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April 19, 2010

Frances Nichols Anglin  
Oregon Public Utility Commission  
550 Capitol St., NE  
Suite 215  
Salem, OR 97301

Re: DR 26 / UC 600

Dear Ms. Nichols Anglin:

Enclosed for filing in the above entitled matter please find an original and (5) copies of Qwest Corporation's Opposition to Complainant's Motions to Reconsider Order No. 10-027 and to Stay Proceeding, along with a certificate of service.

If you have any questions, please do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink that reads "Carla". The signature is written in a cursive, flowing style.

Carla M. Butler

CMB:  
Enclosure

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/UC 600

<p>THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, et al.</p> <p>Complainants,</p> <p>v.</p> <p>QWEST CORPORATION,</p> <p>Defendant.</p>	<p><b>QWEST CORPORATION'S OPPOSITION TO COMPLAINANTS' MOTIONS TO RECONSIDER ORDER NO. 10-027 AND TO STAY PROCEEDINGS</b></p>
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Defendant Qwest Corporation (“Qwest”) respectfully responds to the Consolidated Motions to Reconsider and Vacate Order No. 10-027 and to Stay Proceedings (the “Motion”) that complainants Northwest Public Communications Council (“NPCC”) and various payphone service providers (“PSPs”) (collectively “Complainants”) filed on April 2, 2010. For the reasons set forth below, Qwest respectfully submits that Complainants have failed to meet their burden for a motion for reconsideration, that the Commission properly denied Complainants’ motion for leave to file amended complaints in Order No. 10-027 to add claims that the Commission had previously rejected, and that Complainants fail to meet their burden for a stay of Order No. 10-0278 or a stay of this proceeding.

**ARGUMENT**

**I. COMPLAINANTS FAIL TO MEET THE BURDEN ON RECONSIDERATION**

**A. Legal Standard for a Motion for Reconsideration**

The Commission’s rules set forth four possible bases for a motion for reconsideration. See OAR 860-014-0095(3). Complainants base their motion on (1) OAR 860-014-0095(3)(c), which allows the Commission to reconsider a previous order if there has been “[a]n error of law or fact in the order which is essential to the decision,” and (2) OAR 860-014-0095(3)(d), which

allows reconsideration if there is “[g]ood cause for further examination of a matter essential to the decision.” For the reasons below, there is neither an error of law or fact, nor good cause, for reconsideration, and thus Complainants fail to meet their burden under either of these bases.

**B. Rulings sought to be reconsidered**

The Commission order that Complainants ask the Commission to reconsider is Order No. 10-027 (the “Order”), which the Commission issued on February 1, 2010. The Order granted in part, and denied in part, Qwest’s December 8, 2009 motion to strike the First Amended Complaint that Complainants filed on November 16, 2009. The Order also granted in its entirety Qwest’s motion to strike the Second Amended Complaint that Complainants had filed on that same day (a few minutes apart), and further denied Complainants’ “precautionary” motion to allow the filing of the Second Amended Complaint.<sup>1</sup>

In its Order, the Commission allowed the First Amended Complaint only to the extent that it identified the specific PSPs named in Exhibit A thereto and made them parties to this proceeding.<sup>2</sup> The Commission, however, denied that portion of the First Amended Complaint that included a claim for refunds for “CustomNet” services because the Commission previously had rejected NPCC’s attempt to broaden the scope of the case by including claims regarding CustomNet services which the Commission decided were time-barred, and thus struck all references to CustomNet services from the First Amended Complaint. Order, pp. 6-8. The

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<sup>1</sup> Qwest also notes that on February 12, 2010, Complainants filed a motion for additional time until February 17, 2010 to file their Third Amended Complaint that is consistent with the Order, which Administrative Law Judge Allan Arlow granted on February 16, 2010. However, Complainants have failed to file the Third Amended Complaint as directed. In addition, on February 17, 2010, Complainants filed a motion for a stay of the proceedings pending the filing of a motion for reconsideration of the Order, which is the present motion. However, Judge Arlow denied that motion on March 11, 2010. Nevertheless, Complainants have still failed to file the Third Amended Complaint as directed.

