

BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/UC 600

NORTHWEST PUBLIC COMMUNICATIONS
COUNCIL,

Complainant,

v.

QWEST CORPORATION

Defendant.

QWEST CORPORATION'S
RESPONSE TO NPCC'S REQUEST
FOR CERTIFICATION

Qwest Corporation ("Qwest") respectfully submits this response to Complainant Northwest Public Communications Council's ("NPCC") Request for Certification of the ALJ's Ruling dated March 25, 2005, holding this proceeding in abeyance (the "Ruling"). While Qwest disagrees with the ALJ's Ruling holding this proceeding in abeyance, over the objection of both parties, Qwest does not believe that the Ruling merits certification to the Commission. Even if the Commission were to review and affirm the Ruling, it would be entirely inappropriate for the Commission to take the additional, extraordinary step urged by NPCC, that the Commission do NPCC's bidding and file a petition for declaratory ruling with the FCC, putting NPCC's claims before the FCC. For these reasons, the ALJ should deny NPCC's Request.

I. THE ALJ SHOULD NOT CERTIFY THE RULING

In the hearing before the ALJ held on March 3, 2005, Qwest agreed with NPCC that the Commission could and should rule on the pending cross-motions for summary judgment without waiting for the FCC's decision on three pending petitions. In these FCC petitions, payphone providers and their associations are asking the FCC to overturn final decisions of state commissions and state courts denying their claims for refunds, in circumstances similar to those presented in NPCC's claim. Qwest believes that the Commission has the ability to decide this case based upon the applicable FCC orders and the consistent precedent denying contested

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1 refund claims.¹ Qwest also believes that the pending FCC petitions completely lack merit and
2 that the FCC will deny them outright.

3 Even though Qwest believes that the ALJ should not have issued the Ruling, Qwest does
4 not join NPCC's Request. Certification is appropriate where a ruling "[m]ay result in substantial
5 detriment to the public interest or undue prejudice to any party . . ." OAR 860-014-0091(1)(a).
6 NPCC asserts no harm to the public interest and simply argues that it will be harmed by delay.
7 Pure delay, however, does not amount to a showing of undue prejudice to a party. For this reason
8 alone, the ALJ should deny the Request.

9 **II. IF THE ALJ CERTIFIES THE RULING, THE COMMISSION SHOULD DENY**
10 **THE EXTRAORDINARY RELIEF NPCC REQUESTS**

11 If the ALJ does certify the Ruling to the Commission, Qwest would not oppose the
12 Commission's reversing the Ruling and allowing the case to proceed without further delay. The
13 parties have fully briefed the summary judgment motions, and the issue is ripe for a Commission
14 decision. If the Commission affirms the Ruling, however, it should deny the extraordinary
15 additional relief requested by NPCC.

16 NPCC asks the Commission to file a petition for declaratory ruling with the FCC, asking
17 the FCC to decide several questions that are raised by NPCC's Complaint in this proceeding.²
18 The Commission should deny this extraordinary request for several reasons.

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21 ¹ As discussed in detail in Qwest's briefs on summary judgment, in none of the cases on which
22 NPCC relies did a state commission grant a refund based upon the FCC's Waiver Order, upon which
23 NPCC relies, in circumstances where the refund claim was actually disputed by the RBOC. Indeed, in all
reported cases where the RBOC disputed its liability to make a refund under the Waiver Order, the
refund claim was denied.

24 ² NPCC asserts that the Commission has the authority to do this under ORS 756.040(3), which
25 authorizes the Commission to participate in proceedings "for the purpose of representing the public
26 generally and the customers of the services of any . . . telecommunications utility . . ." The Commission
would not be "representing the public generally *and* the customers of" (emphasis added) Qwest by
pursuing NPCC's claim before the FCC. Rather, NPCC's claim concerns only approximately a dozen
customers of Qwest.

