

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC  
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Respondent.

QWEST CORPORATION'S RESPONSE  
TO NPCC'S MOTION THAT CASE BE  
CLASSIFIED AS MAJOR PROCEEDING  
AND REQUESTING ORAL ARGUMENT

Qwest Corporation ("Qwest") respectfully submits this response to NPCC's motion requesting that the Administrative Law Judge ("ALJ") classify this case as a "major proceeding" and grant oral argument ("NPCC's Motion"). The ALJ should deny NPCC's motion because the major proceeding statute and rule do not apply to this case. Even if they did, this case does not qualify under either the mandatory or discretionary provisions of the Commission's rule regarding major proceedings.

**I. The Major Proceeding Rule Does Not Apply To This Case**

NPCC's request is based upon ORS 756.518(2) and OAR 860-014-0023, implementing that statute. ORS 756.518(2) was effective on January 1, 2002. 2001 Or Laws c. 558 § 3. That statute required the Commission to "adopt rules that establish criteria for determining which proceedings give rise to a right to oral argument under the subsection." OAR 860-014-0023 was effective as a temporary rule in December 2002 and as a permanent rule in March 2003. This proceeding, however, was commenced in May 2001, before either the statute or the rule were passed.

It is axiomatic that statutes and rules have prospective effect only, unless the intent of the legislature to provide retroactive effect is clear. *State ex rel. Juv. Dept. of Multnomah County*, 192 Or App 604, 609, 87 P3d 680 (2004). ORS 756.518(2) does not demonstrate any legislative

intent that the statute or resulting rule have retroactive effect, that is upon proceedings already commenced at the time the statute and rule were passed. Accordingly, the major proceeding statute and rule apply only to PUC proceedings commenced after the statute and rule became effective, and do not apply to this case.

This conclusion is confirmed by OAR 860-014-0023(3), which requires a party to file a petition for a case to be classified as a major proceeding "when a docket is opened." The PUC thus intended the rule to apply prospectively to new dockets, not to existing dockets. NPCC's Motion was filed more than three and one-half years after this docket was opened. This case is simply not subject to the major proceeding rule, and the ALJ should deny NPCC's Motion for that reason alone.

## **II. This Complaint Proceeding Does Not Qualify as a Major Proceeding**

Even if this case were subject to the major proceeding rule, it does not qualify under the mandatory criteria. As NPCC notes, two conditions are required to meet the definition of a major proceeding:

- "a proceeding that has, or is expected to have, a full procedural schedule with written testimony or written comments"; and
- "Has a significant impact on utility customers or the operations of a regulated utility . . ."<sup>1</sup>

OAR 860-014-0023(1). NPCC cannot satisfy either of these two required conditions.

First, this proceeding does not currently have a full procedural schedule with written testimony or written comments. Indeed, there is currently no procedural schedule whatsoever in this proceeding. The current activity in this case results from NPCC's motion for summary

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<sup>1</sup> NPCC does not attempt to qualify under the condition that a proceeding have "a substantial impact on utility rates or service quality . . ." OAR 860-014-0023(1)(a).

judgment and Qwest's cross-motion for summary judgment. No schedule has yet been established, let alone a "full procedural schedule."

NPCC bases its argument that a full procedural schedule is "expected" on its assumption that the Commission will grant NPCC's motion for summary judgment and deny Qwest's cross-motion for summary judgment. That, of course, remains to be seen. If the Commission grants Qwest's cross-motion for summary judgment, NPCC's Complaint will be dismissed and there will be no further proceedings in this matter. Given the pending cross-motions, it is not possible to conclude at this time that this proceeding is "expected" to have a "full procedural schedule." If this were the only criterion, the ALJ should deny NPCC's Motion with leave to renew after summary judgment is decided; however, this is not the only criterion, and the ALJ should deny the motion because NPCC cannot satisfy the second condition.

