

**BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
UT 125/DR 26**

In the Matter of §
QWEST CORPORATION fka §
US WEST COMMUNICATIONS, INC. §

**NPCC’s REPLY PURSUANT TO
ALJ CHRIS ALLWEIN’S ORDER DATED FEBRUARY 7, 2024**

RELEVANT BACKGROUND

On January 26, 2024, Qwest filed a Motion ostensibly asking the PUC to require counsel for NPCC to “show authority” to appear “on behalf of NPCC’s members” in this proceeding and show whether “any PSP authorizes counsel’s actions here.” Qwest cites Oregon Revised Statute (ORS) 9.350 and Oregon Administrative Regulation (OAR) 860-001-0420 as alleged support for the Motion. Qwest’s Motion also asked for a stay of all proceedings until the “authority” issue was resolved.

Qwest states its concerns as follows:

First, counsel appear to have conflicts of interest with the parties they purport to represent because they have acquired those parties’ claims.

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Second, counsel appear to lack authority to represent the PSPs because no attorney-client relationship could remain with the many PSPs which no longer have any corporate existence or any personnel authorized to form an attorneyclient relationship or otherwise to participate in this proceeding.

Motion, page 1. Claim “First” is not factually true, and claim “Second” is not legally true as shown in NPCC’s letter dated January 30, 2024.

On January 30, 2024, NPCC filed a letter with the PUC in which it explained that Qwest’s Motion was factually unfounded, legally unsupported, and was asking for relief that Qwest previously waived. NPCC’s January 30, 2024 letter is incorporated into this Response as if fully set forth herein. In that letter, NPCC asked whether the ALJ required any further response.

On February 7, 2024, ALJ Allwein issued an Order which, in relevant part, allowed NPCC to file a reply to Qwest’s Motion on February 12, 2024. The ALJ did not specify which issues required additional response. This Reply is filed accordingly in the hopes it

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addresses any other issues of concern to the ALJ not covered by the January 30, 2024 letter. If it does not, NPCC requests leave to file a further response upon notice regarding any specific issues.

NECESSARY CORRECTION OF THE RECORD

Giving it due credit for consistency, Qwest tediously continues to attempt to mislead the PUC about who are the parties in this case and what remedies are being sought. On the theory that a lie repeated often enough may begin to resemble the truth, Qwest's relentless falsehoods on those points are now directly aimed at infecting the ALJ.

The parties of record in this case are the PUC, NPCC, and Qwest. See Judge Kirkpatrick's Memorandum dated August 29, 2023. No NPCC *members* are parties here, yet Qwest continues to make its arguments as if they are. Qwest asks NPCC's counsel to show their authority to "appear on behalf of" not NPCC, but rather "on behalf of NPCC's *members*." Motion, page 1. This makes no sense because NPCC members are not parties here.

Additionally, the remedy being sought here is not “damages.” When the ALJ inartfully says in his February 7, 2204 Ruling, page two (emphasis added), that: “[i]f in a future phase of this proceeding, it becomes necessary *to calculate damages owed* to individual companies, then [Qwest’s billing records] may be relevant to the proceeding,” it plays into Qwest’s deception. Importantly, the remedy here is not “damages.” The remedy is refunds of *overcharges* required by statute and multiple prior orders in the docket. This slip of the pen may be read to imply that the ALJ has bought into the mischaracterization of remedies in this remand proceeding, just as Qwest hopes would happen from its repeated prevarications. However, the ALJ then seemingly confirmed that he knows what the remedies and procedural posture of the case actually are when he remarked: “The directions by the Court of Appeals means that the PUC will conduct and complete the review and make findings even if the only participants in this matter are Staff and [Qwest].” *Id.*, page 3. Obviously, this latter remark is correct and confirms that NPCC has no burdens of proof in

the case and no “damages” are being sought as they would be in a money-damages civil lawsuit.

NPCC asks that in the future, all parties take care in the use of terms in this proceeding so that correctives such as this become unnecessary.

RULES INVOKED

Qwest invokes ORS 9.350 in alleged support of its Motion. That statute provides:

The court or judge thereof may, on motion of either party and on showing reasonable grounds therefor, require the attorney for an adverse party to prove the authority under which the attorney appears, and until the attorney does so, may stay all proceedings by the attorney on behalf of the party for whom the attorney assumes to appear.

