

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **UM 1288**

4 PUBLIC UTILITY COMMISSION OF
5 OREGON,

6 Complainant,

7 v.

8 VCI COMPANY f/k/a STAN EFFERDING
9 and STANLEY JOHNSON, dba VILAIRE,
and VCI COMPANY, a Washington
corporation

10 Defendants.

PUBLIC UTILITY COMMISSION
OF OREGON'S RESPONSE TO
MOTION TO SET ASIDE DEFAULT
ORDER

11
12 **INTRODUCTION**

13 The Public Utility Commission of Oregon (Commission) opposes setting aside the
14 Default Order. The Commission gave the Defendants explicit directions to file an answer
15 within ten days from the date the Complaint was mailed pursuant to its authority under
16 ORS 756.512(1). The Commission did so after the Federal Communications
17 Commission (FCC) issued a NOTICE OF APPARENT LIABILITY FOR FORFEITURE
18 AND ORDER (FCC 07-148 Order), on August 15, 2007, that found that VCI Company
19 had apparently repeatedly and willfully violated rules governing federal universal service
20 fund support mechanisms and found that VCI is apparently liable for a total forfeiture of
21 \$1,047,500.¹

22
23 ¹ The FCC found that VCI had apparently violated sections 47 CFR sec. 54.407(c) and 54.413(b)
24 by willingly and repeatedly failing to keep and provide to the Universal Service Administration accurate
25 records of the revenues it was forgoing to provide Lifeline and Link Up service. In addition, the FCC
26 found that VCI had apparently violated sec. 54.407(b) and 54.413(a) by willfully or repeatedly receiving
duplicate reimbursement for qualifying low-income customers served. *Id.* at 1. The FCC found that VCI is
apparently liable for the total forfeiture of \$1,047,500. *Id.* The Commission also noted that its fines were
for duplicate telephone numbers and addresses in Minnesota, Oregon, and Washington. The FCC indicated
that VCI had presumably done the same thing in the other states that VCI operated in and that it would
investigate VCI's actions in those other states in a separate investigation. *Id.* at 6 fn. 51.

1 Defendants do not quarrel with the fact they were served with a copy of the
2 Complaint electronically and by mail, which specifically directed the Defendants to
3 answer the Complaint within 10 days from the date it was mailed to them. Defendants
4 received notice of the ten-day filing deadline, but chose to ignore it. Nor did the
5 Defendants take any steps to have the time to answer extended. The Commission issued
6 a Default Order on September 26, 2007, six days after the Defendants were expressly
7 required to answer.

8 Defendants have moved to set aside the Default Order arguing that: (1) the
9 Default Order was issued in error; and (2) the Default Order represents improper *ex parte*
10 action in violation of Commission rules and Defendants' due process rights.²
11 Defendants' arguments are without merit and should be denied.

12 ARGUMENT

13 I. The Default Order was not entered in Error

14 ORS 756.512(1) provides:

15 The Public Utility Commission shall serve a copy of the complaint
16 upon the defendant, and shall give the defendant at least 10 days within
17 which to respond to the complaint. Within the time so fixed, or such
18 further time as the commission shall fix, the defendant shall file an answer
to the complaint, taking issue on such parts of the complaint as the
defendant desires and setting forth such additional matter as shall be

19 VCI has the right to respond to the NOTICE OF APPARENT LIABILITY. But the FCC's
20 proposed forfeiture of over \$1 million and its ongoing investigation of VCI practices in other states raise
21 serious questions regarding the Commission's ability to recover any overpayment resulting from this
administrative action. As a result, the Commission determined that it would be in the public interest to
expedite the completion of this case by allowing the Defendants the minimum amount of time allowed by
statute to respond to the Complaint.

