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March 30, 2009

**VIA FEDERAL EXPRESS &
ELECTRONIC MAIL**

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

Subject: Docket DR 26/UC 600

Dear Sir/Madam:

Enclosed, for filing, are an original and one copy of the Reply In Support Of Complainant's Motion For Leave To Amend Complaint in the above-referenced docket. If you have any questions, please contact the undersigned.

Very truly yours,

Brooks E. Harlow, P.C.

cc w/enc.: Mr. Lawrence Reichman
Mr. Jason W. Jones
Mr. Alex M. Duarte

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

The Northwest Public Communications
Council,

Complainant,

v.

Qwest Corporation,

Respondent.

DOCKET NO. DR 26/UC 600

REPLY IN SUPPORT OF
COMPLAINANT'S MOTION FOR
LEAVE TO AMEND COMPLAINT

Qwest Corporation ("Qwest") incorrectly asserts that granting the Northwest Public Communications Council's ("NPCC") motion ("Motion") would "materially change" the nature of this case. There will be no material impact on Qwest by adding the NPCC members as named complainants. NPCC has litigated this case on behalf of its members in a representative capacity since the beginning, as Qwest knows. NPCC members, not NPCC itself, ordered the services at issue from Qwest. The discovery, claims, damages theories and briefing will be the same whether the NPCC members are named or not, and the damages awarded will be paid to the members, not NPCC. There is no conceivable prejudice to Qwest in naming them as complainants.

Adding the CustomNet claim also does not materially change this case. Both CustomNet and PAL involve the same laws, parties, damages theories, and unlawful behavior by Qwest. CustomNet and PAL will result in the discovery of the same telephone bills, which contain rates for both services. And NPCC and its members seek the same relief from Qwest for both CustomNet and PAL, which is a refund of the excessive charges. The CustomNet claim should be no surprise to Qwest, because NPCC explained in 2005 in a summary judgment

1 motion brief that it planned to add CustomNet to this case at the conclusion of the Docket UT-
2 125 rate case ("Rate Case").

3 Qwest's response to NPCC's motion only cites concerns that—if relevant at all—
4 will be involved with this case whether the Motion is granted or not. As a result, the
5 Commission should grant NPCC's Motion to add its members (on whose behalf it has litigated
6 this case since the beginning) as named complainants and to add CustomNet to the claim.

7 **A. NPCC Meets The Low Threshold For Amendment Of Complaints**

8
9 As Qwest's own response admits, leave to amend will be "freely given when
10 justice so requires." ORCP 23 A; *see also Forsi v. Hildahl*, 194 Or App 648, 651 (2004); *see*
11 *also Brackhahn v. Nordling*, 269 Or 667, 672 (1974) (permitting a plaintiff to add allegations to
12 support an additional tort claim that relied on different elements and legal theories than the
13 original claim in the complaint). This Commission has held that "in administrative proceedings,
14 pleadings are *liberally construed and easily amended*." Order, In the Matter of the Revised Tariff
15 Schedules Applicable to Electric Service Filed By PacifiCorp, 2000 Ore. PUC LEXIS 275 at *4
16 (emphasis added).
17

18 When evaluating whether to allow a complaint amendment, Oregon courts will
19 consider (1) the prejudice that would be suffered by the non-moving party, (2) the timing of the
20 request for amendment, (3) the relationship of the amendment to the existing claims, and (4) the
21 colorable merit of the proposed amendment. See Safeport, Inc. v. Equipment Roundup & Mfg.,
22 184 Or App 690, 699 (2002). Based on these factors, NPCC's motion should be granted.
23

24 1. *Qwest Will Not Be Prejudiced By The Amendment*

25 Qwest strains to prove that it would suffer prejudice by grant of the motion.
26 Qwest claims that "adding 13 new complainants drastically changes the nature of this case,"

1 would "dramatically expand the scope of the claims against Qwest" and "expand discovery." *See*
2 Response at 5. In truth, ***there will be no additional burden on Qwest if the Motion is granted.***
3 Qwest will want to obtain the same phone bills showing the 13 NPCC members' damages
4 whether they are named parties or not.¹ The NPCC and 13 members will submit one legal brief
5 on a particular issue, not 14 separate briefs. Should Qwest conduct depositions during discovery,
6 it will depose the same NPCC member representatives whether the motion is granted or not. In
7 fact, all of Qwest's grievances apply to this case regardless of whether the Motion is granted.

8 Qwest will also not be prejudiced by adding the CustomNet claim. Both
9 CustomNet and PAL involve the same law (Section 276, the new services test and related FCC
10 orders), parties (NPCC members and Qwest), Qwest actions (charging illegally high rates), relief
11 sought (refunds of the excessive charges) and evidence (Qwest bills).

12 Qwest complains that it will be unable to defend the CustomNet claim because of
13 the "specter of unavailable information," but the amount of information that is available for both
14 CustomNet and PAL is the same. That is because that ***the CustomNet charges relevant to this***
15 ***case are on the same bills as the PAL claims.*** If Qwest has lost a PAL bill, then it has also lost
16 a CustomNet bill. If Qwest has a PAL bill, then it also has a CustomNet bill. The bill is
17 evidence for both claims. Qwest claims that CustomNet "would require discovery on issues that
18 have not previously been required" but cites no examples.

