

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC  
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

ORDER

DISPOSITION: MOTION FOR LEAVE TO AMEND COMPLAINT  
DENIED IN PART AND GRANTED IN PART

**I. INTRODUCTION**

In this order, we deny the Motion of the Northwest Public Communications Council (NPCC) to amend its complaint by adding new claims against Qwest Corporation (Qwest) for refunds relating to the provision of “CustomNet” fraud prevention services. We find that granting the request to add the new claims would have (1) joined claims not sufficiently related to the subject matter of the initial complaint--Public Access Line (PAL) service--to relate back to it; and (2) violated the statute of limitation provisions applicable to the new claims that NPCC proposes to add to this proceeding.

We grant the motion to amend the complaint by adding 13 new plaintiffs. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint, and the amendment serves to clarify the true parties with a pecuniary interest in and knowledge of the transactions that are the subject of the complaint. Therefore, Qwest is not prejudiced by their inclusion as parties-plaintiff.

**II. PROCEDURAL HISTORY**

By Order No. 05-208, entered May 3, 2005, the Public Utility Commission of Oregon (Commission) affirmed a ruling of the Administrative Law Judge (ALJ) holding this proceeding in abeyance pending a decision by the Federal Communications Commission (FCC) on certain petitions for declaratory ruling in CC Docket 96-128 due to “the fact

that the issues raised by parties in this case are currently pending before the FCC in the Consolidated Petition Proceeding.”<sup>1</sup> In affirming the ALJ’s Ruling, the Commission noted as follows:

[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. Thus, in the end, the parties will find themselves in the same place as the petitioners in the Consolidated Petition Proceeding.<sup>2</sup>

On February 4, 2008, more than two-and-a-half years after the Commission issued its order, NPCC filed a Motion to Lift Order Holding Case in Abeyance and then, on March 18, 2008, withdrew the Motion in the belief—eventually proven to be mistaken—that the FCC would be acting in the near future.

Another year passed, and on January 14, 2009, NPCC filed a Motion to Lift Order Holding Case in Abeyance, asserting, at page 2, that it “had lost patience with the FCC,” but believed that recent cases in the Ninth and Tenth Circuit Courts of Appeal (Ninth and Tenth Circuit) were “controlling federal law that clarifies Qwest’s obligation under Section 276 of the Communications Act and should give the Commission more than a sufficient legal basis for determining the issues presented in this case.”

On January 28, 2009, Qwest filed a Response to NPCC’s Motion to Lift Order Holding Case in Abeyance. Qwest did not oppose the NPCC Motion, but took issue with NPCC’s characterization of Qwest’s positions in the case and the impact of the Ninth and Tenth circuit decisions.

A telephone prehearing conference was held in this case on Thursday, February 5, 2009. At the conference, the ALJ granted the NPCC Motion, and it was agreed that NPCC would file either a motion for leave to file an amended complaint or a stipulation agreeing to the filing of an amended complaint no later than February 26, 2009. NPCC timely filed its Motion for Leave to Amend Complaint and Amended Complaint of the Northwest Public Communications Council, *et al.* for Refunds of Payphone Services Overcharges (Motion) on February 26, 2009. On March 13, 2009, Qwest Corporation’s Response to NPCC’s Motion for Leave to Amend Complaint (Response) was filed. NPCC filed a Reply in Support of Complainant’s Motion for Leave to Amend Complaint (Reply) on March 30, 2009.

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<sup>1</sup> Order, at 1-2.

<sup>2</sup> *Id.*, at 2-3.