<sup>2</sup> These were the same entities that the original Complainant, NPCC, had sought leave to add as parties more than a year ago, on February 26, 2009, and which the Commission granted in Order No. 09-155 on May 4, 2009. The Order at issue here is consistent with the Commission’s Order No. 09-155 in May 2009.

Commission also denied the Second Amended Complaint *in its entirety* because it not only improperly sought to include a claim for CustomNet refunds, but it also sought to add entirely new claims. Specifically, the Second Amended Complaint sought to allege claims for refunds under ORS 759.185 and the Commission's rate case and refund orders in Dockets UT 125 and UT 80, which are completely unrelated to the refund claims under the FCC "New Services Test" payphone orders, and thus which would have unduly broadened the scope of this proceeding. Order, pp. 7-8.

In essence, the Commission denied Complainants leave to file their proposed First Amended and Second Amended Complaints because these pleadings were inconsistent with the Commission's previous decision regarding proposed amendments to the original complaint in Order No. 09-155, and they would have impermissibly expanded the scope of this proceeding. Order, pp. 6-7. The Commission considered Complainants' motions to further amend the complaint to be *collateral attacks* on Order No. 09-155, which was not previously challenged. Accordingly, the Commission found the proposed First Amended and Second Amended Complaints, as filed, to be improper. *Id.*, pp. 6-8.

**C. The Commission properly denied the motion as to CustomNet claims**

The Commission properly denied Complainants' motion seeking to add CustomNet claims to their two proposed amended complaints for several reasons.

**1. The Commission did not apply an incorrect legal standard in deciding the motion to amend the complaint**

Complainants argue, without citation to authority, that "the Commission failed to see that the appropriate standard of review to the allowance of the filing of an [a]mended [c]omplaint is whether or not the opposing party had notice as to the 'possibility' of the claims as opposed to weighing their merits." Motion, p. 10; see also p. 6. Complainants go on to argue, again without

citation to authority, that “[t]he standard is to allow the pleading and then after it has been pled[,] the opposite party is entitled to move against the pleading.” Motion, p. 10. Complainants further argue that the Commission further erred because its previous ruling (Order No. 09-155) was based on a filing by Complainant NPCC, but not by the PSP complainants. *Id.* Finally, Complainants argue that the Commission’s denials of the amended complaints as to the CustomNet claims (both the Order and Order No. 09-155) were a “prejudgment” of the issue.

Complainants are simply mistaken, as the appropriate standard for amending a complaint is not to automatically grant leave to amend, and then allow the defendant to oppose the complaint later. That is not the law in Oregon; not surprisingly, Complainants do not cite to any authority in support of this claim. This is especially so since the Commission has already *previously denied*, more than a year ago, Complainants’ attempts to improperly expand the scope of this proceeding eight years after it was filed by seeking to assert claims the Commission decided were time-barred. Accordingly, the Commission did not apply an incorrect legal standard in deciding the motion to amend the complaint again.

In fact, the Commission has broad discretion to grant or deny a motion to amend a complaint. See e.g., *Sheets v. Knight*, 308 Or. 220, 236, 779 P.2d 1000, 1010, 1989 Ore. LEXIS 166 (1989) (“The general rule [for amendments under ORCP 23A] is that ‘a ruling on a motion to amend pleadings is within the discretion of the trial court [here, Commission] and that this court will not reverse unless a manifest abuse of discretion has occurred’” (citing to *Pacific Form Corp. v. Burgstahler*, 263 Or. 266, 274, 501 P.2d 308 (1972)); *Contractors, Inc. v. Form-Eze Systems, Inc.*, 68 Or. App. 124, 129, 681 P.2d 148, 151, 1984 Ore. App. LEXIS 3132 (“ORCP 23A provides that a party may amend pleadings at any time by leave of court,” but “[t]he [Commission] has broad discretion in determining when justice requires amendment to a

complaint, and its decision will not be disturbed unless it is shown that the [Commission] exceeded the bounds of its discretion”).

