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February 19, 2008

Frances Nichols Anglin
Oregon Public Utility Commission
550 Capitol St., NE
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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 Response to NPCC's Motion to Lift Order Holding Case in Abeyance, 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
cc: Service List
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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Respondent.

QWEST'S RESPONSE TO NPCC'S
MOTION TO LIFT ORDER HOLDING
CASE IN ABEYANCE

Respondent Qwest Corporation (“Qwest”) hereby responds to the motion to lift the order holding this case in abeyance that the complainant, Northwest Public Communications Council (“NPCC”), filed on February 4, 2008. NPCC’s motion seeks to lift the Commission’s Order No. 05-208, in which the Commission affirmed Administrative Law Judge Sam Petrillo’s Ruling holding this proceeding in abeyance pending a decision by the Federal Communications Commission (“FCC”) on the consolidated petitions for declaratory ruling in CC Docket 96-128.

For a variety of reasons, Qwest respectfully submits that Judge Petrillo’s and the Commission’s reasoning in their Ruling and Order continue to apply today, and thus that the Commission should deny NPCC’s motion and should continue to hold this case in abeyance pending a decision by the FCC. Qwest further submits that the cases that NPCC cites do not support its argument for lifting the abeyance order, and in fact, these decisions undermine NPCC’s argument and support Qwest’s position that the abeyance order should remain in place. Finally, NPCC’s claims of undue delay are exaggerated. Thus, the Commission should deny NPCC’s motion and keep the abeyance order intact for the time being.

ARGUMENT

I. The Commission's reasons for holding the case in abeyance continue to exist

Preliminarily, the Commission's reasoning for holding the case in abeyance continues to exist today, which by itself is sufficient to deny NPCC's motion and thus to continue the order of abeyance. In his Ruling, which the Commission affirmed, Judge Petrillo found that the most reasonable procedural approach was to hold the case in abeyance pending a decision by the FCC on the consolidated petitions for several reasons, and all of these reasons continue to apply today.

For example, it should be undisputed that the threshold question in this case pertains to the "scope" of any refund obligations contemplated by the FCC's *Payphone Orders*, and particularly, the so-called *Waiver Order*, and that this issue, and other related issues, are squarely before the FCC in its review of the consolidated petitions. Judge Petrillo reasoned that since any refund liability of Qwest and other Regional Bell Operating Companies ("RBOCs") under the *Payphone Orders* is ultimately a question of law, the FCC should be allowed the opportunity to provide guidance to state commissions (and courts) concerning the appropriate interpretation of those orders. See Ruling, p. 7. After all, the FCC itself is in the best position to articulate what its own decisions require. In other words, who better to determine what the FCC meant, and contemplated, regarding the *Waiver Order* than the FCC itself? That reasoning applies today.

In addition, although NPCC complains about what it perceives as "undue delay" by the FCC, Judge Petrillo was correct when he noted that a Commission decision on the then-pending summary judgment motions was unlikely to shorten the time necessary to resolve the dispute between NPCC and Qwest. This is especially so because either party that does not prevail on (or is not fully satisfied with) any Commission ruling or order is likely to appeal to a court and/or to the FCC. As Judge Petrillo recognized, such an appeal could easily take years to be decided, and it is very doubtful that such appeals would be concluded before the FCC's decision on the

consolidated petitions in any event. Thus, Qwest believes that Judge Petrillo's view, affirmed by the Commission, that it makes little sense to expend time and resources litigating this matter before the Commission and state courts, when it is unlikely to produce a final outcome (especially when identical issues are pending with the FCC), remains apt today. See Ruling, pp. 7-8, and fn. 15; Order, pp. 2-3 ("Thus, in the end, the parties will find themselves in the same place as the petitioners in the Consolidated Petition Proceeding.").

Judge Petrillo also noted that it is probable that to the extent the FCC grants the pending consolidated petitions, the FCC will have occasion to consider all of Qwest's affirmative defenses, including the application of the two-year federal statute of limitations.¹ Again, that holds true today as it did when the Commission issued its order.