### III. DISCUSSION

#### A. NPCC Motion

##### 1. *Parties' Positions*

##### a. NPCC

NPCC, a trade association, seeks refunds for alleged overcharges by Qwest for services provided to NPCC's member companies. The original NPCC Complaint alleges that Qwest charged PAL rates in excess of amounts due under Section 276 and the FCC's new services test. The original NPCC Complaint did not provide a specific dollar amount of the alleged overcharges because, NPCC now asserts, it asked the Commission to include the disparity in rates for a fraud prevention service known as "CustomNet" established in a separate rate case proceeding then pending in Docket UT-125.<sup>3</sup>

NPCC seeks to amend its original complaint in two ways. First, it seeks inclusion of allegations relative to CustomNet charges in the complaint proceeding. NPCC claims that these separate charges arise out of the same behavior and seek the same type of relief for the same parties. "The CustomNet claim is just an outgrowth of the original case, which is brought about by the fact that the CustomNet claims became ripe to assert in 2007." The CustomNet claims could only be asserted once the rate case was concluded by the November 2007 settlement.<sup>4</sup> NPCC claims that Qwest will not be prejudiced or disadvantaged because the original case had been held in abeyance until a month ago, and "[i]t would have been improper for NPCC to attempt to amend its Complaint while the case was held in abeyance and prior to the end of the Rate Case. The Parties have not completed presentation of evidence \* \* \*. NPCC's request to amend the complaint to include the CustomNet claim is within the statute of limitations because the claim accrued in November 2007, at the time of the Final Order approving the CustomNet rates."<sup>5</sup>

Second, NPCC seeks inclusion of additional plaintiffs. NPCC asserts that Oregon Revised Code of Civil Procedure (ORCP) 30 permits the addition of the members to the case because the law and facts are identical to both NPCC and its members and would not change the claims asserted or the discovery process and thus "[t]here is no imaginable prejudice or disadvantage to Qwest \* \* \*. Even if this amendment raised statute of limitations issues \* \* \* under ORCP 23, Oregon courts permit a complaint to be amended to substitute in a proper party as the party plaintiff even if the statute of limitations has run, thus allowing the substitute plaintiff to bring an original action against defendant."<sup>6</sup>

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<sup>3</sup> Motion, at 2.

<sup>4</sup> *Id.* at 4-6.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

**b. Qwest**

Qwest, in its introductory summary, contends that the Motion should be denied because (1) the new claims would change the nature of the current case; (2) Qwest would be prejudiced by the amendment; and (3) the claims lack merit because they are barred by the two-year statute of limitations: the 13 proposed new complainants' rights accrued in 1997 and are being brought for the first time 12 years later.<sup>7</sup> Qwest also notes the failure of NPCC to distinguish between adding, versus substituting, complainants and the legal infirmities associated with the inclusion of CustomNet services in the amended complaint.<sup>8</sup>

With regard to new plaintiffs, Qwest contends that ORCP 23 does not apply to the addition of new plaintiffs because the relation back provision clearly applies to amending the complaint by adding new defendants, not plaintiffs. "It also establishes when an existing party's amended complaint relates back for statute of limitations purposes, again including when an amended complaint adds a new defendant." Qwest contends that ORCP 30—Misjoinder and nonjoinder of parties—is the appropriate section.<sup>9</sup> Even if ORCP 23 does apply, Qwest provides four factors for the Commission to consider when exercising its discretion regarding allowing an amendment: (1) the proposed amendment's nature and relationship to the existing pleadings, (2) prejudice to the opposing party, (3) timing, and (4) the merit of the proposed amendment.<sup>10</sup>

Qwest next argues that the Commission should deny the amendment to add 13 new complainants because it drastically changes the nature of the case, requiring it to defend against the claims of 13 additional parties and increasing the amount of discovery. Furthermore, "[a]dditional discovery may be required as to when each of the complainants was or should have been aware of its potential claims against Qwest\* \* \*."<sup>11</sup> Qwest also claims that it would be prejudiced because, if the case is expanded, there is a likelihood that meaningful discovery from the new parties might no longer be available because NPCC has admitted that some member companies' records may be unretrievable and does not assert that the individual complainants would suffer any prejudice if they are not added to the proceeding.<sup>12</sup>

Qwest next contends that the refund claims are barred by the two-year statute of limitations set out under 47 U.S.C. §415(b) which covers complaints against carriers for refunds and argues that the claims must be brought within two years of the claim's accrual. Since the claims are based solely upon federal requirements in an FCC order, the federal statute of limitations applies.<sup>13</sup> Where claims are based on allegations that Qwest's PAL rates effective April 15, 1997, did not comply with the new services test, the Commission has ruled that a claim accrues "when a plaintiff knows or has reason to know of the harm or injury that is the basis of the cause of action." Other providers of payphone services, some

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<sup>7</sup> Response, at 1.