19 2. *NPCC's Amendment Is Timely.*

20 Qwest complains about the "late amendment," but this case is really just getting
21 started, despite being eight years old. There has been no discovery. ***Qwest has not yet even filed***
22

23 _____
24 ¹ At this early stage of the litigation, it is not clear if the Commission would order Qwest to process refunds to all
25 PAL subscribers according to a formula--as it handled refunds in UT 125--which would require no discovery of
26 individual damages, or would require NPCC or each complainant to prove the amounts Qwest unlawfully collected,
which could involve extensive discovery of phone bills. But the burden hinges on how the Commission decides the
case, not on who the named parties are.

1 *an answer* to the original complaint. The parties have waited for the Rate Case to conclude and
2 for FCC guidance that has not materialized.

3 As NPCC explained in its Motion, NPCC is amending now because this case was
4 held in abeyance since 2005 by Commission Order pending the conclusion of the Rate Case, in
5 which NPCC challenged both Qwest's PAL *and* CustomNet rates. The Rate Case ended in 2007
6 when Qwest's CustomNet rates were approved. NPCC's claim only became ripe at that time.²
7 The Commission lifted the abeyance in February 2009, and NPCC shortly thereafter moved to
8 amend the complaint.

9 Qwest's surprise over the CustomNet amendment is disingenuous, as NPCC
10 informed Qwest and this Commission in early 2005 that NPCC intended to add CustomNet to
11 this case. NPCC Reply to Qwest at 2, Note 5 (Jan. 25, 2005). Oregon courts readily allow
12 amendments where the amending party made their intentions known earlier in the case or where
13 there is no surprise. Rock v. Francis, 133 Or App 80, 88 (1995) (plaintiff was permitted to
14 amend their complaint at the close of evidence at trial where the plaintiff previously informed the
15 defendant of their intention to change their claims); *see also* Hall v. Fox, 106 Or App 377, 379-
16 80 (1991) (affirming the trial court's decision to permit the addition of a claim for attorney fees
17 because, in part, defendant could not argue that he was surprised by the contract provision
18 providing for attorney fees).

19 The issue of whether a complaint is late is essentially moot as long as there is no
20 prejudice to Qwest, which is the case here. In the absence of prejudice, parties may amend their
21 complaint to add new claims even as late as during trial. *See* Reeves v. Reeves, 203 Or App 80,
22

23
24 ² If NPCC's original complaint had specifically included a CustomNet claim, Qwest could have successfully moved
25 to dismiss the CustomNet claim, because the Commission did not recognize that CustomNet was subject to the
26 FCC's new services test and had not ordered a rate reduction. Absent a rate reduction, no refund claim could be
maintained.

1 84-85 (2005) (affirming the trial court's decision to permit the plaintiff to amend his complaint
2 on the third day of trial).

3 3. *The Motion Is Closely Related To NPCC's Existing Claims*

4 Qwest alleges that allowing the NPCC members to proceed as complainants will
5 "materially change the substance of the complaint," which is wrong. *See* Response at 9. The law
6 and facts at issue in this case are identical whether the complaint is amended or not, as NPCC
7 explains above.

8
9 4. *The Amendment Has "Colorable Merit"*

10 Adding the NPCC members as complaintants has self-evident merit. Qwest
11 harmed them and must pay them refunds, as explained above. This is ultimately their case. The
12 CustomNet claim has merit as well. Qwest charged NPCC members \$2.00 per line, per month
13 for CustomNet, when the legal rate was \$0.11 per month. The \$2.00 rate was over *eighteen*
14 *times* the legal rate.

15 **B. The Statute of Limitations Does Not Bar The Amendment.**

16 The statute of limitations is immaterial to this case, because NPCC's proposed
17 amendment relates back to the original complaint. Nevertheless, NPCC will take this
18 opportunity to correct Qwest's erroneous assertions regarding the issue.

19 1. *NPCC's CustomNet Claim Involves The Same "Conduct, Transaction, Or
20 Occurrence" As NPCC's Existing PAL Claim*

21 ORCP 23 C permits amendments "[w]henver the claim or defense asserted in the
22 amended pleading arose out of the *conduct, transaction, or occurrence* set forth or attempted to
23 be set forth in the original pleading," in which case "the amendment relates back to the date of
24 the original pleading," and the statute of limitations is not a bar. ORCP 23 C (*emphasis added*);
25 *See Griffith v. Blatt*, 334 Or 456 (2002); *see also Walter v. Hobbs*, 176 Or App 194 (2001). An
26 amended complaint filed after the statute of limitations period may relate back "if the defendant
would have been able to discern from the earlier pleading a potential for the additional basis of

1 liability." Jeffries v. Mills, 165 Or App 103, 119 (2000). "Relating back is permitted although
2 the different cause of action in the amended complaint involves some issues which are different
3 or in addition to those presented by the original complaint." See Brackhahn v. Nordling, 269 Or
4 667, 673 (1974).