22 ² Defendants have not argued that their failure to answer the complaint within the time fixed by the
23 Commission was due to "mistake, inadvertence, surprise, excusable neglect or other good cause" under the
24 OAR 860-013-0055(2) (a). Defendants' counsel acknowledges that "I relied on the Commission's
25 regulations providing for twenty (20) days to file an answer to schedule when defendants needed to file
their response to the Complaint." Declaration of William J. Ohle at para. 7. The general rule is that
26 mistakes of counsel do not constitute 'mistakes, inadvertence, surprise, or inexcusable [sic] neglect'
necessary to set aside a judgment." *Terry B. McCarthy v. Oregon Freeze Dry, Inc.*, 334 Or 77, 82, 46 P3d
721 (2002), citing *Longyear, Admx. v. Edwards*, 217Or 314, 319-320, 342 P.2d 762 (1959). Nor is the
negligence of counsel "good cause." See *Sekermestrovich v. SAIF*, 280 OR 723, 726-27, 573 P2d 275
(1977).

1 pertinent to the matter in controversy. Such additional matter shall be
2 deemed denied without the filing of any other pleading by the
3 complainant. After the filing of the answer the commission shall set the
4 matter for hearing, giving the defendant at least 10 days' written notice of
5 the time and place of the hearing, unless the commission for good reason
6 stated in the notice, fixes a shorter time. Amendment of any answer may
7 be permitted by order of the commission.

8 The Commission has adopted a rule regarding when parties are generally to file
9 answers in various types of proceedings before it. OAR 860-013-0050 provides:

10 (1) Unless otherwise specified or directed by the Commission or Administrative
11 Law Judge, answers shall be filed as follows:

12 (a) An answer to a complaint, application or petition shall be filed within
13 20 days after service.

14 Defendants contend that ORS 756.512(1) dictates the minimum time that the
15 Commission must allow for a party to answer. It does not restrict the Commission from
16 allowing more time, which is what the Commission did in enacting ORS 860-013-
17 0050(1). Defendants assert that under any rational reading of the statute and rules,
18 Defendants had 20 days to file an answer and the Default Order was entered a week prior
19 to the expiration of the 20 day-period. Defendants' Motion at 4. Defendants' reading of
20 the rule is deeply flawed.

21 ORS 756.512(1) requires the Commission to serve a copy of the complaint upon
22 the defendant and fix the time to respond to the complaint giving the defendant at least 10
23 days to respond. Under the rule, parties are to file an answer to a complaint within 20
24 days of the date of service **“[u]nless otherwise specified or directed by the**
25 **Commission or Administrative Law Judge...”** The Commission retains its authority
26 under ORS 756.512(1) to fix a time different than the 20 days provided in the rule, but in
27 no event may that time be less than 10 days. Defendants' argument ignores the “unless
28 otherwise specified or directed” language in OAR 860-013-0050(1) quoted above.

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1 Here, the Commission specifically directed the Defendants to file an answer
2 within 10 days of service:

3 “WHEREFORE, the Commission directs the defendants to file a verified
4 answer to this complaint within ten (10) days from the date this complaint
is mailed to the defendants.” Complaint at 4.

5 Because the Commission “otherwise specified or directed” the Defendants to file
6 an answer within 10 days, the 20-day period under OAR 860-013-0050(1)(a) does not
7 apply here. Defendants were required to file an answer within ten days from the date the
8 Complaint was mailed to them. The Commission did not error in issuing a Default Order
9 on September 26, 2007, six days after the time for Defendants to answer expired.

10 Defendants argue that an order from the Commission or Administrative Law
11 Judge was required to fix the 10-day period to respond. Defendants offer no textual
12 support or analysis to support their argument. ORS 756.512(1) does not require that the
13 Commission fix the time to respond to a complaint through an order. The Commission
14 fixing the time to answer in the Complaint was a reasonable method to ensure that
15 Defendants had adequate notice of when they needed to appear. The Commission action
16 was both reasonable and within the Commission’s authority under ORS 756.512(1).

17 Defendants also argue that they are entitled to an additional three days under
18 ORCP 10C because the Complaint contained substantive documents served only by mail.
19 Defendants’ reliance on ORCP 10C is misplaced.