<sup>8</sup> *Id.*, at 2.

<sup>9</sup> *Id.*, at 3.

<sup>10</sup> *Id.*, at 4, citing *Forsi v. Hildahl*, 194 Or 667 (1974).

<sup>11</sup> *Id.*, at 4-5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at 6 and cases cited therein.

represented by NPCC’s counsel, filed timely complaints, undercutting NPCC’s arguments for allowing amendment in this case.<sup>14</sup> Qwest asserts that NPCC’s reliance on various cited cases relate to substitution, not addition, of parties and thus does not support its argument. Furthermore, the new complainants’ claims are materially different from the original claims, changing the substance of the complaint and increasing the damages. They therefore do not “relate back” to the original complaint. The claims would also be untimely in any event, being subject to the two-year statute of limitations.<sup>15</sup>

Qwest next addresses NPCC’s proposed addition of claims for refunds of CustomNet Charges. Although subject to the same rate-setting standards as PAL services, Qwest contends that CustomNet is subject to significantly different procedural requirements: whereas the FCC required ILECs to file PAL rates with state commissions, it required ILECs to file CustomNet rates with the FCC itself. “[T]he only rates potentially subject to return under the FCC’s Waiver Order—the basis of NPCC’s current claim—are PAL rates; NPCC’s claim that Qwest must also refund a portion of CustomNet charges is not based on the Waiver Order. Rather, it appears to be based directly on Section 276 of the Telecommunications Act.”<sup>16</sup>

Using the first factor in the *Forsi* case, Qwest argues that the addition of a claim for refunds of CustomNet charges would substantially change the nature of the case, adding new elements of damages not at issue for the almost eight years that the case has been pending. Applying the second and third factors in *Forsi*, Qwest argues that it would be prejudiced because it would require discovery on new issues and raise the specter of unavailable information, hampering Qwest’s ability to mount a defense against the new claims. Finally, Qwest claims a bar to the action by the statute of limitations.<sup>17</sup>

### c. NPCC Reply

NPCC replies that there will be no material impact upon Qwest by adding the NPCC members as named complainants because, as Qwest knows, NPCC has always acted on behalf of its members. Therefore, discovery, claims, and damages theories would be the same. Furthermore, CustomNet and PAL involve discovery of the same telephone bills and the same type of relief—refund of excessive charges—applies to both services. Qwest has not been surprised because in 2005 NPCC put Qwest on notice that it would be adding CustomNet services to the complaint.<sup>18</sup>

NPCC asserts that ORCP 23 A, buttressed by the *Forsi* case, provides that in administrative cases pleadings are liberally construed and easily amended and that based on the four factors in the *Safeport*<sup>19</sup> case, the NPCC motion should be granted.<sup>20</sup> Specifically, NPCC asserts that Qwest will not be prejudiced by the amendment. First, the addition of the

<sup>14</sup> *Id.*, at 6-8 and cases cited therein.

<sup>15</sup> *Id.*, at 8-9 and cases cited therein.

<sup>16</sup> *Id.*, at 9.

<sup>17</sup> *Id.*, at 10-11 and cases cited therein.

<sup>18</sup> Reply, at 1-2.

<sup>19</sup> *Safeport, Inc. v. Equipment Roundup & Mfg.*, 184 Or 690, 699 (2002).