We could find no cases in which this rule was found to apply in a PUC proceeding. Indeed, according to Westlaw, this rule has never been addressed in *any* Oregon appellate opinions in any way similar to the way Qwest presents it here. Also, Oregon law may prevent the PUC from ruling on the Motion because such a ruling is not covered by ORS

Chapter 756 (duties and powers) and seems to be *precluded* by ORS 756.525. Qwest's citation to OAR 860-001-0420 (the general rule on motion practice at the PUC) also does not provide for the relief Qwest seeks.

Because Qwest has provided no legal authority showing these rules apply in PUC proceedings or in our present circumstances, or that the PUC has the legal authority to grant it, the Motion should be denied for lack of supporting authority.

STATUTE INVOKED IS DISCRETIONARY

But even if this rule applied here (which it doesn't), the rule is a "may" rule that provides discretionary authority for Your Honor to determine whether an attorney has proper "authority" to represent a party in the proceeding. The rule provides no "guidance" on how that decision would be made, so looking at the ordinary way in which attorneys demonstrate authority to represent clients (i.e., the existence of a fee agreement) should be applied. On ALJ request the Fee Agreements will be filed confidentially under the rules for *in camera*

review, which show the fee agreement between Mr. Patrick and NPCC, and the Associate Counsel Agreement between Mr. Patrick, the clients, and James Pikel with Scheef & Stone, LLP.

WHAT THIS CASE IS REALLY ABOUT

Importantly, this is *not* a “damages” lawsuit no matter how loudly Qwest screams that it is. Rather, it is a PUC enforcement action dating back to 1996 in which Qwest is now statutorily required to prove it only charged lawful rates from 1996 to 2003, and if it cannot do so, the obligation falls on the PUC to investigate pursuant to the COA Remand and remedy Qwest’s continuing illegal conduct by ordering the calculation and refunding of overcharges with interest. *See NPCC v. Qwest Corporation*, 323 Or.App. 151, 167-68 (2022, pet. denied)(note: the word “damage(s)” appears nowhere in the COA ruling, but the word “refund(s)” appears 73 times). The remedy sought and lawfully authorized is thus not “damages” but rather refunds of overcharges, based on the prior orders in this docket and as a matter of law of the case.

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The distinction between damages and refunds is not trivial. Instead, it touches on burdens of proof, who the parties are, as well as the proper, statutory role of the PUC, which is not acting as a court that can award “damages” in a civil lawsuit. Qwest is valiantly trying to confuse and obfuscate the record in this case by making such false characterizations that Mr. Reichman knows full well are not true, with the transparent intent of making any ruling of the PUC subject to reversal on appeal and further dragging out the proceeding an indeterminate length of time while the PSPs are further denied their due and owing refunds. The PUC must not continue to fall for Qwest’s illicit gambits—yet a third time.

Another reason Qwest keeps trying to paint the picture of this case as an “NPCC members v. Qwest” civil-court damages lawsuit and eschews the very real distinction between NPCC and NPCC members is because it wants to then re-argue that because NPCC *members* have sought damages in prior court actions, they are in some inexplicable manner precluded from receiving the administrative remedy of *refunds*

of overcharges in this proceeding. Qwest will also likely contend that those prior lawsuits resulted in “victory” for Qwest, when in fact that is demonstrably not true. Indeed, one such damages lawsuit is still pending in the Multnomah Circuit Court (on remand from the U.S. Ninth Circuit court of appeals). *See* Case No. 13-1115-906, styled *Communications Management Services, LLC; et al.* Additionally, because the parties in *this* case (the PUC, NPCC, and Qwest) were different from the parties in the earlier court lawsuits (which included NPCC members and Qwest), and the claims in the lawsuits (money damages) were different from the claims here (statutory refunds), and statutory refunds are not a remedy that could not have been sought in the lawsuits, any assertions of issue or claim preclusion would be meritless. *See Bloomfield v. Weakland*, 339 Or. 504, 510-11 (2005)(*citing Rennie v. Freeway Transport*, 294 Or. 319, 323 (1982))(preclusion requires that the two matters have the same parties, the same claims, ***and the same relief sought could be obtained in both suits***).

Even though legally inapplicable because the court cases sought money damages and this matter seeks statutory refunds which could not have been sought in the court cases, we can probably count on Qwest to waste more of everyone's time making those fruitless arguments in this forum, no matter how disingenuous. *See* hints raised in Qwest's letter to Judge Moser dated August 23, 2023 and footnote 8 in the Motion.¹ The war machine that Qwest continues to grind should be stopped. Qwest did not prevail or even raise the disqualification issue in the any prior PUC proceedings nor in its briefing at the COA, and the Supreme Court denied Qwest's Petition for Review. Qwest chose not to make any *further* petition knowing the outcome, and the Court of Appeals has issued its judgment. The qualification issue is thus laid to rest.

