

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 26/UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

ORDER

DISPOSITION: ALJ RULING AFFIRMED

This matter is before the Public Utility Commission of Oregon (OPUC) on cross motions for summary judgment filed by the Northwest Public Communications Council (NPCC) and Qwest Corporation (Qwest).¹ The principal issue raised by the motions concerns whether Qwest is bound by the refund provisions of Federal Communications Commission (FCC) Order DA 97-805 (hereafter, the *Waiver Order*). More specifically, the issue is whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" (NST) established in the FCC's *Payphone Orders*.²

On March 23, 2005, the Administrative Law Judge (ALJ) issued a Ruling holding this proceeding in abeyance pending a decision by the FCC on certain petitions for declaratory ruling in CC Docket 96-128 (Consolidated Petition Proceeding.) Among the reasons cited by the ALJ for his decision is the fact that the issues raised by the

¹ For purposes of this order, "Qwest" includes its predecessor, U S WEST Communications, Inc.

² Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*First Payphone Order*); Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*), aff'd in part and remanded in part, *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (*Second Payphone Order*), vacated and remanded, *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) (*Third Payphone Order*), aff'd, *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000). The *First Payphone Order* and the *Payphone Reconsideration Order* are collectively known as the *Payphone Orders*.

parties in this case are currently pending before the FCC in the Consolidated Petition Proceeding.

On April 4, 2005, NPCC filed a motion requesting certification of the ALJ's Ruling pursuant to OAR 860-014-0091(1)(a). NPCC argues that holding this proceeding in abeyance pending FCC action may result in substantial detriment to the public interest and undue prejudice to NPCC's members. It states that its "sole concern" is the potential delay that may take place before the FCC decides whether to proceed in the Consolidated Petition Proceeding. It emphasizes that any undue delay would severely prejudice NPCC members because of the substantial and continuing decline of the payphone industry.

In the alternative, NPCC requests that the Commission petition the FCC to address several issues set forth in its motion. As a further alternative, it suggests that the Commission Chairman request the FCC act promptly to resolve the Consolidated Petition Proceeding and provide guidance on the issues NPCC poses.

On April 11, 2005, Qwest responded to NPCC's motion for certification. Although it disagrees with the ALJ's decision to hold this proceeding in abeyance, Qwest maintains that NPCC's motion does not meet the requirements of OAR 860-014-0091(1)(a). If the matter is certified, Qwest will not oppose a Commission decision reversing the Ruling and allowing the case to proceed without delay.

Qwest also disagrees with NPCC's request that the Commission petition the FCC to resolve issues in this docket. It asserts that the latter proposal is: (a) outside the scope of the ALJ Ruling, (b) requests the Commission to do what NPCC has deliberately chosen not to do; and (c) asks the Commission to pose questions to the FCC that are stated in an unfair and argumentative manner.

Although the prospect of procedural delay is generally not sufficient to meet the requirements of OAR 860-014-0091(1)(a), the ALJ certified his Ruling to the Commission because of the unusual circumstances surrounding this proceeding. Upon review, the Commission concludes that the ALJ's decision to hold this proceeding in abeyance should be affirmed for the reasons set forth on pages 8-9 of the Ruling.

NPCC's primary reason for challenging the ALJ's Ruling centers around its concern that the FCC will not act in a timely manner to resolve the issues in the Consolidated Petition Proceeding. As the ALJ explains, however, a decision by this Commission interpreting the *Waiver Order* will not expedite the resolution of this dispute. Given the amounts at issue, it is virtually certain that any decision we reach will be appealed, a process that we agree may take years to conclude. After a decision by the Oregon appellate courts, it is equally certain that the losing party will petition the FCC to preempt the state court decision pursuant to Section 276(c) of the

Telecommunications Act.³ Thus, in the end, the parties will find themselves in the same place as the petitioners in the Consolidated Petition Proceeding.

Another reason for holding this matter in abeyance is that it will provide the FCC an opportunity to fashion a comprehensive solution to the issues in a manner consistent with the requirements set forth in its *Payphone Orders*. As noted by the ALJ, the petitioners in the Consolidated Petition Proceeding have requested the FCC to consider remedies that go well beyond what NPCC has requested in this case. We agree with the ALJ that it is reasonable to allow the FCC time to determine whether it will undertake to resolve these matters.

In reaching this decision, we note that the ALJ's decision does not postpone this matter indefinitely. The Ruling allows the parties to move to reopen the proceeding if circumstances arise warranting such action. To ensure there is no undue delay, the parties may ask the Commission to revisit this matter if the FCC has not acted by the end of this year.

It is also important to emphasize that our decision to affirm the ALJ's Ruling does not affect our obligation to ensure that Qwest's PAL rates are consistent with the NST, as required by the remand of the Oregon Court of Appeals in *Northwest Public Communications Council v. OPUC*.⁴ The Commission intends to move forward with that process, notwithstanding any action taken by the FCC in the Consolidated Petition Proceeding.

As a final matter, the Commission declines NPCC's invitation to pose questions to, or seek guidance from, the FCC. We agree with Qwest that NPCC's request is inappropriate. NPCC is effectively asking the Commission to do what NPCC has deliberately chosen not to do; that is, file a petition with the FCC for enforcement of the *Waiver Order*. As explained in the ALJ's Ruling, NPCC has already filed extensive comments in the Consolidated Petition Proceeding that articulate the details of its dispute with Qwest and request guidance from the FCC on specific issues. If NPCC believes that it is necessary to pose additional questions to the FCC, there is no reason why it cannot do so.⁵

³ Section 276(c) provides: "To the extent that any State requirements are inconsistent with the Commission's regulations, the Commission's regulations on such matters shall preempt such State requirements." All of the petitioners in the Consolidated Petition Proceeding have alleged preemption.

As noted by the ALJ, NPCC has joined in these claims.

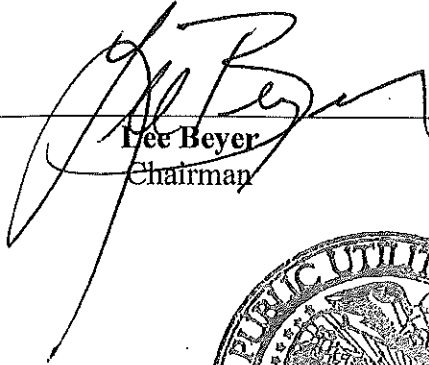
⁴ 196 Ore. App. 94, 100 P.3d 776, 2004 Ore. App. LEXIS 1471 (November 10, 2004).

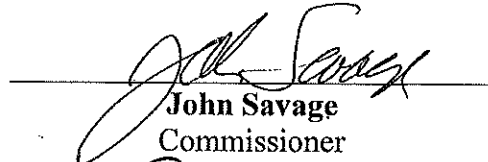
⁵ Qwest claims that NPCC is asking the Commission to advance NPCC's litigation strategy to avoid violating the prohibition against simultaneously litigating the same claim in two forums. *Qwest Response* at 3. NPCC could overcome such a problem by withdrawing its Complaint/Request for Declaratory Ruling in this docket, and refiled at a later date, if necessary.

ORDER

IT IS ORDERED that the Ruling issued by the Administrative Law Judge in this matter on March 23, 2005, is affirmed.

Made, entered, and effective MAY 03 2005


Lee Beyer
Chairman


John Savage
Commissioner


Ray Baum
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. The request must be filed with the Commission within 60 days of the date of service of this order and must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order to a court pursuant to applicable law.