**2. The Commission did not commit error by not considering again the same arguments that it had previously rejected**

Complainants concede that they are bound by Commission’s May 2009 order (Order No. 09-155), which they did not challenge in any way. Motion, p. 6. Nevertheless, they now challenge the Order (No. 10-027) by essentially arguing that the Commission erred in denying an opportunity to add CustomNet claims in their newly-proposed First Amended Complaint and Second Amended Complaint. But that is precisely *what NPCC had argued in 2009* in seeking to add CustomNet claims to their originally-proposed first amended complaint.<sup>3</sup> Given that Order No. 09-155 was not challenged, the Commission was correct in not considering the same substantive arguments that were unsuccessfully made in 2009. As such, Complainants cannot reasonably argue that the Commission erred by refusing to reconsider that same issue almost a year later, and they cannot point to any such error (or authority for such a proposition).

**3. The Court of Appeals’ “Remand Order” does not require the Commission to consider a claim for refund of CustomNet charges**

In a rather novel argument, the Complainant now argue that the Oregon Court of Appeals November 2004 order (“Remand Order”) required this Commission to consider refunds for CustomNet services. The Court of Appeals’ Remand Order did nothing of the sort. Indeed, there is absolutely nothing in the Remand Order that even references, or even suggests, any “refunds” for CustomNet charges. Rather, all that the Remand Order did was remand the case back to the Commission with instructions for the Commission to reconsider its previous rate-

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<sup>3</sup> See e.g., NPCC’s February 26, 2009 Motion for Leave to Amend Complaint; NPCC’s March 30, 2009 Reply in Support of Complainant’s Motion for Leave to Amend Complaint; see also Order No. 09-155, pp. 7-8

setting orders in the Docket UT 125 rate case (Order Nos. 01-810 and 02-009) in light of the FCC's "New Services Test" and orders, with prospective application only. The Court of Appeals did not require the Commission to consider refunds for CustomNet services. Indeed, "refunds" are not even discussed in the Remand Order.

4. **CustomNet services are separate from PAL (payphone) services and were not included in the original Complaint**

Complainants also apparently seek to rewrite history by arguing that CustomNet services were already in the NPCC's original 2001 complaint. However, that argument has absolutely no merit. First, even a cursory review of the original May 2001 complaint shows that CustomNet was *not* mentioned or referenced in it. *See e.g.*, NPCC's May 11, 2001 Complaint.

Perhaps just as importantly, if CustomNet services *were* part of the original complaint, there would have been no reason for the motion to amend the complaint to "add" CustomNet services in February 2009. Notably, nowhere in the February 26, 2009 motion to amend was there even a mention that CustomNet service was already part of the complaint, or that the motion was simply a clarification or precautionary move. *See e.g.*, February 26, 2009 motion.

5. **The Commission was not required to, and did not, consider evidence**

Throughout their motion, Complainants argue that the Commission made "evidentiary findings" in the Order. *See* Motion, pp. 9-11. The Commission did no such thing, however, and Complainants fail to identify any such evidentiary findings. Indeed, the Commission was in a position to make a decision, *as a matter of law*, in Order No. 09-155 that the most recent relevant case law unequivocally concluded that the applicable two-year statute of limitations poses an absolute bar to the addition of CustomNet claims to this case. Thus, the court decision upon

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(finding that the scope of the proceeding was the PAL (payphone) rate refunds, NPCC was seeking to broaden the scope of the case, and that addition of CustomNet claims did not "relate back" under ORCP 23C).