MOTION IS WITHOUT FACTUAL MERIT

¹ Even if some of the monies sought in prior court cases could be seen as "similar to" the refunds applicable here, two points: One, at least one of those earlier court cases seeking damages is still pending on Remand from the Oregon USDC, in Multnomah Circuit Court, and two, this case—regardless of what it used to be—is now only a PUC enforcement action per the Court of Appeals ruling from which this remanded case is now being adjudicated.

Even if the rule applied (which it doesn't) and even if Your Honor were inclined to take it up (which you shouldn't), Qwest starts off from an incorrect premise when it asks for NPCC's counsel to show their authority to represent "NPCC members." As is clear from all of the pleadings in this case, especially from Judge Kirkpatrick's Memorandum ruling dated August 29, 2023 in which she expressly identified the parties in this proceeding, ***NPCC members are not parties***. Thus, Qwest is asking NPCC's counsel to "prove" a matter that is not relevant since the underlying contention behind the Motion (i.e., NPCC members are represented parties here) is wrong.

Whether counsel for NPCC also happen to represent any NPCC members (who are not parties in this proceeding but are parties in the Multnomah Circuit Court proceeding), is not relevant here, so showing "authority" to represent them here is not relevant.

Further, Qwest never challenged Judge Kirkpatrick's Memorandum ruling when it was issued last August, and has thus waived its arguments on "authority" even if the subject rule applies

here and Your Honor was inclined and had the legal authority to take it up.

Even more to the point regarding waiver, Mr. Patrick has been representing NPCC for over 14 years and Mr. Pikel has been representing NPCC for over five years, during which extensive time these lawyers have worked thousands of hours represented NPCC in this UT 125 proceeding and in two appeals to the Oregon Court of Appeals, and Qwest never once raised any issues about counsel's "authority" to represent NPCC at the PUC until now.

Prior failure by Qwest to raise the "authority" issue is not due to ignorance or sloth. During the last 15 years, Qwest counsel, Larry Reichman, has been actively involved and had more than sufficient time to raise any authority issues that had any merit. Obviously, he did not do so because that argument lacks merit and Qwest's current Motion is nothing but a tactical effort to derail these proceedings now that Qwest sees the writing on the wall: that it is about to be ordered to refund millions of dollars in wrongfully appropriated overcharges and interest.

As Judge Allwein so succinctly and correctly stated in his Ruling dated February 7, 2024, page 3 (emphasis added):

I note that regardless of the resolution of Qwest's motion pursuant to ORS 9.350, the Court of Appeals decision requires the Commission to review and make findings on the legality of Qwest's rates from 1996 through 2003. The directions by the Court of Appeals means that the PUC will conduct and complete the review and make findings *even if the only participants in this matter are Staff and the Company.*

The Qwest Motion therefore can be seen as nothing but Qwest's continuing effort to waste everyone's time and to keep knowledgeable counsel out of this very complex case so they cannot assist the PUC in its duties as ordered by the Court of Appeals. This is a completely improper use of ORS 9.350. The Motion should be denied and Mr. Reichman should be admonished for his conduct in bringing it.

**THE PUC IS NOT THE PROPER FORUM
TO RESOLVE CONFLICTS OF INTEREST**

Qwest also raises what it claims is a conflict of interest which supposedly prevents Messrs. Patrick and Pikel from representing NPCC in this proceeding. Qwest argues that because Mr. Patrick may have an

ownership interest in one of the Oregon ratepayers who were overcharged by Qwest (which he doesn't), Mr. Patrick is somehow unable to represent NPCC due to an alleged conflict of interest and he should thus be disqualified from representing NPCC in this case.

That argument is foreclosed—even in a *court*—by the ruling in *Kidney Association of Oregon, Inc. v. Ferguson*, 315 Or. 135 (1992). In that case, decedent Ronald Ragan left his entire estate to the Kidney Association of Oregon (KAO) and his will named Randall Ferguson as personal representative of his estate. KAO also hired Ferguson to represent it as the estate's sole beneficiary. During liquidation of estate property, Ferguson's hourly legal fees were so high that there was almost nothing left to distribute to KAO, the estate's beneficiary. KAO asserted that Ferguson should receive no fee because he had a conflict of interest when he represented both the estate and its beneficiary. The trial court disagreed and awarded Ferguson his legal fees. The Court of Appeals reversed, finding that a conflict of interest existed and thus Ferguson should be paid no fees (a similar argument to that made by

Qwest here, with NPCC in the guise of the estate and PSPs in the guise of the beneficiaries) as discipline for violation of ethics rules regarding conflicts of interest.