Second, regardless of the decision on the pending motions for summary judgment, this case will not have "a significant impact on utility customers."<sup>2</sup> This is simply a complaint proceeding brought on behalf of a small number of customers against Qwest. NPCC has identified that "about a dozen of Qwest's customers from April of 1997 through at least March 2003" may benefit from an award of damages in this proceeding. NPCC's Motion at 2. NPCC then argues that a decision in its favor will be "significant" to each of these twelve or so customers. Qwest submits that a potential impact on a dozen customers of a utility with approximately one million customers is not what the legislature had in mind as a "major proceeding," or what the Commission had in mind when it described a major proceeding as one that "has a significant impact on utility customers." Rather, the Commission must have intended that the proceeding have an impact on a significant number of the utility's customers, not a significant impact on a very small number of customers. There is not a material difference

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<sup>2</sup> NPCC also does not assert that this proceeding will have a significant impact on the operations of a regulated utility. OAR 860-014-0023(1)(b).

between one customer or twelve customers when viewed in light of the utility's one million customers. Clearly, the Commission intended the term "utility customers" to refer to a significant portion of a utility's customers, not to only one or a dozen customers.

For these reasons, this case does not qualify as a major proceeding.

### **III. The ALJ Should Not Grant Major Case Status**

OAR 860-014-0023(2) allows the ALJ to grant major case status if one of two conditions is met. In this case, NPCC relies upon only one of these conditions, that the case "raises novel questions of fact or law."

NPCC cannot meet this test either. NPCC argues that the question in this case is novel because it is one of "first impression" before this Commission. As discussed in Qwest's memorandum in support of its cross-motion for summary judgment, however, this precise issue has been faced by an appellate court in New York, based upon identical facts. Thus, there is nothing novel about this issue. Moreover, while this may be an issue of first impression for this Commission, it is also an issue of "only impression" for this Commission. That is, NPCC purports to bring this complaint on behalf of all payphone providers who might benefit from NPCC's claim based upon a 1997 FCC order. Regardless of who prevails in this case, once this case is decided, this issue will not come before the Commission again. Thus, this case will not establish any precedent that could be used by this Commission in any other case. For these reasons, any novelty in the legal issue does not justify a major case designation. Finally, the issues of law present in this case arise under FCC orders and not under Oregon law or regulatory policy. For these reasons, designation as a major case based on a "novel question of law" is not appropriate.

### **IV. The ALJ Should Deny Oral Argument**

NPCC first requests oral argument based upon its petition to have the ALJ designate this proceeding as a major proceeding. This request should be denied once the ALJ denies the request for designation as a major proceeding.

NPCC argues in the alternative that the ALJ should grant oral argument in his discretion. However, since NPCC fails to meet the criteria for designation as a major proceeding, there is no other basis upon which to grant oral argument. Moreover, Qwest respectfully submits that the briefing in this case will provide an adequate basis upon which the Commission can base a decision. In any event, oral argument to the Commission is not appropriate in this case. This case presents a narrow legal issue, based upon application of numerous FCC orders. It does not present questions of fact or regulatory policy that might benefit from a hearing in front of the Commission. In order for the Commissioners to participate meaningfully in an oral argument, they would need to review the lengthy briefs and orders that are at issue. Such effort is not appropriate in a simple complaint proceeding.


Should the ALJ desire to hear oral argument in connection with the pending cross-motions for summary judgment, Qwest would certainly be willing to participate; however, Qwest does not believe that oral argument in front of the Commission is appropriate in this case. For these reasons, the ALJ should deny the request for oral argument or, at most, grant oral argument in front of the ALJ, if the ALJ would find that helpful.

**CONCLUSION**

For the foregoing reasons, the ALJ should deny NPCC's motion to designate this proceeding as a major proceeding. The ALJ should also deny NPCC's request for oral argument before the Commission.

DATED: February 4, 2005.

**PERKINS COIE LLP**

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**CERTIFICATE OF SERVICE**

I hereby certify that I served the foregoing QWEST CORPORATION'S RESPONSE TO NPCC'S MOTION THAT CASE BE CLASSIFIED AS MAJOR PROCEEDING AND REQUEST FOR ORAL ARGUMENT on:

Brooks E. Harlow  
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by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by fax), to be sent by the following indicated method or methods, on the date set forth below:

by **mailing** in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service at Portland, Oregon.

DATED: February 4, 2005.

**PERKINS COIE, LLP**

By   
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Attorneys for Respondent Qwest Corporation