which the Commission relied (the Ninth Circuit in *Davel Communications, Inc. v. Qwest Corporation*, 460 F.3d 1075, 1089 (9th Cir. 2006)) was based on the court's holding that the CustomNet claims accrued in 1997, when Qwest was required to file New Services Test-compliant rates, and thus were barred (at least in part) by the applicable two-year statute of limitations under 47 U.S.C. § 415. Order No. 09-155, p. 8, fn. 29. The *Davel* court made this decision on a motion under an FRCP 12(b)(6) motion to dismiss, based on the allegations of the complaint, and did not make any evidentiary rulings. See *Davel*, 460 F.3d at 1083-84. Likewise, the Commission did *not* make any evidentiary rulings in Order No. 09-155, and simply applied its rulings from that order in the Order at issue here, so there is no merit to Complainants' argument that the Commission made "evidentiary rulings" without the benefit of evidence in the record.<sup>4</sup> Moreover, Complainants did not argue that the Commission was required to make evidentiary rulings when it sought leave to add these claims in February 2009, and cannot be heard to argue that for the first time now.

**6. The Commission correctly decided CustomNet claims are time-barred**

Similar to their argument that the Commission erred in making "evidentiary rulings," Complainants claim that the Commission relied on the Ninth Circuit's *Davel* decision "that would have to be based on evidentiary consideration." Motion, p. 11. Again, however, the Commission was well within its rights in relying on the Ninth Circuit's decision in *Davel*, which was also made as a *matter of law*, based on the undisputed facts, and thus, based on when a

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<sup>4</sup> There is also no merit to Complainants' repeated arguments that Qwest did not submit any evidence regarding "prejudice." Motion, pp. 10-11. First, the Commission could determine, as it did in 2009 (Order No. 09-155), as a *matter of law*, that Qwest would suffer prejudice by having Complainants add new substantive claims (CustomNet) to a complaint that was already eight years old. Moreover, Complainants apparently lose sight of the fact that they did not challenge Order No. 09-155. The order that they do challenge (Order No. 10-027) was not based on prejudice to Qwest. Rather, the Order was based on the fact that Complainants sought the *same relief* that they had unsuccessfully sought in 2009, and that they had not challenged the 2009 order, and thus that they were *collaterally challenging* that order. Order, pp. 6-7.



CustomNet claim would have accrued. The Ninth Circuit ruled on the CustomNet accrual issue as a matter of law by finding that accrual of such a claim did not require that “New Services Test”-compliant rates be in effect. Thus, the Commission correctly applied ORCP 23C in finding that the CustomNet claims accrued in 1997 and do not “relate back” to the original complaint’s PAL refund claims. Certainly, the Commission did not abuse its discretion in denying leave to add these claims. See e.g., *Sheets v. Knight, supra*, 308 Or. at 236, 779 P.2d at 1010 (abuse of discretion standard regarding the denial of a motion to amend a complaint); *Pacific Form Corp. v. Burgstahler, supra*, 263 Or. at 274 (same); *Contractors, Inc. v. Form-Eze Systems, Inc., supra*, 68 Or. App. at 129 (same).

7. **An amended complaint is not required to update the law**

Finally, Complainants argue that their proposed amendments are necessary to update the applicable case law. Motion, pp. 8-9. For example, they argue that “[t]he need for the [a]mended complaint was that the case law and orders of the FCC since the original filing of the Complaint had clarified several aspects of the Act itself and their application to the PUC’s proceeding.” *Id.*, p. 8. However, they do not cite to any authority for the proposition that their desire to update the law in a complaint gives them the unconditional right to add new substantive claims (especially more than eight years after filing the complaint). Qwest is not aware of any requirement that a complaint should be continually amended to reflect updates in the law. But even if there were any such authority, it is clear that Complainants intend to do much more than to update or clarify the law- they want to broaden the scope of the proceeding by bringing in new claims from events that clearly occurred prior to the filing of the 2001 complaint (the UT 125 rate case claims) and to raise new, and previously rejected, substantive claims (CustomNet).