5 NPCC's CustomNet claim relates back to the original complaint because it arises
6 out of the same facts as the PAL claim, as explained above. Qwest claims that the CustomNet
7 claim is prohibited because it would result in Qwest paying increased damages, but Qwest cites
8 no cases where the likelihood of increased damages prohibited amendment.

9 Qwest asserts that CustomNet is based on "an entirely different legal theory" from
10 PAL but cannot cite a single legal theory that NPCC has advanced regarding CustomNet that
11 would be inapplicable to PAL. As NPCC has explained, CustomNet and PAL are based on the
12 same legal theories.

13 2. *Qwest's argument relies upon the wrong time period for the statute of*
14 *limitations.*

15 Qwest claims that the statute of limitations is two years but it is actually four
16 years. Under 28 USC § 1658(a), claims brought under an amendment to an existing statute
17 enacted after 1990 have a four year statute of limitations: "Except as otherwise provided by law,
18 a civil action arising under an Act of Congress enacted after the date of the enactment of this
19 section [in 1990] may not be commenced later than 4 years after the cause of action accrues."
20 The Supreme Court has already held that the four year limitation in 28 USC § 1658(a) applies
21 broadly to all causes of action that "'aris[e] under an Act of Congress enacted' after December 1,
22 1990...if the plaintiff's claim against the defendant was made possible by a post-1990
23 enactment." Jones v. R.R. Donnelly & Sons Co., 541 U.S. 369, 382 (2004). The Supreme Court
24 explicitly extended the four year provision of § 1658 to claims under the 1996
25 Telecommunications Act, like NPCC's claims arising under § 276. City of Rancho Palos Verdes
26 v. Abrams, 544 U.S. 113 at 123 (2005).

1 Congress enacted Section 276 as part of the Telecommunications Act of 1996, so
2 the four year statute of limitations applies. *See T-Mobile USA, Inc. v. Qwest Communications*
3 *Corp.*, 2007 U.S. Dist. LEXIS 83006 at *9 (WD Wash October 26, 2007)(emphasis added)("T-
4 Mobile's claims appear 'to be based upon a new legal arrangement of the national
5 telecommunications market which Congress altered dramatically in the [Telecommunications
6 Act of 1996]. . . . Therefore, Congress' four-year residual statute of limitations [governs] T-
7 Mobile's claim.").

8 **C. Qwest Concocts Legal Barriers On The Amendment Of Complaints That Do**
9 **Not Exist.**

10 Qwest claims that ORCP 23, which discusses amendment of pleadings, only
11 permits amendment of complaints for purposes of adding defendants. ORCP 23 contains no
12 such restriction. The rule broadly permits that "[w]henver the claim or defense asserted in the
13 amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to
14 be set forth in the original pleading, the amendment relates back to the date of the original
15 pleading." It also discusses adding defendants but is not limited to that purpose.

16 Qwest claims that ORCP 30 prohibits amendment of the complaint to include the
17 NPCC members as complainants but cites no support for that claim. In reality, ORCP 30 states
18 that "[p]arties may be dropped or added by order of the court on motion of any party or of its
19 own initiative at any stage of the action and on such terms as are just." NPCC contends it is
20 "just" to allow the NPCC members to become parties and to add CustomNet, when doing so
21 creates no prejudice to Qwest and involves same facts and law as the original complaint.³ Qwest
22 claims that ORCP 23 is not relevant to NPCC's request to amend but cites no specific language
23 stating that this is the case.

24 ³ Indeed the reason the amendment is being sought is because Qwest itself asserted that NPCC was not the proper
25 complainant in this docket. Qwest's Memorandum in Opposition to NPCC (January 4, 2005). Although NPCC
26 disagreed with Qwest, assuming—for sake of argument only—that the assertion had any merit, the appropriate
ruling would be to permit the joining or substitution of the individual members. Thus it is prudent to plead in the
alternative by adding the 13 members now in addition to the NPCC in its representational capacity.

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D. Conclusion

Qwest fails to cite any additional burden or prejudice that it would suffer by grant of the Motion. NPCC's Motion meets the low standard for amending complaints and should be granted.

Respectfully submitted this 30th day of March, 2009.

MILLER NASH LLP



Brooks E. Harlow
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David L. Rice

Attorneys for the Northwest Public
Communications Council

1 I hereby certify that I served the foregoing REPLY IN SUPPORT OF
2 COMPLAINANTS MOTION FOR LEAVE TO AMEND COMPLAINT on:

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18 by the following indicated method or methods:

- 19 by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-
20 prepaid envelope, addressed to the attorney as shown above, the last-known office
21 address of the attorney, and deposited with the United States Postal Service at
22 Seattle, Washington, and by electronic mail on the date set forth below.
- 23 by sending full, true and correct copies thereof via **overnight courier** in sealed,
24 prepaid envelopes, addressed to the attorneys as shown above, the last-known
25 office addresses of the attorneys, on the date set forth below.

26 DATED this 30th day of March, 2009

27 /s/ _____
28 Carol Munnerlyn, Secretary