20 The ORCP “governs in all cases except as modified by these rules, by order of the
21 Commission, or by ruling of the ALJ.” *See* OAR 860-011-000(3). Because the
22 Commission “direct[ed] the defendants to file a verified answer to this complaint within
23 ten (10) days from the date this complaint is mailed to the defendants,” ORCP 10C does
24 not govern here. Second, the time specified to answer a Complaint in OAR 860-013-
25 0050 includes times “otherwise specified or directed by the Commission.” The
26 Commission, when it “otherwise specified or directed” that the Defendants file an answer

1 to the Complaint within 10 days of the date it was mailed, modified the ORCP. Finally,
2 the Commission, by enacting specific rules authorizing service by mail, *see* OAR
3 860-013-0071, and by adopting rules regarding when to respond to various proceedings
4 before the Commission, including a specific rule regarding when to file an answer to a
5 Complaint, which do not include a provision allowing for three additional days where
6 service is by mail, *see* OAR 860-013-0050(1) (a), the Commission modified its adherence
7 to the ORCP. Defendants were not entitled to an additional three days to respond to the
8 Complaint.

9 Alternatively, even if the Defendants are entitled to an additional three days that
10 would only extend the time to answer until September 24, 2007. The Default Order was
11 signed and entered on September 26, 2007, a date after the time for Defendants to answer
12 had expired.

13 After a party fails to plead or otherwise appear in the time specified “[a]ll material
14 allegations of the complaint shall be deemed to be admitted and hearing waived. The
15 proceeding may be disposed of without further notice to the defaulting party.” OAR 860-
16 013-0055. The Commission was entitled to issue the Default Order under its rules. The
17 Commission did not error in issuing the Default Order.

18 The Commission filed a Motion to Admit Exhibits its pre-filed testimony and
19 exhibits, Exhibits 100 to 115 into the record on September 21, 2007, the day after
20 Defendants were required to appear. The Default Order admitted Exhibits 100 to 115.
21 Defendants contend that they have fifteen days after service of the Commission’s motion
22 to file a response under OAR 860-013-0050(3) (d). Defendants state that they have until
23 October 8, 2007, to file their Response to the Motion to Admit Exhibits.

24 Under OAR 860-013-0055(1) once a party is in default all the allegations of the
25 Complaint are deemed admitted and the hearing is waived. The proceeding may be
26 disposed of without further notice or comment. The Commission was free to consider the

1 pre-filed testimony and exhibits already filed with it in issuing the Default Order without
2 further notice or comment.

3 Even if the Commission was required to rule on the Motion to Admit the Exhibits
4 before issuing the Default Order, Defendants did not file DEFENDANTS'
5 OBJECTIONS TO THE ADMISSION OF PRE-FILED EXHIBITS until October 9,
6 2007, which was untimely according to the Defendants' own calculation. The
7 Commission will be filing a Motion to Strike the Defendants' objections as untimely.

8 Further, regardless of whether Exhibits 100 to 115 are considered, the allegations
9 of the Complaint are deemed admitted and the hearing waived. The Default Order is
10 supported by substantial evidence.

11 **II. The Default Order did not violate Commission rules or due process**

12 Defendants assert that the taking of a Default Order here against a represented
13 party without prior notice raises serious due process concerns. Defendants cite the
14 following holding in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314
15 (1950):

16 "An elementary and fundamental requirement of due process in any
17 proceeding which is to be accorded finality is notice reasonably
18 calculated, under all the circumstance, to apprise interested parties of the
19 pendency of the action and afford them an opportunity to present their
20 objections." Motion at 6.

19 The holding in *Mullane* quoted by Defendants also includes the following
20 language not quoted by Defendants:

21 "*** The reasonableness and hence the constitutional validity of any
22 chosen method may be defended on the ground that it is reasonably certain
23 to inform those affected ***" (Citations omitted). 339 U.S. at 314-315.

