

BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON  
DR 26/UC 600

THE NORTHWEST PUBLIC  
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

REQUEST OF NPCC FOR  
CERTIFICATION TO THE COMMISSION

**INTRODUCTION**

The Northwest Public Communications Council (“NPCC”) respectfully requests that the ALJ certify to the Commission an appeal of the ALJ’s ruling dated March 25, 2005, holding this proceeding in abeyance pending action by the FCC (“ALJ Ruling”). This request is brought pursuant to OAR 860-014-0091(1)(a) and on the grounds that denial of this request may result in substantial detriment to the public interest and undue prejudice to the complainant, NPCC. As discussed further below, merely waiting for FCC action is contrary to the public interest because the PUC’s processes for timely resolution of the dispute likely will be substantially delayed. Likewise, the rights of the NPCC and its members would be harmed by delay. Therefore, the OPUC should not hold this proceeding in abeyance, as both NPCC and Qwest argued to the ALJ.

As an alternative to the PUC proceeding on its own now, the PUC should be proactive in the FCC process. That would help to encourage quicker action by the FCC as well

as a resolution of the issues implicated in this docket rather than a FCC decision on unrelated grounds. Specifically, the PUC should request, by petition or letter, that the FCC address specific issues that this Commission believes are inherent in this docket. Moreover, the PUC should explicitly formulate the questions identifying those issues to ensure that the FCC provides the guidance that the OPUC would await.

## DISCUSSION

### **I. Holding This Matter In Abeyance Pending An FCC Ruling In Its Docket Number CC 96-128 Could Delay The Resolution Of This Docket For Years.**

While the ALJ's ruling attempts to weigh the likely delay between holding this matter in abeyance or proceeding and running the risk of appeals, there is no recognition of just how long the FCC might take. The delay at the FCC could be well beyond the expectation of the ALJ and this Commission. As just one example, the FCC originally was notified that the Wisconsin Public Service Commission would be unable to establish NST-compliant rates for its four largest telephone companies in 1997 and 1998.<sup>1</sup> In that case, the FCC was *required* to act to establish NST-compliant rates for the LEC's in Wisconsin. Even so, the ultimate resolution of the *Wisconsin* case did not occur until January of 2002,<sup>2</sup> *four or five years* later. In the proceeding to which the ALJ Ruling defers, the pending petitions are *discretionary*. The FCC need not rule at all, let alone on any timetable. Thus, under the ALJ's ruling, this case may be held in "abeyance" for years or indefinitely.

This Commission does not need to cede its control over this docket to the FCC. More than half a dozen states have decided refund claims under the same FCC order that is the basis of the claim here. *See* cases discussed in NPCC's Reply re summary judgment at 19-25

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<sup>1</sup> *See In the Matter of Wisconsin Public Service Commission*, 15 FCC Rcd. 9978 (2000) ("Bureau Order"). The Order is unclear exactly when the matter was referred to the FCC. However, it is evident that the other referral occurred by early 1998. *Id.*, ¶¶ 3-4.

<sup>2</sup> *See In the Matter of Wisconsin Public Service Commission*, 17 FCC Rcd. 2051 (2002) ("Wisconsin Order").

(Jan 25, 2005). All but one of those state commissions awarded refunds—without the need for FCC guidance. This Commission has the jurisdiction and the expertise to determine the issues raised in this proceeding. NPCC encourages this Commission to move forward expeditiously. The payphone industry has suffered a substantial and continuing decline for the last several years and undue delay would severely prejudice the members of the NPCC.

**II. If The Commission Agrees With The ALJ That FCC Guidance Would Be Necessary, Then The Commission Should Be Proactive.**

**A. *It is not in the public interest simply to wait for answers from the FCC that may never come.***

The NPCC firmly believes that the FCC, were it ever to rule, would find in favor of its claims against Qwest. NPCC's sole concern is undue delay. This Commission can do more, however, to help ensure not only that the FCC addresses the refund issues in a reasonably timely fashion, but also that the FCC actually does reach the questions that are before this Commission. As the ALJ Ruling stands, there is a significant risk that the FCC could dispose of its pending petitions on procedural grounds wholly unrelated to the issues in this OPUC docket. For this Commission to nothing but wait for a ruling that may never issue—when it has an opportunity to tee up its issues directly and succinctly with the FCC—is not in the public interest.

The PUC has an obligation to the parties and the public interests to resolve the claims with reasonable diligence. Accordingly, the NPCC urges this Commission to make a specific request to the FCC for a ruling.