Finally, Judge Petrillo noted the concern that Qwest had expressed about a delay, and specifically about Qwest's potentially increased financial exposure if refunds are ultimately found to be due. However, Judge Petrillo explained that for the same reasons articulated previously, any Commission decision on the summary judgment motions in this case was unlikely to accelerate the final resolution of the dispute. Judge Petrillo further noted that any potential RBOC financial exposure would remain until the FCC proceedings are finally resolved, and thus holding this case in abeyance would not increase Qwest's potential financial exposure any more than what it would be otherwise. See Ruling, p. 8, and also fn. 17 (noting that the payphone petitioners have requested that RBOCs either refund PAL rates or disgorge all of the dial-around compensation (DAC) that RBOCs have received since April 15, 1997, and thus the

¹ For the reasons set forth later in this response, there is no merit to NPCC's argument that the Ninth Circuit's decision in the *Davel* case expressly rejected Qwest's statute of limitations defense. For that matter, even if NPCC had correctly characterized the Ninth Circuit's ruling on the statute of limitations issue, there is no merit, as Qwest explains later in this response, to NPCC's assertion that Qwest's "primary defenses" in this case were the filed-tariff doctrine and the statute of limitations. As this Commission knows, and NPCC should know, Qwest's primary defense is (and always has been) that Qwest did not "rely" on the FCC's April 1997 *Waiver Order*, and thus that Qwest is not subject to any refund obligation, of any duration. The Ninth Circuit in *Davel* did not address that particular issue, and indeed, referred that "scope of the *Waiver Order*" issue to the FCC under primary jurisdiction grounds, which in and of itself supports a denial of NPCC's motion.

fact that different remedies could be imposed is yet another reason to allow these issues to be resolved by the FCC); see also Order, p. 3. Again, this reasoning continues today, despite NPCC's concerns about when the FCC might resolve the consolidated proceeding. This is especially so because the Commission has previously reduced Qwest's PAL rates to a level NPCC stipulated complies with the New Services Test, and thus any potential refund obligation would be a fixed amount.

Accordingly, although NPCC (and Qwest) desire that the FCC decide these issues more promptly than has been the case at the present time, the reasoning that the Administrative Law Judge and the Commission relied on in initially holding this case in abeyance pending an FCC decision continues to apply today. Moving forward with this case at the present time would not bring the parties any closer to resolution than they would otherwise be until the FCC has decided these issues, including what it meant and contemplated in its 1997 *Waiver Order*. For these same reasons, moving forward with this case at the present time would simply waste the Commission's and the parties' time and resources. Thus, the Commission should deny NPCC's motion and continue to hold the case in abeyance pending a decision by the FCC.

II. Neither the *Davel* or *TON* circuit court decisions support NPCC's argument

In addition, the Commission should deny NPCC's motion because neither the *Davel* or the *TON Services* circuit court decisions support NPCC's argument. If anything, these circuit court decisions undermine NPCC's position and support denying the motion, and thus support holding the case in abeyance until the FCC has addressed the primary issues in this case. Moreover, NPCC seriously mischaracterizes these Ninth Circuit and Tenth Circuit decisions when it argues that "there is recent controlling federal law that clarifies Qwest's obligations under Section 276 [of the Act] and should give the Commission more than a sufficient legal basis for determining the issues presented in this case." (Motion, p. 1.)

A. Davel supports continuing the stay based on its primary jurisdiction holding

First, NPCC argues that the Ninth Circuit and Tenth Circuit courts of appeal provide sufficient guidance for this Commission to proceed without awaiting the FCC. (Motion, pp. 8-9.) However, both the *Davel* and *TON Services* decisions that NPCC cites actually *undermine* NPCC's request that the Commission now decide the issues in this case, and they support Qwest's position that the Commission should deny NPCC's motion and continue the abeyance. This is especially so because these courts referred the primary issue here, regarding the scope of the *Waiver Order*, to the FCC under primary jurisdiction grounds. Said the Ninth Circuit:

We agree that the primary jurisdiction doctrine requires referral of the threshold issue of the scope of the Waiver Order. Both this court and the Supreme Court have held that the interpretation of an agency's congressionally granted regulatory authority falls within the agency's primary jurisdiction where the order reflects policy concerns or issues requiring uniform resolution. (Emphasis added.) [Citations omitted.] . . .