23 The Commission's Complaint informed the Defendants of the claims being
24 brought against them. The Commission fixing the time to respond to the Complaint by
25 including language in the Complaint was a reasonable method to ensure that Defendants
26 had adequate notice of when they needed to appear. Defendants' due process rights to be

1 reasonably informed about the pendency of an action and to be informed about when they
2 needed to answer were not violated here.

3 The passage quoted from *Mullane* raises a second aspect of due process, e.g., the
4 opportunity to present their objections. Contrary to the Defendants' arguments,
5 Defendants were not denied the opportunity to meaningfully participate in this
6 proceeding. Defendants do not find themselves with a Default Order against them
7 because they were denied an opportunity to participate in these proceedings. Rather
8 Defendants have a Default Order against them because of a mistake of their counsel.
9 Defendants and their counsel were properly served with a copy of the Complaint that
10 directed them to file an answer within ten days from the date it was mailed. Defendants'
11 counsel did not file an answer in the time fixed by the Commission. Nor did Defendants'
12 counsel take any steps to have the time to answer extended.

13 Defendants assert that once the Defendants' counsel participated in the case they
14 were entitled to a 10-day written notice under ORCP 69(1). Defendants' argument is
15 misplaced. OAR 860-011-0000(3) provides: "The Oregon Rules of Civil Procedure shall
16 govern in all cases except as modified by these rules, by order of the Commission, or by
17 ruling of the ALJ."

18 OAR 860-013-0055, the Commission rule governing default orders, in relevant
19 part, provides:

20 (1) If a party fails to plead or otherwise appear within the time
21 specified in OAR 860-013-0050, the party shall be in default. All material
22 allegations of the complaint shall be deemed admitted and hearing waived.
The proceeding may be disposed of without further notice to the
defaulting party.

23 Thus, under this rule if the Defendants fail to plead or otherwise appear within the
24 time specified in OAR 860-013-0050, they are in default and the proceeding may be
25 disposed of without further notice to the defaulting party. The times specified in OAR
26 860-013-0050 include times "otherwise specified or directed by the Commission." Here,

1 the Defendants failed to plead or otherwise appear within the time specified by the
2 Commission under OAR 860-013-0050, as directed by the Commission, under ORS
3 756.512(1). When a party is in default, OAR 860-013-0050(1) permits the Commission
4 to dispose of the proceeding without further notice to the defaulting party. By not
5 including a 10-day notice before taking a default against a represented party in OAR
6 860-013-0050(1), the Commission modified the ORCP's default order provisions. A
7 10-day notice was not required before the taking of a default here under the
8 Commission's default rule.

9 Defendants note that the Commission rules discourage ex parte communications
10 and allow a party ten (10) days to respond to such communication citing OAR 860-12-
11 0015(1) and (7). Defendants' Motion at 5. Defendants elsewhere argue that they did not
12 receive notice or opportunity to be heard on the issue of the Default. Defendants' Motion
13 at 3. Defendants imply that the default order here was ex parte and improper.
14 Defendants' argument overlooks OAR 860-013-0055(1), which permits the Commission
15 to dispose of the proceeding without further notice to the defaulting party. The Default
16 Order does not involve improper ex parte communications.

17 Defendants also note the Commission calendar does not show a public hearing
18 scheduled on September 26, 2007, the day the Default Order was issued. Defendants'
19 Motion at 3. Defendants imply – without any analysis or citation to authority – that the
20 Commission violated the Oregon's Public Meeting Laws. Defendant's implication is not
21 well-taken.

22 The Commission complied with the Public Meetings Law. Meetings to conduct
23 deliberations in contested cases are statutorily exempt public meetings under ORS
24 192.660(1). Accordingly, the public notice required by ORS 192.640(1) does not apply
25 to any meeting the Commission had to conduct deliberations regarding this case.