**B. *The OPUC has the power to petition the FCC and should do so.***

The PUC's general powers include the power to petition the FCC. Specifically:

The Commission may participate in any proceeding before any public office, commission, or body of the United States or any state for the purpose of representing the public generally and the customers of the services of any public utility or telecommunications utility operating or providing service to or within this state.

ORS 756.040(3). Thus, this Commission is specifically authorized to participate in the pending FCC proceeding to represent the public generally; *i.e.*, to seek guidance in properly implementing the FCC's payphone orders and carrying out public policy regarding payphone competition, as established by Congress and the FCC.

There are several potential procedural approaches this Commission could take to participate in the FCC Docket CC 96-128. The preferred approach would be for the Commission to direct its staff to prepare and file a petition for a declaratory ruling and to move that the OPUC's petition be consolidated with the pending petitions of IPTA, IPANY, and SPCA. The petition would simply request guidance from the FCC on the questions set forth below. In response, the FCC would issue a Public Notice requesting comment, as it did with the three prior petitions. Then NPCC, Qwest, and others would undoubtedly brief both sides of the issues thoroughly.

As a less formal alternative to a petition, the Chairman of the PUC could address a letter to the Chairman of the FCC noting that this action has been held in abeyance, urging the FCC to act promptly on the pending petitions for declaratory ruling, and requesting guidance on the questions detailed below.

**C. *The OPUC should pose specific questions to the FCC on which the PUC seeks guidance, as raised in this docket.***

Regardless of the procedural vehicle the PUC adopts, it should specify the questions or issues that the PUC hopes the FCC will resolve. This is particularly important in this case because of the procedural posture of the declaratory petitions currently pending before the FCC.

In all three of the pending petitions, the petitioner seeks declaratory rulings preempting final decisions of state tribunals. Moreover, in all three cases, the petitioners have exhausted all avenues of appeal in their respective states. Focusing on the procedural posture in Illinois, New York, and Mississippi, the opponents of the

petitions have urged the FCC to deny them on grounds of *res judicata* and estoppel. In contrast to the pending FCC petitions, in this case, there is no final decision on any issue relevant to NPCC's refund claim. The NST-compliant PAL rates that are the prerequisite to the refund claims should be set shortly, on remand from the Oregon Court of Appeals in the Docket UT-125. Likewise, there has been no substantive ruling on NPCC's refund claims.<sup>3</sup>

Because *res judicata* is potentially implicated in the three pending FCC petitions, it is entirely possible that after years of delay the FCC would deny the petitions for declaratory ruling on grounds that are completely inapplicable to the NPCC's case. Consequently, the FCC would not reach *any* of the issues that the PUC desires to be answered while this case is held in abeyance.

The prejudice of waiting as long as four or five years for a ruling that provides absolutely no guidance to this Commission on the issues in this docket cannot be overstated. This prejudice can easily be avoided by the PUC filing its own petition for declaratory ruling specifying the questions on which it desires guidance. Then, assuming the FCC does eventually rule, it is almost certain to address the questions that the PUC wants answered.

**D. *The questions to be posed are explicit and implicit in the ALJ Ruling and the parties' pleadings.***

These suggested questions are drawn directly and indirectly by the ALJ Ruling and the parties' pleadings on summary judgment:

1. Is Qwest bound by its agreement in letters sent to the FCC April 10 and 11, 1997, approved in FCC Order DA 97-805 ("*Waiver Order*") to pay refunds retroactive to April 15, 1997, in the event the OPUC found that Qwest's Payphone Access Line ("PAL") rates in effect on and after April 15, 1997, did not

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<sup>3</sup> The PUC dismissed the complaint sua sponte in 2002, mistakenly believing the case was moot. However, upon appeal to the circuit court, the case has now been reinstated for substantive proceedings.

comply with the New Services Test ("NST") established in the *Payphone Orders*?<sup>4</sup>

2. Do the FCC's *Payphone Orders*, including the *Waiver Order*, require Qwest to refund a portion of the intrastate "PAL" rates paid by the Payphone Service Providers ("PSPs") since April 15, 1997, given that a final non-appealable judgment of the Oregon Court of Appeals found in 2004 that Qwest's PAL rates on and after April 15, 1997, did not comply with the New Services Test ("NST") as established in the *Payphone Orders*?

3. Did the FCC intend in issuing the *Waiver Order* that an RBOC that lacked state commission approval of its PAL rates on file as of April 15, 1997 as NST-compliant, would be required to pay refunds if it were later determined that the RBOC's PAL rates did not comply with the NST; or did the FCC intend in its *Waiver Order* that the RBOC would only be liable for refunds if it had filed to change its PAL rates between April 15, 1997, and May 19, 1997 regardless of whether its PAL rates on and after April 15, 1997 complied with the NST?