Given the emphasis on achieving uniformity in policy determinations and administration, the application of the primary jurisdiction doctrine to the issue of the scope of the Waiver Order is particularly compelling. . . . As the current dilemma may not have been contemplated at the outset by the agency, interpreting the Waiver Order requires consideration of policy considerations similar to those that gave rise to the FCC's 1996 and 1997 orders applying the New Services Test to intrastate payphone rates, as well as the Waiver Order itself.

. . . Thus, beyond issues of FCC intent, any application of the Order to the several-year period beyond the original forty-five-day waiver term— a several-year period in which the existence of NST-compliant tariffs was uncertain— would raise policy questions not resolved by the Waiver Order itself. . . .

We cannot say without addressing such policy considerations how the Waiver Order should be applied in the circumstances of this case. How the Waiver Order applies here thus involves questions of policy best left to the FCC, the agency that adopted the Waiver Order in the first place pursuant to its regulatory authority in this area.²

² The Ninth Circuit also noted that the *Waiver Order* is national in scope, and affects LECs and payphone providers throughout the country, including many industry members not involved in the litigation before the court. Thus, the Court stated:

For the Order's reimbursement requirement to be applied uniformly, it is the FCC that must construe its scope. . . . It is precisely the purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence. At least unless and until the FCC declines to determine the scope of the Waiver Order, questions regarding that scope, including those at the core of this case, are within the agency's primary jurisdiction. *Davel*, *supra*, 460 F.3d at 1090.

.....

*We conclude that the issue of the scope of the Waiver Order should be referred to the FCC. (Emphasis added.) Davel Communications, Inc. v. Qwest Corporation, 460 F.3d 1075, 1089-1090 (9th Cir. 2006).*³

Accordingly, *Davel* and *TON Services* support Qwest's position that this Commission should continue the abeyance order and await a decision by the FCC on these issues.

B. *Davel* does not dispose of Qwest's "primary" defenses

NPCC also argues that "Qwest's *primary defenses* to this case were the 'Filed Tariff' doctrine and the statute of limitations," and thus that this Commission need not await further guidance from the FCC on these two issues because the Ninth Circuit and the Tenth Circuit "have explicitly rejected those very defenses." (Motion, p. 8 (emphasis added).) NPCC, however, grossly mischaracterizes both Qwest's advocacy here and the holdings in these cases. If anything, these decisions support Qwest's position that it should be the *FCC* who should decide what it meant and contemplated in its *Payphone Orders*, including the *Waiver Order*.

First, it is surprising that NPCC would allege that Qwest's primary defenses here are the filed-tariff doctrine (or filed-rate doctrine) and the statute of limitations. Even a cursory reading of Qwest's briefs in this case make clear that Qwest's primary defense is that it did *not rely* on the FCC's April 1997 *Waiver Order* and further, that the *Waiver Order* does not provide for the extraordinary relief of open-ended refunds from 1997 until such time that NPCC became satisfied that Qwest's PAL rates comply with the FCC's "New Services Test" (NST). See e.g., Qwest's Memorandum in Opposition to NPCC's Motion for Partial Summary Judgment and in Support of Qwest's Cross-Motion for Summary Judgment, pp. 13-18, 18-20; Qwest's Reply

³ Further still, while not binding on this Commission, the Tenth Circuit in the *TON Services* case also agreed that referral to the FCC under primary jurisdiction doctrine grounds was appropriate. Although the court expressed some concerns about the district court's rulings regarding the issues to be referred and its process in referring the matter to the FCC, it nevertheless affirmed the district court's determination that a primary jurisdiction referral was appropriate in that case. Thus, the Tenth Circuit's decision also supports denial of NPCC's motion.

Memorandum in Support of Cross-Motion for Summary Judgment, pp. 1-9. In other words, the primary issue here pertains to the *scope* of the *Waiver Order*.