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1 Furthermore, under ORS 192.660(2)(h), discussions in executive session may proceed
2 even to the point at which the governing body has reached an informal consensus as to its
3 course of action. The final decision prohibition, ORS 192.660(6)³ guarantees that the
4 results of any consensus will be made public by the requirement that any final decision be
5 made in open session. *See* Attorney General’s Public Records and Meeting Manual
6 (2005) at 136. The Commission made its final decision public here by issuing the
7 Default Order.

8 Defendants do not argue that 10 days is not an adequate amount of time to file an
9 answer to the Complaint as grounds for setting aside the Default Order. But to the extent
10 that the Defendants may attempt to argue that it is part of the total circumstances of this
11 case, we will address it here. Defendants in their factual background state that the “total
12 bulk of the Complaint, including Exhibits, is over 100 pages and includes expert
13 statistical and financial analysis.” Defendants’ Motion at 2. Defendants state that the
14 Complaint that was sent electronically to Defendants’ counsel included numerous
15 confidential documents not contained in the electronic documents. *Id.*

16 Defendants’ argument exaggerates the work that Defendants had to perform
17 before filing an answer by conflating a discussion of the Complaint and the other pre-
18 filed exhibits that the Commission also served on defendants. Defendants were only
19 required to file an answer to a 4-page complaint in the 10-day period. Defendants were
20 not required to respond to the pre-filed testimony or exhibits in the 10-day period that
21 account for the great majority of the documents that Defendants received.

22 Defendants’ discussion about the electronically-filed exhibits creates the false
23 impression that the filing included many exhibits that were not in Defendants’
24 possession. The filing included six exhibits that were not served on the Defendants
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26 ³ ORS 190.660(6) provides: “No executive session may be held for the purpose of taking any final action or making any final decision.”

1 electronically because they included confidential information. But five of those six
2 exhibits were Qwest's responses to Commission subpoenas, which Qwest provided to
3 defendants at the same time they were sent to the Commission. *See* Affidavit of David B.
4 Hatton; *see also* Ex. 104, Ex. 105, Ex. 106, Ex. 107 and Ex. 108. All of those documents
5 were in Defendants' possession for weeks or in most cases months before the
6 Commission filed the Complaint. *Id.* While the Defendants would need to verify that the
7 Exhibits 104, 105, 106, 107 and 108 were in fact Qwest's responses to the Commission's
8 subpoenas, that task was hardly onerous or imposing. The only document that
9 Defendants did not receive through the electronic filing that they did not have in their
10 possession was Ex. 113, a summary of service history of 114 individual listings and
11 numbers or duplicate individual listings or numbers. Defendants were not required to
12 complete a review of that document before answering the Complaint. Exhibit 114, the
13 document that contains the Commission's overpayment calculation used in the
14 Complaint, was provided to the Defendants when they were served electronically.
15 Defendants have not shown that they were denied the ability to meaningfully participate
16 in this proceeding because of the 10-day period to answer.

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1 Defendants have not shown that the Commission's default rules violate
2 procedural due process. Nor have they shown that the Commission, in applying those
3 rules against parties that were in default because they failed to answer within the time
4 specified, violates due process. Defendants' due process rights were not violated and the
5 Default Order should not be set aside.

6 DATED this 11th day of October 2006.

7 Respectfully submitted,

8 HARDY MYERS
9 Attorney General

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11 s/David B. Hatton
12 David B. Hatton, #75151
13 Assistant Attorney General
14 Of Attorneys for the Public Utility
15 Commission of Oregon
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1 documents not contained in the electronic documents. Mr. Ohle's affidavit incorrectly
2 implies that the Commission included a large number of new documents that Defendants
3 were not familiar with. The Commission electronically-filed exhibits did not include six
4 documents because they included confidential information. But Mr. Ohle does not
5 explain that five (Ex. 104, 105, 106, 107, and 108) of those six exhibits were Qwest's
6 responses to Commission subpoenas, which Qwest provided to Defendants at the same
7 time they were sent to the Commission:

- 8 A. Exhibit 104 was Qwest's response to the Commission's December 8, 2006
9 subpoena, that Qwest responded to on December 28, 2006. Qwest's
10 Certificate of Service indicates that it served Qwest response to Mr. Ohle and
11 me on December 28, 2006, by overnight mail.
- 12 B. Exhibit 105 was Qwest's February 21, 2007 response to the Commission's
13 January 31, 2007, subpoena. The Certificate of Service indicates that it served
14 Qwest's response to Mr. Ohle and myself.
- 15 C. Exhibit 106 was Qwest's response to the Commission's January 31, 2007,
16 subpoena to Qwest. The Certificate of Service was not included in this
17 exhibit. The Certificate of Service was not included with the filing. But
18 again, Qwest mailed a copy of this exhibit was mailed to Mr. Ohle at the same
19 time it was mailed to me.
- 20 D. Exhibit 107 was Qwest's May 1, 2007, response to the Commission's March
21 30, 2007 subpoena. The Certificate of Service indicates that a copy of
22 Qwest's response was sent to Mr. Ohle via overnight delivery.
- 23 E. Exhibit 108 is Qwest's August 20, 2007, response to the Commission's July
24 31, 2007 subpoena. The Certificate of Service indicates that Qwest's response
25 was sent to both Mr. Ohle and myself by overnight delivery.

26 All of those documents were in Defendants' possession for weeks, or in some
cases months, before the Commission filed the Complaint. The only document that
Defendants did not receive through the electronic filing that they did not have in their
possession at the time the Complaint was filed was Ex. 113, a summary of service history
of 114 individual listings and numbers or duplicate individual listings or numbers.

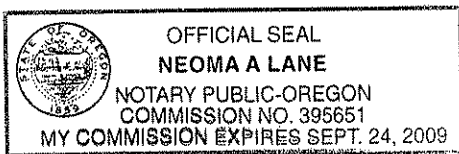
5. Mr. Ohle states that he anticipated a meeting would be scheduled to discuss the
substance and the allegations of the Complaint after its filing. The parties did have

1 discussions about setting up a settlement meeting in an attempt to resolve the case, but no
2 meeting occurred. Mr. Ohle may well have anticipated that we would have a meeting in
3 the future. But when I last spoke in late August, no meeting was scheduled and we had
4 no agreement or understanding that the parties would meet.

5 David B. Hatton

6 David B. Hatton

7 SUBSCRIBED AND SWORN to before me this 11th day of October, 2007.
8



Neoma A. Lane
Notary Public, State of Oregon
County of Marion
My Commission Expires: 09/24/09

1 3. Defendants did not file DEFENDANTS' OBJECTIONS TO THE ADMISSION
2 OF PRE-FILED EXHIBITS until October 9, 2007, after the time to respond had
3 expired.

4 **CONCLUSION**

5 Based on the foregoing, the Commission moves to strike the DEFENDANTS'
6 OBJECTIONS TO THE ADMISSION OF PRE-FILED EXHIBITS.

7 DATED this 11th day of October 2006.

8 Respectfully submitted,

9 HARDY MYERS
10 Attorney General

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David B. Hatton, #75151
13 Assistant Attorney General
14 Of Attorneys for the Public Utility
15 Commission of Oregon
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1 **CERTIFICATE OF SERVICE**

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3 I certify that on October 11, 2007, I served the foregoing upon all parties of record in this
4 proceeding by delivering a copy by electronic mail and by mailing a copy by postage prepaid
5 first class mail to:

6 **SCHWABE WILLIAMSON & WYATT**
7 WILLIAM J. OHLE
8 SCHWABE WILLIAMSON WYATT PC
9 1211 SW 5TH AVE
10 SUITE 1500 - 1900
11 PORTLAND OR 97204
12 wohle@schwabe.com

11 

12 _____
13 Neoma Lane
14 Legal Secretary
15 Department of Justice
16 Regulated Utility & Business Section
17
18
19
20
21