

be a motion to dismiss, and Qwest's motion to dismiss CEC's February 1 filing was denied. CEC's February 1 filing moved to dismiss Qwest's complaint so that the parties can negotiate further, but it is unclear on what CEC bases its motion. It does not cite any of the bases set forth in ORCP 21, nor does it address Qwest's complaint, which is that the rates, terms and conditions are unjust and unreasonable. The Commission has jurisdiction over the complaint under ORS 757.279, and CEC's February 1 motion to dismiss was also denied.

CEC also filed a motion to dismiss on February 24, 2005. Qwest moved to dismiss that motion because it was not filed by the deadline set forth in Commission rules. Typically, late filings are accepted if the party files by the deadline for an extension to submit the document. In this particular situation, the delay was not substantial and did not delay the proceeding at this early stage, so Qwest's motion is denied. However, once a schedule is set, parties are expected to adhere to the deadlines. CEC's second motion to dismiss fails for the same reason as the first: it does not provide a basis on which to dismiss the complaint. Qwest approaches it as a motion to dismiss for failure to state a claim. Under that analysis, the fact-finder must "assume the truth of all well-pleaded allegations and all reasonable inferences favorable to [complainant] that may be drawn from them." *Swanson v. Warner*, 125 Or App 524, 526 (1993). In this case, Qwest has stated that CEC has demanded that it sign a contract with rates, terms and conditions that are unjust and unreasonable. That is sufficient to state a claim for relief under ORS 757.279. CEC's motion to dismiss was denied.

Third, the joint petition to intervene filed by Bend Cable and Crestview on February 9, 2005 was granted. Petitioners' participation shall be limited to discussion of whether proposed contract provisions between Qwest and CEC are just and reasonable. I find that the petitioners have sufficient interest in the proceeding and the petitioners' appearance and participation will not unreasonably broaden the issues, burden the record, or unreasonably delay the proceeding. *See* OAR 860-012-0001(2).

Fourth, the following schedule was adopted:

Qwest's outline of issues	April 15, 2005
CEC stipulation	April 15, 2005
Meeting between the parties – engineers	no later than May 13, 2005
Report on meeting between the parties	May 16, 2005
Discovery begins	May 16, 2005
Meeting between the parties – formal mediator	no later than June 17, 2005
Qwest filing	July 1, 2005
Deadline for Petitions to Intervene	July 15, 2005
CEC filing	July 22, 2005
Concurrent testimony by all parties	August 12, 2005
Concurrent reply testimony by all parties	September 2, 2005
Evidentiary Hearing	September 21-23, 2005.

Qwest's outline of issues is to specify the provisions in CEC's contract that Qwest believes are unjust and unreasonable, provide Qwest's reasons, and articulate alternative language for those provisions. CEC's stipulation refers to the discussion at the prehearing conference that parties will not be subject to additional penalties while engaged in good faith proceedings at the Commission in establishing a new contract, and that the parties will maintain a working relationship.

The meetings between the parties, to be held by May 13 and June 17, are part of a negotiation process. Details are to be worked out among the parties. The May 16 report is to be a joint writing submitted by Qwest and CEC providing the Commission with a procedural update on the meetings. Throughout this schedule, the parties have the right to pursue negotiations outside the PUC hearing process. These negotiations do not involve the Commission hearings division and cannot be used as evidence in Commission hearings. ORS 40.190(1). Offers and communication between the parties made in the course of negotiations should not be forwarded to the Commission.

The Qwest filing on July 1 shall specify the pole attachment rate, term and condition provisions which are claimed to be unjust or unreasonable. Further, the filing shall describe both parties' positions on those unresolved provisions and provide as much data and information as possible supporting Qwest's claims. Qwest shall also provide a proposed agreement addressing all issues, including those on which the parties have reached agreement and those that are in dispute. CEC shall respond by addressing each unresolved contract provision listed in Qwest's filing and describing CEC's position on those issues.

Discovery may begin May 16, 2005. The parties are encouraged not to use discovery to interfere with the negotiation process or to allow it to affect their negotiations. The parties will continue to have the ability to conduct discovery throughout the schedule, especially in order to rebut issues raised by the other party in testimony. All parties may file concurrent testimony, and the remainder of the schedule will proceed as is customary in Commission proceedings.

The dates for filing are considered "in-hand" dates. Finally, I refer the parties to the Administrative Hearings Procedures for contested case proceedings, located at www.puc.state.or.us under the heading "Commission Overview."

Dated at Salem, Oregon, this 4th day of April, 2005.

Christina M. Smith
Administrative Law Judge