NPCC further misleadingly argues that the Ninth Circuit's decision in *Davel* "also disposes of Qwest's statute of limitations defenses." (Motion, p. 8.) However, the statute of limitations discussion in *Davel* was limited to the plaintiffs' claims based on Qwest's "fraud protection rates," and the fact that it was undisputed that Qwest had filed no fraud protection tariffs with the FCC until 2003. In contrast, here the issue is not about fraud protection rates or fraud protection tariffs, but rather, whether Qwest is obligated to make any *refunds* of its *PAL rates* from 1997 onward, and more specifically, whether Qwest "relied on" the 1997 *Waiver Order*, such that NPCC is entitled to any PAL rate refund, for any period of time. That issue was not addressed by the Ninth Circuit. Thus, this is not an apples-to-apples comparison.

Moreover, even if this were an apt comparison, the Ninth Circuit actually *rejected* the plaintiffs' contention that their cause of action did not accrue until Qwest filed NST-compliant fraud protection rates in 2003, and their argument that they had "no knowledge until 2003 that Qwest's rates were too high." 460 F.3d at 1091. The court held that once the plaintiffs were aware that Qwest had missed the federal filing deadline (requiring the filing of fraud protection tariffs and rates), they were obliged to make reasonable inquiries to determine any possible injury they may have suffered as a result of Qwest's failure to file such rates. Thus, although the court did hold that the plaintiffs' fraud protection claims based on non-NST-compliant fraud protection rates paid within two years of their filing of their complaint (in 2004) were timely, it *affirmed* the district court's dismissal on statute of limitations grounds regarding any fraud protection claims based on rates paid *more than two years prior* to the filing of the complaint.

Finally, the quote from *Davel* that NPCC cites to (Motion, pp. 8-9) does *not* support its argument. Indeed, the quote is simply the Ninth Circuit's description of the *plaintiffs' argument*,

based on “Davel’s [the plaintiffs’] *construction* of the Waiver Order,” and that “on that [plaintiffs’] *interpretation*” of the *Waiver Order*, their claim for damages based on the *Waiver Order* did not accrue until 2002 (when they alleged Qwest finally filed NST-compliant PAL rates). 460 F.3d at 1092. (Emphasis added.) As stated, however, the Ninth Circuit did *not* address the statute of limitations issue as to the *Waiver Order* claims.⁴ Given that NPCC’s counsel is also counsel to the plaintiffs in *Davel*, it is even more curious that it would mischaracterize the court’s rulings in that case.⁵

III. NPCC’s “delay” claims are exaggerated

Finally, NPCC makes much ado about “undue delay” by the FCC. (Motion, pp. 1, 5-7.) It even goes so far as to exaggerate the claim by referring to an 11-year-old petition regarding an FCC order *prior to the Waiver Order*, and which NPCC itself admits is “unrelated to the issue at hand,” as well as to “items that have been on circulation [on the FCC’s Items on Circulation list] for almost three years.” (Motion, p. 5, and fns. 11 and 12, and p. 7.) However, NPCC’s “list” of alleged “FCC delay” does not necessarily show that the FCC will not issue a decision in the consolidated proceeding in the near future, or by the end of the year. This is especially so because the FCC General Counsel has already previously advised the federal court having jurisdiction of the matter, 12 months ago, that the FCC projected a ruling within six months. (Motion, p. 6, fn. 17.) Although clearly the FCC has not yet issued a decision, and thus is six

⁴ Of course, even if the Ninth Circuit had ruled precisely in favor of NPCC and against Qwest on these two defenses (which it did not), that does not mean that waiting on the FCC’s decision on the core issues about the scope of the *Waiver Order* is not appropriate. Ultimately, the FCC is the one who should decide that core issues.