4. Did the FCC's *Payphone* and *Waiver Orders* effectively preempt any "filed rate doctrine" or "filed tariff doctrine" defense to payment of refunds -- assuming that an RBOC's PAL rates were on file with state commissions as "tariffs" on and after April 15, 1997 -- when it is later determined that those rates did not comply with the NST, or can those doctrines bar a state commission from ordering refunds under the *Waiver Order*?

5. Did the applicable statute of limitations, whether state or federal, on a claim for refunds pursuant to the *Waiver Order* not begin to run until an RBOC's NST-compliant rates became effective and the RBOC refused to pay the refund, or does the statute of limitations begin to run when an RBOC self-certifies NST compliance, regardless of whether the rates on file were actually in compliance or the supporting cost data was filed?

**E. *The PUC should monitor the FCC proceeding and periodically evaluate whether to continue to hold this docket in abeyance.***

Finally, the Commission should set some deadline or timeframe for holding this proceeding in abeyance rather than doing so indefinitely. The Marion County Circuit Court has retained jurisdiction over this matter and scheduled a status conference for September 26, 2005, to review the PUC's progress in resolving this case

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<sup>4</sup> *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 20541 (1996) ("*Report and Order*"); *Order on Reconsideration*, 11 FCC Rcd. 21233 (1996).

(see attached). The NPCC suggests that the Commission should monitor the progress of its petition for declaratory ruling and review it with the parties at least every six months to evaluate whether the case should continue to be held in abeyance or if the Commission should proceed to make a decision on its own. The first status conference should be sufficiently early that the court can be apprised of the status before September 26, 2005.

### CONCLUSION

The NPCC continues to urge the PUC to continue this docket unabated and issue its ruling based on the clear law and intent of the FCC as set forth in NPCC's pending motion for summary judgment. In the alternative, however, the PUC should file its own petition for declaratory ruling with the FCC pursuant to its general powers. The PUC should specify the questions it seeks to have addressed and should aggressively monitor the progress of the FCC proceedings to ensure that if undue delay occurs, the PUC can act as necessary to preserve its jurisdiction.

RESPECTIVELY SUBMITTED this 4th day of April, 2005.

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**ATTACHMENT 1**



IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR MARION COUNTY  
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P.O. Box 12869, Salem, Oregon 97309-0869  
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March 9, 2005

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Bar#: 03042

Northwest Public Communicati/Public Utility Commission O  
Case#: 02C14442 Civil Other

**NOTICE OF SCHEDULED COURT PROCEEDING**

Scheduled Proceeding: **Hearing Status Check**  
Date: **9/26/05**  
Time: **10:00AM**  
Room: **Judge Burton's Chambers**

Additional Information:  
OUT OF TOWN COUNSEL MAY APPEAR  
BY TELEPHONE CONFERENCE CALL  
TO 503-584-7713.

**IMPORTANT NOTICE: PLEASE READ**  
Failure to appear at the court event indicated above at the time  
and place specified may result in an order being rendered against  
you in this case.

**Client(s) of Addressee:**  
NORTHWEST PUBLIC COMMUNICATION

**CC:**  
JASON W JONES

RECEIVED

MAR 14 2005

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April 4, 2005

**VIA ELECTRONIC MAIL & FEDERAL EXPRESS**


Public Utility Commission of Oregon  
ATTN: Filing Center  
550 Capitol Street NE, Suite 215  
Post Office Box 2148  
Salem, Oregon 97308-2148

Subject: Docket DR 26/UC 600

Dear Sir/Madam:

Attached for filing are an original and one copy of the Request of NPCC for Certification to the Commission in the above-referenced docket. Please return a "received" copy to us using the enclosed self-addressed, stamped envelope provided. Thank you.

Very truly yours,

  
David L. Rice

cc w/enc: All Parties of Record

CERTIFICATE OF SERVICE


DOCKET NO. DR 26/UC 600

I hereby certify that a true and correct copy of the foregoing Request of NPCC for Certification to the Commission has been provided via electronic mail and first-class U.S. mail to the following:

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Jason Jones  
Department of Justice  
1162 Court Street, 4<sup>th</sup> Floor  
Salem, OR 97310

DATED at Seattle, Washington this 4<sup>th</sup> day of April, 2005.

  
\_\_\_\_\_  
Carol Munnerlyn, Secretary