

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 COMPLAINANTS' MOTION FOR
ENLARGEMENT OF TIME TO FILE
SUMMARY JUDGMENT BRIEF

I. INTRODUCTION AND SUMMARY OF ARGUMENT

Qwest Corporation ("Qwest") respectfully submits this response to Complainants' Motion for Enlargement of Time To File Summary Judgment Brief (the "Motion"). Complainants assert a number of things in their Motion, but none of them supports extending the time for Complainants to file a cross-motion for summary judgment. In fact, Complainants' Motion is just another in a long series of tactics by Complainants to *completely avoid* having this Commission decide the Complaint Complainants themselves filed here more than nine years ago, based on Complainants' new-found belief that the Commission does not have jurisdiction to resolve their Complaint.

Complainants have now filed *three* other actions in pursuit of their strategy to interfere with the Commission's proceeding to decide their PUC Complaint – two in federal court and one in the Oregon Court of Appeals. None of the other proceedings that Complainants have initiated justifies granting Complainants any further extension in this case. Indeed, it is the courts in these other proceedings, not the Commission, that lack jurisdiction to proceed for a variety of different reasons, as discussed below. Moreover, there is no possibility that the Oregon Court of Appeals will stay this proceeding or issue any other order that should cause the Commission not to

1 proceed to decide this case on summary judgment on the current schedule.

2 If Complainants do not wish to have the Commission resolve their Complaint, that is
3 entirely within their control – they can voluntarily dismiss their Complaint. If they do not do
4 that, then this Commission should continue – as it has correctly determined to do – to resolve the
5 Complaint in a timely manner. Not only is Complainants' litigation strategy causing Qwest to
6 incur substantial, additional expense in having this claim resolved, Complainants have now
7 dragged the Commission itself into litigation in federal court and the Oregon Court of Appeals.
8 The only way to bring this to a conclusion is for the Commission to stay on the course it has
9 charted, which is to resolve the Complaint on summary judgment. If Complainants do not wish
10 to file a cross-motion for summary judgment, then the Commission should simply proceed to
11 decide Qwest's motion, filed more than 60 days ago.

12 II. ARGUMENT

13 A. Nothing in the Federal Court Proceedings Justifies an Extension

14 Complainants first argue that two actions in the federal court justify an extension. The
15 first is the fact that the District Court has continued its hearing on Qwest's motion to dismiss
16 until July 22, 2010. Motion at 1. That fact does not justify an extension. Qwest's motion to
17 dismiss was already briefed and scheduled for argument when the Commission established the
18 current briefing schedule on June 4, 2010. The pendency of that proceeding did not cause the
19 Commission to stay its hand in deciding this case on the merits, and there is no reason to change
20 that decision. Nor is there anything new about the fact that Complainants have filed a motion for
21 summary judgment in the District Court. Motion at 2. They filed that motion on March 10,
22 2010, and the Court has decided not to require a response until it first decides Qwest's motion to
23 dismiss. Qwest is confident that the District Court will dismiss Complainants' case and will
24 never decide their motion for summary judgment.

25 The second fact that Complainants assert in support of their Motion is that they have filed
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1 a new action in District Court seeking judicial review of the Commission's Order No. 09-155,
2 which denied, in part, Complainants' motion to amend the PUC Complaint. Motion at 1. This
3 new filing also does not justify an extension for several reasons. First, Order No. 09-155 is not a
4 "final order" subject to judicial review in any forum. ORS 756.610; 183.310(6)(b). It is only an
5 intermediate, procedural order that can be reviewed only after the Commission has fully resolved
6 Complainants' Complaint. Second, even if that were a final order, jurisdiction for review of
7 Commission orders lies exclusively with the Oregon Court of Appeals. *Id.* The federal court has
8 no jurisdiction to review Order No. 09-155. Third, Complainants' appeal of Order No. 09-155, if
9 it were an appealable final order, is untimely in any court. As the Commission noted in Order
10 No. 10-027, Complainants did not timely seek clarification, rehearing, or review of Order No.
11 09-155. Order No. 10-027 at 7.