**D. The Commission properly denied the motion to add a claim for additional refunds under the UT 125 Orders and ORS 759.185**

**1. UT 125 refund claims do not belong in this case**

Complainants also argue the Commission erred in denying their motion for leave to file a Second Amended Complaint to add claims for refunds based on Docket UT 125 rate case refund orders and ORS 759.185 (apart from the FCC payphone orders that have been the bases for the complaint for more than eight years). However, the Commission was correct in finding that adding such claims in this highly complex, almost nine-year-old proceeding would have impermissibly expanded the case far beyond its original scope. As such, it was proper for the Commission to deny leave to include such claims in this case.

Nor did this decision prejudice Complainants, who are free to seek to bring a claim to enforce rate case refund orders they believe Qwest has not complied with in an appropriate proceeding. However, the Commission did not abuse its discretion in deciding they cannot do so in this complaint proceeding which has been pending for almost nine years based exclusively on Qwest's alleged obligations to pay refunds under various FCC payphone compensation orders.

**2. The Order does not make it “impossible” for Complainants to prove their PAL refund claim**

Complainants seem to argue that the Commission's striking of the new references to Docket UT 125 in the First Amended Complaint makes it “impossible” for them to prove their alleged damages (the difference between the rates Qwest charged and the rates the Commission determined to be compliant with the FCC's “New Services Test” in Docket UT 125).

Complainants protest too much, as this is nothing more than a hyper-technical point and wildly exaggerates the impact.

In reviewing Complainants' draft of the Third Amended Complaint in February 2010 (the proposed amended complaint that Complainants should have filed in 2009, and then again by February 17, 2010 after the Commission issued its Order), Qwest agreed that references to Docket UT 125 which had been *part of the original complaint* were *acceptable*. What Qwest has objected to, however, and what the Commission has stricken, are *claims* that Complainants are somehow entitled to *additional refunds* (apart from the FCC payphone orders) under the rate case refund orders in Docket UT 125 and under Oregon law (ORS 759.185). Complainants are *not* precluded from mentioning or utilizing rates established in UT 125 as the basis for refunds they seek in this case.

## **II. THE COMMISSION SHOULD DENY THE MOTION TO STAY**

### **A. Legal Standard for a Motion to Stay**

The Commission should also deny Complainants' motion to stay the proceedings. Their argument appears to be primarily that the Commission should stay this proceeding because of their pending motion for reconsideration. Oregon law, however, is clear that the mere filing of a motion for reconsideration does not stay the Commission *order* that is the subject of the reconsideration motion. ORS 759.561(1). A party receiving an adverse Commission order can certainly move for a stay of that order based on its motion for reconsideration. However, even if granted, all that a stay under that statute and the Commission's rule would do would be to stay the effectiveness of the *order*; it would not stay the entire proceeding itself. See OAR 860-014-0095(5). Moreover, the Order merely requires the *filing of an amended complaint* (which NPCC originally asked for, and which Qwest notes they still have not filed, despite the absence of a stay of the Order), and nothing more.

Further, Complainants also cite to ORS 183.482 as the standard for a stay, referring to the Commission's Order No. 06-229 in Docket ARB 671. However, that standard applies to stay a Commission order pending *appeal*, and not pending a motion for reconsideration. Moreover, as shown below, Complainants do not meet the standard in ORS 183.482 in any event.

