Michael Singer Nelson**
360Networks
867 Coal Creek Cir., Suite 160
Louisville, CO 80027
mnelson@360.net
**VIA EMAIL & REGULAR U.S. MAIL**

**Greg L. Rogers**
Level 3 Communications
1025 Eldorado Boulevard
Broomfield, CO 80021
greg.rogers@level3.com
**VIA EMAIL & REGULAR U.S. MAIL**

**William A. Haas**
PAETEC Communications
1 Martha's Way
Cedar Rapids, IA 52233
bill.haas@paetec.com
**VIA EMAIL & REGULAR U.S. MAIL**

DATED: December 17, 2009.



Debbie Dern