12 Fourth, even if the appeal were appropriate despite these other reasons, and even if
13 Complainants ultimately prevail on that appeal (both of which are extremely unlikely, the latter
14 because of the Commission's broad discretion in deciding motions to amend a complaint), there
15 is still no reason the Commission should not proceed to decide Complainants' claim with respect
16 to PAL services at this time. The only aspect of Order No. 09-155 that Complainants seek to
17 have reviewed is the denial of their motion to amend the Complaint to add a claim for refund of
18 CustomNet services. However, as the Commission noted in Order No. 09-155 at 8, the claim for
19 refund of CustomNet charges "do[es] not arise 'out of the [same] conduct, transaction, or
20 occurrence" as the claim for refund of PAL charges. Therefore, there is no inefficiency in the
21 Commission's continuing to proceed with deciding Complainants' PAL refund claim on what
22 could theoretically be a separate track.

23 Moreover, Complainants are wrong when they say that the District Court may decide the
24 extent of the PUC's jurisdiction to proceed. Motion at 1. As discussed in connection with
25 Complainants' previous motions to stay or extend, the District Court is not being asked to decide
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1 whether this case can proceed before the Commission. Again, if Complainants do not wish to
2 have the Commission decide their Complaint, that is entirely within their control and they do not
3 need to resort to multiple cases in different fora to achieve that result.

4 **B. The Petition for Judicial Review and Motion for Stay Filed at the Court of Appeals
5 Do Not Justify an Extension**

6 Complainants also state that they are entitled to an enlargement of time because they have
7 filed for judicial review of Order No. 10-027 with the Oregon Court of Appeals and, in
8 connection with that appeal, have moved the Court for a stay pursuant to ORS 756.610. None of
9 these other facts justifies an extension for several reasons. First, Order No. 10-027 also is not a
10 "final order" subject to appeal under ORS 756.610. It is only an intermediate, procedural order
11 that struck Complainants' proposed First Amended Complaint to the extent it included a claim
12 for CustomNet refunds in violation of Order No. 09-155, and denied Complainants leave to file a
13 Second Amended Complaint that would have included a brand-new claim for refunds under the
14 Commission's orders in Qwest's rate case, Docket UT 125, and under ORS 759.185. Order No.
15 10-027 is not a final order subject to appeal. Moreover, the Commission's order denying leave to
16 file the Second Amended Complaint was not even prejudicial to Complainants as the ALJ
17 indicated that Complainants may seek to raise issues concerning the rate case by filing a separate
18 petition.

19 Second, Complainants' motion for stay does not justify an extension. ORS 756.610(2),
20 pursuant to which Complainants have requested a stay, authorizes a stay only of "the order" that
21 is subject to appeal; it does not authorize a stay of *proceedings*. Thus, even if the Court of
22 Appeals decides it has jurisdiction to hear an appeal of Order No. 10-027 (which is extremely
23 unlikely), and even if it decides there is good cause to grant the stay (also unlikely), any stay
24 would affect only Order No. 10-027. The only thing that order requires Complainants to do is to
25 file an amended complaint in compliance with the Commission's orders. Any stay granted by the
26 Court of Appeals would not, and could not, stay *proceedings* at the Commission. Thus, there is

1 no reason for the Commission to extend the due date for Complainants to file for summary
2 judgment as there is no possibility that the Court of Appeals will stay this proceeding.

3 Finally, there is no reason to believe that the Court of Appeals will act on Complainants'
4 motion to stay within two weeks as Complainants represent. Motion at 2. Undoubtedly, Qwest,
5 and perhaps also the Commission, will first move the Court to dismiss the appeal as there is no
6 final order subject to review. Such a motion can take several weeks to be fully briefed and
7 decided. In effect, Complainants are attempting to use their baseless appeal as a reason to obtain
8 an indefinite stay of this case, which efforts the Commission has correctly rejected many times
9 already this year.

10 III. CONCLUSION

11 For the foregoing reasons, the Commission should deny Complainants' motion to enlarge
12 time. The Commission should require Complainants to file a motion for summary judgment as
13 currently scheduled for July 8, 2010, or waive such a filing. If Complainants choose not to file
14 such a motion, then the Commission should maintain the date of July 29, 2010 for Complainants
15 to respond to Qwest's motion for summary judgment and should then allow Qwest to file a reply
16 in support of its motion by August 19, 2010.

17 DATED: July 7, 2010.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 7th day of July, 2010, served the foregoing QWEST
3 CORPORATION'S RESPONSE TO COMPLAINANTS' MOTION FOR ENLARGEMENT OF
4 TIME TO FILE SUMMARY JUDGMENT BRIEF upon all parties of record in this proceeding
by causing a copy to be sent by electronic mail and U.S. mail to the following addresses:

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