**B. Complainants make no showing of irreparable harm**

First, unlike the party seeking a stay in Docket ARB 671, Complainants here do not make a showing of "irreparable harm," as required by ORS 183.482. First, they do not allege any *facts* whatsoever showing any irreparable harm. Second, they simply rely on the declaration of their new counsel. However, counsel not only fails to allege any *facts*, but he merely makes *conclusory allegations* about "hav[ing] reviewed the history of the case" and about "com[ing] to the conclusion that the prejudice" that Complainants have suffered and will suffer will be "extreme." See Declaration of Frank G. Patrick, ¶ 2. These are not facts, but are merely conclusory and argumentative statements to which counsel is not competent to testify. The Commission should disregard, and strike, this declaration. The lack of irreparable harm is apparent as Complainants still may pursue judicial review of the Commission's order and may pursue their rate case refunds in a different proceeding.

Moreover, the Commission in Docket ARB 671 stayed the effectiveness of the order requiring Qwest to file an interconnection agreement pending reconsideration based on a showing by the party seeking a stay that it would be forced to cease operations if Qwest filed and enforced the interconnection agreement at issue.<sup>5</sup> Here, however, there has been no showing of any "irreparable injury," and all that Complainants are required to do is to *file an amended complaint* (which they originally sought) and to continue with the case they themselves have

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<sup>5</sup> The Commission then approved the interconnection agreement the following month in July 2006.

filed with the Commission. There is no allegation, much less proof, of an irreparable injury such as Complainants being forced to cease operations if the Commission does not stay the Order.

**C. Complainants make no showing of a colorable claim**

Complainants also do not make any showing of a “colorable claim” as required by ORS 183.482. Indeed, they do nothing more than to allege that they believe they are right, and that Qwest and the Commission have been wrong, about these issues. This is not a colorable claim of error sufficient to justify a stay. Moreover, Complainants conveniently ignore the fact that if they thought they had a colorable claim about the Commission’s denial of the CustomNet claims, they could have (and should have) sought reconsideration *a year ago*. They did not, however, and thus the Commission was correct in rejecting what can only be reasonably seen as a one-year late collateral attack of Order No. 09-155.

**D. Complainants’ jurisdictional argument is inconsistent with their actions**

Complainants also argue in the alternative that the Commission should stay the proceeding (other than the new refund claims under UT 125 and ORS 759.185) because the claims in the complaint are “*outside of the jurisdiction* of the PUC.” Motion, p. 12. (Emphasis added.) This is a very odd statement, however, but is apparently a brand new argument now that they have forum-shopped and filed a similar complaint in federal court. This is especially odd given that NPCC itself filed the complaint *with the Commission* almost nine years ago, invoked the Commission’s jurisdiction over the complaint (see May 11, 2001 Complaint, p. 2, ¶ 3), and never took a contrary position about jurisdiction. Indeed, when the parties were briefing the substantive issues, NPCC’s counsel made very clear that “NPCC believes that the Commission has jurisdiction over its complaint.” See NPCC’s February 7, 2005 letter to ALJ Samuel Petrillo.

Further still, Complainants' citation to a Ninth Circuit decision (*AT&T Corporation v. Couer D'Alene Tribe*, No. 99-35088 (9th Cir. 03/19/2002)) misses the mark for a variety of reasons, not the least of which is that the case had to do with sections 206 and 207 of the Act, not section 276. Moreover, unlike here, where the Commission has jurisdiction over these claims, the plaintiff in *Couer D'Alene Tribe* tried to bring a Telecommunications Act claim in a *tribal court* instead of the FCC or federal court. Here, of course, Complainants brought this case at the Commission, and reaffirmed the Commission's jurisdiction for these claims.<sup>6</sup>

**E. The Commission should deny the "renewed" motion to bifurcate and stay**

Complainants also alternatively move to stay the entire proceeding based on their previous motion to bifurcate and stay, filed January 27, 2010. However, Complainants withdrew that motion after the Commission rejected their proposed Second Amended Complaint. Bifurcation would make sense, if at all, only if the Commission were to allow the UT 125 refund claim, which it has not (and should not). This is essentially Complainants' third motion to stay in less than three months (January 27, February 17 and April 2, 2010). The Commission has determined to proceed with this case, with cross-motions for summary judgment due in about two weeks, and it rejected a stay when Complainants announced they would seek reconsideration of the Order. Thus, the Commission should proceed, as nothing has changed to allow a stay. It is abundantly clear that this last-minute motion to stay is simply the latest arsenal in Complainants' blatant delay and forum-shopping efforts to have a new forum (the federal court)