⁵ Finally, in a desperate attempt to avoid a statute of limitations problem, NPCC makes the curious argument that “under the holding in *Davel*, NPCC’s complaint would be timely if filed before *November of 2009*.” (Motion, p. 9 (emphasis added).) Thus, NPCC apparently takes the position that its claim did not accrue or become ripe until the Commission’s Order No. 07-497, in *November 2007* in docket UT 125, in which the Commission approved the parties’ (Qwest’s, NPCC’s and Staff’s) stipulation that Qwest’s current PAL rates are NST-complaint. In other words, NPCC is apparently now arguing that its refund claims did not accrue (and thus were not ripe) until November 2007, *more than 6½ years after it filed its complaint in May 2001*. Although that statute of limitations issue is not determinative of the instant motion, it does go to show how NPCC desperately attempts to mislead the Commission into believing that “the issuance of the opinions in *Davel* and *TON Services* cases [gives the Commission] more than sufficient guidance to proceed with this case anew.” (Motion, p. 9.)

months late with its projection, that does not, in and of itself, necessarily mean that the FCC will not issue a decision within the relatively near future.

Moreover, NPCC well knows that these are complex issues, that the FCC has many pressing items of business, and that the FCC is a deliberative and detail-oriented body that often takes years to decide very complex issues like these. Thus, the fact that, for example, the Ninth Circuit referred the *Davel* case (the only case NPCC listed as “delayed” that involves Qwest) to the FCC in September 2006 (less than 18 months ago) does not mean this is an “FCC *delay* of one and a half years.” (Emphasis added.)⁶ NPCC apparently equates the amount of time *pending with the FCC* as being tantamount to “delay,” which is not a fair characterization.

Further still, unlike the petitions by self-interested payphone parties that NPCC primarily references, Qwest notes that it has actually been less than 18 months from the time the Ninth Circuit in *Davel* mandated the district court to refer these issues to the FCC, and less than seven months since the Tenth Circuit remanded the *TON Services* case. As far as is apparent from NPCC’s motion, those appear to be the only cases in which a federal court has specifically referred these issues to the FCC. Qwest, however, does not believe that seven to 18 months is necessarily “undue delay” for an FCC matter, especially one that further complicated the issues by introducing yet another RBOC (Qwest), and the specific facts involving that RBOC, in the issues pending before the FCC.⁷ Qwest believes the Commission should presume that the FCC’s will rule on these issues in due time.

⁶ Although not listed in NPCC’s “list” of “FCC delay” cases, Qwest notes that the Tenth Circuit also referred the *TON Services* case to the FCC, and that this case likewise involves Qwest. That referral, however, was less than seven months ago, which can hardly be said to result in undue delay by the FCC. Moreover, such recent referral may well explain why the FCC has not yet issued a decision in these matters.

⁷ For example, as Qwest noted in its cross-motion for summary judgment, several of the cases that NPCC has cited in its briefs involved other RBOCs who were factually in a different situation than Qwest. One example was BellSouth, which admitted that it relied on the *Waiver Order*, and thus did not contest that it was subject to at least some type of a refund obligation. However, as Qwest has made clear, unlike BellSouth, Qwest did not rely on the *Waiver Order*. See Qwest’s Memorandum in Opposition to NPCC’s Motion for Partial Summary Judgment and in Support of Qwest’s Cross-Motion for Summary Judgment, pp. 18-20.

Accordingly, Qwest respectfully submits that the Commission should not assume, as NPCC apparently does, that the FCC has “unduly delayed” its decisions in this very complex matter, involving at least seven different petitions from seven different states, in the past 3½ years. Nor should the Commission assume that simply because the Consolidated Proceedings are not on the FCC’s “Items on Circulation” list, this necessarily means that “the FCC is unlikely to resolve the [*Waiver Order*] issue anytime soon” (Motion, p. 7).

CONCLUSION

For all of these reasons, Qwest respectfully submits that the Commission should deny NPCC’s motion to lift the Commission’s order holding this case in abeyance.

Dated: February 19, 2008

Respectfully submitted,

QWEST CORPORATION



By _____

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CERTIFICATE OF SERVICE

DR 26 / UC 600

I hereby certify that on the 19th day of February, 2008, I served the foregoing **QWEST CORPORATION'S RESPONSE TO NPCC'S MOTION TO LIFT ORDER HOLDING CASE IN ABEYANCE** 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.

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DATED this 19th day of February, 2008.

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