The Oregon Supreme Court reversed the Court of Appeals, finding that no conflict of interest existed because the interests of the estate (here, NPCC) were coincident with the interests of estate beneficiaries (here, the PSPs). The Supreme Court also held that *courts other than the Supreme Court* are not authorized to determine disciplinary rule violations nor to impose sanctions for their violation. *KAO*, 315 Or. at 143. Obviously, disqualifying an attorney from representing his clients is a form of disciplinary action.²

² Attorney Randall was paid by the estate based on his hourly billings (hence the depletion of estate assets), not as a contingency on the total recovery. Even then, the Supreme Court found no actionable conflict of interest that supported depriving him of earned fees. Here, Mr. Patrick has a *contingency-fee* agreement with various PSPs, who are analogously the “beneficiaries” of NPCC’s efforts in this case and will never have to pay more than a contractually-agreed percentage of recovery.

Additionally, even if Mr. Patrick owned one or more of the claims of the overcharged Oregon PSPs (which he does not)³ and simultaneously represents Oregon PSPs as counsel, there would still be no conflict of interest because Mr. Patrick (as a PSP claim owner) would have the exact same interest as every *other* PSP in maximizing recovery of the overcharges for everyone.

Even though Mr. Patrick has a contingent-fee attorney agreement with one or more PSP's, a contingent-fee agreement does not create a conflict of interest between the attorney and his clients. Indeed, it is just the opposite: the attorney's goal is to maximize recovery in the case to the *mutual* benefit of his client and himself because the sum of his fee, (based on a percentage of recovery), increases as the recovery amount for the client increases.

³ Mr. Patrick owned the claims of NSC and Deval in this case at one time, but after he acquired them he assigned them to the other NPCC members pro rata rather than keeping those claims as his personal property.

Finally, any debilitating conflict of interest is the concern of Mr. Patrick's clients, not Qwest or the PUC, and none of those clients have voiced any concern in that regard.

Thus, in no circumstances, including the bizarre circumstances fabricated in Qwest's Motion, is there any conflict of interest between Mr. Patrick and either NPCC or any of NPCC's members, and the Motion should be denied.

FURTHER ACTIONS

If the ALJ, after consideration of this Reply, has certain information that it requires in order to rule on the motion and gives NPCC the appropriate time to respond, its lawyers will do so. The shortened time to respond in the February 7, 2024 Ruling seems to indicate the response herein filed is sufficient. If that is not correct, then please consider this as NPCC's request for further clarification of the ALJ expectations and sufficient time to comply. If NPCC members need to be consulted, additional time may be required because all but two are out of state, four now deceased were principles of its entity,

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their successors will require more than casual information, and this is a matter never contemplated or necessary until this moment.

Prayer

Accordingly, NPCC asks the ALJ to deny the motion of Qwest or to clarify what NPCC is to do with the litany of excessive demands to show its council has appropriately appeared and represents NPCC.

NPCC also asks for such other and further relief as is just, including additional time to allow for further response by NPCC members should that be appropriate.

RESPECTFULLY SUBMITTED:

/s/ Frank G. Patrick

OSB 760228

Attorney for NPCC

503-318-1013

Frank@FGPatrickLaw.com

PO Box 231119

Portland, OR 97281

February 12, 2024

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I hereby certify that I electronically Filed a copy of the foregoing “Response” (Reply) as follows:

By email to the addresses below on **February 12, 2024**:

PUC.FilingCenter@puc.oregon.gov

Lawrence Reichman
Perkins Coie, LLP
1120 N.W. Couch Street, 10th Floor
Portland, Oregon 97209-4128
lreichman@perkinscoie.com

Natascha Smith
Assistant Attorney General
Business Activities Section
natascha.b.smith@doj.state.or.us

/s/ Frank G. Patrick
OSB 760228
Attorney for NPCC
503-318-1013
Frank@FGPatrickLaw.com
PO Box 231119
Portland, OR 97281

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Frank G. Patrick - OSB 760228
PO Box 231119
Portland, OR 97281
Phone (503) 318-1013 •