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<sup>6</sup> Of course, if Complainants truly do not believe this Commission has jurisdiction over these claims, NPCC would not have filed this complaint with the Commission. And if Complainants' new counsel blames prior counsel for the decision to file with the Commission, Qwest notes that Complainants are free to dismiss the complaint here, and thus proceed solely before the federal court. There is no question, however, that Complainants' new jurisdictional arguments are merely part of their recent forum-shopping tactics.

consider the claims that this Commission is considering.<sup>7</sup> There is simply no merit to another request for a stay.

**F. Complainants make no argument that the Commission should stay the proceeding pending “direction” from the U.S. District Court**

Finally, although not discussed in the motion itself, the motion’s caption requests a stay of this docket “pending direction from the United States District Court in Portland[,] Oregon.” Complainants, however, make no argument as to what “direction” the Commission should expect from the federal court, nor will there be any such direction. Complainants reference and have filed with the Commission all of the documents they filed with the federal court in connection with their motion for partial summary judgment. That motion asks the federal court to rule on the merits of the case; Complainants do not indicate what “guidance” the federal court may provide to the Commission in connection with that motion, nor should there be any (and certainly not in the near-term as discussed below). Instead, Complainants filed that motion in furtherance of their forum-shopping activities in an effort to have the federal court rule on the merits of their claims before the Commission does. Complainants’ motion for partial summary

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<sup>7</sup> Complainants make another odd statement for which they again fail to cite to anything in the record of this docket. Specifically, they argue that despite efforts by Complainants to litigate these matters since 1996, “Qwest has managed to protract this matter so that it could not be heard at the PUC prior to the establishment of Order No. 07-497 in UT 125.” Motion, p. 13. Not only do Complainants fail to cite to anything in the record for such an irresponsible statement, but the record is clear that Qwest did no such thing, and that any delay has been attributable to NPCC and the PSPs.

The original complainant, NPCC, filed its complaint in May 2001. The parties shortly thereafter stipulated to stay the case. The Commission then dismissed the complaint *sua sponte* in March 2002 (Order No. 02-181), and the matter was appealed and then remanded back to the Commission in November 2004, when NPCC filed a motion for summary judgment. Qwest then promptly filed a cross-motion for summary judgment in January 2005. Thereafter, the Commission, *over the objections of both NPCC and Qwest*, stayed the case in May 2005, until NPCC moved to lift the stay in February 2009. (NPCC had previously moved to lift the stay in February 2008, but then voluntarily withdrew that motion a month later.) Thus, there has been absolutely *no delay by Qwest*.

Ironically, however, it has been Complainants who have been dragging their feet in this case, especially since July 2009, when they told the Commission they would file the amended complaint allowed by the May 4, 2009 Order 09-155 by *July 27, 2009*. Since then, they have asked for no less than *five extensions or enlargements of time* to file the amended complaint, and then *filed two non-compliant complaints*, and several motions to stay the proceedings. And yet, throughout all of these requests and procedural tactics, almost one full year after Order No. 09-155, *they still have yet to file the amended complaint* that complies with Order Nos. 09-155 and 10-027.

judgment does not ask the federal court to decide whether this Commission has jurisdiction over Complainants' claims (if that would even have been proper).