1 First, this request is plainly outside the scope of the Ruling and, therefore, is not an
2 appropriate subject of a request for certification. The Ruling simply holds this proceeding in
3 abeyance, and was issued on the ALJ's own initiative and not in response to a motion. The
4 Ruling does not address the issue of whether the Commission should file a petition with the FCC
5 or take any other action whatsoever with respect to any FCC matter. Thus, the relief requested
6 by NPCC is not presented by the Ruling and cannot be considered on certification. Moreover,
7 NPCC makes no showing whatsoever, nor could it, of why the Ruling results in "substantial
8 detriment to the public interest or undue prejudice to any party" because it does not grant this
9 relief, since the Ruling does not address these issues. NPCC's request is plainly inappropriate
10 and the Commission should reject it out of hand. Indeed, if the ALJ were to certify the Ruling,
11 he should specify that this issue is not properly presented to the Commission.

12 Second, perhaps what is most objectionable about NPCC's brazen request is that NPCC is
13 asking the Commission to do that which NPCC itself has deliberately chosen not to do: place this
14 dispute before the FCC. The specific questions as to which NPCC asks the Commission to seek
15 a declaratory ruling clearly indicate NPCC's intent to have the Commission place the specific
16 facts of NPCC's claim against Qwest before the FCC. However, NPCC filed its Complaint with
17 this Commission and did not file it with the FCC. At this time, NPCC cannot file a complaint
18 with the FCC without being justifiably accused of improperly pursuing the same relief before two
19 tribunals. Yet, NPCC would have the Commission do precisely what NPCC is precluded from
20 doing. NPCC must anticipate that if the Commission were to petition the FCC, NPCC could
21 then intervene and assert its position without somehow violating the prohibition against
22 simultaneously litigating the same claim in two forums. The Commission should refuse to be a
23 pawn in NPCC's improper litigation strategy. Further, if the Commission were to take this step,
24 it would be committing its resources to litigating NPCC's claim. This would be a completely
25 inappropriate use of the Commission's resources.

1 In the alternative, NPCC asks the Chairman of the Commission to urge the FCC to act
2 promptly on the pending petitions and to request guidance on the specific questions NPCC poses.
3 The Commission should refuse this request as well. The three petitions pending before the FCC
4 ask the FCC to preempt rulings made by state commissions in the first instance, and then by state
5 courts reviewing such decisions. The RBOCs involved have opposed those petitions on the
6 unassailable ground that they are an impermissible collateral attack on state agency and court
7 decisions. Qwest respectfully submits that this Commission may not wish to endorse such
8 desperate acts that are contemptuous of state agency and state court rulings.

9 Finally, Qwest notes that the specific questions that NPCC asks the Commission to pose
10 to the FCC are stated in an unfair and argumentative manner, and would be entirely inappropriate
11 for the Commission to endorse. Qwest does not comment on the specific language at this time,
12 since Qwest believes it is extremely unlikely that the Commission will grant NPCC's unusual
13 request and petition the FCC in any manner. If the Commission were somehow willing to
14 entertain this request, however, Qwest would appreciate the opportunity to participate further in
15 the framing of issues for the FCC.

16 CONCLUSION

17 For the foregoing reasons, the ALJ should deny the request to certify the Ruling to the
18 Commission. If the ALJ were to certify the Ruling, he should specify that the only issue properly
19 before the Commission is the abatement of this action. If the Commission were to consider the
20 Request, Qwest would not object to the Commission's reversing the Ruling and proceeding to
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1 decide the pending motions. In no circumstance, however, should the Commission petition the
2 FCC to decide NPCC's issues or urge FCC action in any respect.

3 DATED: April 8, 2005.

4 Respectfully submitted,

5 **PERKINS COIE LLP**

6 By 

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Attorneys for Defendant Qwest Corporation

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I served the foregoing QWEST CORPORATION'S RESPONSE TO
3 NPCC'S REQUEST FOR CERTIFICATION on:

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11 by causing a full, true, and correct copy thereof, addressed to the last-known office address of the
12 attorney, to be sent by the following indicated method or methods, on the date set forth below:

13
14 by **mailing** in a sealed, first-class postage-prepaid envelope and deposited
15 with the United States Postal Service at Portland, Oregon.

16 by **emailing** to the attorney at the email shown above, which is the last-
17 known email for the attorney's office (as indicated above)

18 DATED: April 8, 2005.

19
20 **PERKINS COIE LLP**

21 By 
22 Lawrence Reichman, OSB No. 86083
23 John P. Nusbaum, OSB No. 96378

24 Attorneys for Defendant Qwest Corporation