What is very telling, however, is what Complainants *do not mention* in their motion. That is, Complainants fail to mention that early last month, Qwest filed a motion to dismiss the federal court complaint on a number of grounds, including jurisdictional grounds. They also fail to mention that, although they then immediately filed a 50-page motion for partial summary judgment (within a week of Qwest's motion to dismiss), the federal court has ruled that it will consider *Qwest's* motion to dismiss *before* considering (or before even requiring Qwest to respond to) their motion for partial summary judgment. Thus, the federal court essentially put Complainants' summary judgment motion *on hold* pending its decision on Qwest's motion to dismiss. See Attachment A, District Court Minute Order of April 1, 2010. There is, therefore, nothing pending at the federal court that would require the Commission to stay this case, or to await anything from the court.

In short, the Commission should bear in mind that Complainants filed the complaint in this forum, and neither Qwest nor the Commission has challenged the Commission's jurisdiction over these claims (and until recently, Complainants had not questioned the Commission's jurisdiction, and indeed, had affirmatively supported the Commission's jurisdiction). Thus, as stated above, if Complainants truly believe the Commission lacks jurisdiction over these claims, they should simply dismiss the complaint. Otherwise, the Commission should continue with its procedural schedule, including the cross-motions for summary judgment due on April 30, 2010.

### **CONCLUSION**

Qwest has shown that Complainants' motion for reconsideration and to vacate Order No. 10-027, or alternatively, to stay the proceedings, is utterly without merit, and is nothing more



than an effort to delay this case in support of their new forum-shopping tactics. The motion is also nothing more than a collateral attack of the Commission's previous order, Order No. 09-155. The Commission should deny Complainants' motion in its entirety.

Dated: April 19, 2010

Respectfully submitted,

QWEST CORPORATION



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U.S. District Court

District of Oregon

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**Document Number:** 39(No document attached)

#### Docket Text:

**MINUTES of Proceedings:** Court heard Motion [30] to Extend Time to Respond to Plaintiff's Motion for Partial Summary Judgment and to Reschedule Oral Argument. Parties to file a joint statement of claims and a stipulation as to the factual/procedural history of this case by 4/30/10. Plaintiff's response to Defendant's Motion [12] to Dismiss First Amended Complaint or to Stay is due 4/16/30; Defendant's reply due 4/30/10. Oral argument will be heard at 1:30 p.m., 5/14/10. All other dates are STRICKEN. A briefing schedule for Plaintiff's Motion for Partial Summary Judgment will be set after Defendant's Motion to Dismiss has been resolved. Frank Patrick present as counsel for plaintiff(s). Lawrence Reichman present as counsel for defendant(s). Court Reporter: Amanda LeGore. Judge Anna J. Brown presiding. (bb)

3:09-cv-1351 Notice has been electronically mailed to:

Frank G. Patrick fgplawpc@hotmail.com

Lawrence H. Reichman lreichman@perkinscoie.com, adargis@perkinscoie.com,

danderson@perkinscoie.com, docketpor@perkinscoie.com, skroberts@perkinscoie.com

**3:09-cv-1351 Notice will not be electronically mailed to:**

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**CERTIFICATE OF SERVICE**

**DR 26 / UC 600**

I hereby certify that on the 19<sup>th</sup> day of April, 2010, I served the foregoing **QWEST CORPORATION'S OPPOSITION TO COMPLAINANT'S MOTIONS TO RECONSIDER ORDER NO. 10-027 AND TO STAY PROCEEDING** in the above entitled docket on the following persons via U.S. Mail, by mailing a correct copy to them in a sealed envelope, with postage prepaid, addressed to them at their regular office address shown below, and deposited in the U.S. post office at Portland, Oregon.

Frank G. Patrick  
Attorney at Law  
P.O. Box 231119  
Portland, OR 97281

Jason W. Jones  
Department of Justice  
1162 Court Street NE  
Salem, OR 97301

Lawrence Reichman  
Perkins Coie LLP  
1120 NW Couch Street, 10<sup>th</sup> Floor  
Portland, OR 97209

DATED this 19<sup>th</sup> day of April, 2010.

**QWEST CORPORATION**



By: \_\_\_\_\_

ALEX M. DUARTE, OSB No. 02045  
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