<sup>20</sup> Reply, at 2.

claimants will not increase Qwest's burden; there will be only one legal brief, no greater number of invoices, and the same parties will be deposed whether the motion is granted or not. Both CustomNet and PAL involve Section 276 of the Communications Act of 1996 and related case law. Both services also have identical parties, identical Qwest actions, and identical relief and evidence, because CustomNet and PAL charges are on the same bills.<sup>21</sup>

Second, NPCC claims that, even though the case is eight years old, the case is just getting started; there has been no discovery or even an answer to the original complaint and thus timeliness is not a material issue. The Complaint only became ripe in 2007, at the conclusion of the rate case, and Qwest has been on notice of NPCC's intentions. Without prejudice to the defendant, the lateness issue is moot.<sup>22</sup>

Third, NPCC contends the amendment meets the requirement that it be closely related to the original complaint because "[t]he law and facts at issue in this case are identical whether the complaint is amended or not \* \* \*."<sup>23</sup> Finally, the "colorable merit" standard has, in NPCC's view, also been met by the CustomNet overcharge allegations.<sup>24</sup>

NPCC cites ORCP 23 C permitting amendments arising out of the same conduct, transaction, or occurrence as the original complaint, in which case the amendment relates back to the original complaint. An amendment filed after the statute of limitations period has past may relate back "if the defendant would have been able to discern from the earlier pleading a potential for the additional basis of liability." NPCC claims the CustomNet claims arise from the same facts as the PAL claim and is based on the same legal theories.<sup>25</sup> NPCC also asserts that Qwest misapplies the time period by which the statute of limitations should be calculated, claiming that the time period under 28 U.S.C. §1658 (a) is four years and not two.<sup>26</sup> NPCC closes its Reply with the assertion that Qwest is concocting legal barriers to the amendment without a proper basis in law by referring to ORCP 23 and ORCP 30 which Qwest interprets as only allowing the addition of defendants, not complainants. NPCC claims that it is "just" to allow the NPCC members to become parties and to add CustomNet, when doing so creates no prejudice to Qwest and involves the same facts and law as the original complaint."<sup>27</sup>

#### IV. ANALYSIS AND OPINION

##### A. Addition of New Claims

In discussing the Commission's role in resolving the issues in the original complaint, the presiding ALJ stated:

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<sup>21</sup> *Id.*, at 2-3.

<sup>22</sup> *Id.*, at 3-5 and cases cited therein.

<sup>23</sup> *Id.*, at 5.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at 5-6.

<sup>26</sup> *Id.*, at 6-7 and cases cited therein.

<sup>27</sup> *Id.*, at 7.

The threshold question presented in this proceeding concerns *the scope of the refund obligation contemplated by the FCC's Payphone Orders* \* \* \*. Since the RBOCs' refund liability under the *Payphone Orders* is ultimately a question of federal law, it makes sense to allow the FCC the opportunity to provide guidance to the states concerning the proper interpretation of those orders. While this Commission could certainly opine on what the FCC intended in its *Payphone Orders*, the FCC itself is in the best position to articulate what its decisions require. \* \* \* In my view, it makes little sense to expend time and resources litigating this matter before the OPUC and state courts when it is unlikely to produce a final outcome, especially when the identical issues are pending before the FCC. \* \* \* any potential RBOC financial exposure will remain until the federal proceedings are finally resolved.<sup>28</sup>

More than four years later, the FCC has yet to issue its Order in response to the requests for a declaratory ruling. Although the ALJ's comments remain as true today as they were in 2005, NPCC now seeks to *broaden the scope* of the case to encompass a service, CustomNet, which may or may not be subject to the same set of issues and intentions regarding refund obligations as are set forth in the *Payphone Orders*. Although NPCC asserts that its claims for CustomNet service overcharges arise out of the same legal theories as for PAL services, without a definitive statement from the FCC that services such as CustomNet were within the scope of the original proceeding, we are not so certain. Indeed, by pursuing CustomNet, we run the risk of obfuscating what is already an uncertain undertaking and raising the possibility that the issuance of an FCC order would not resolve the original complaint because the amendment had added CustomNet services. Thus, we would defeat the very purpose of lifting the abeyance ruling—providing the parties with a definitive Order addressing the issues in the original complaint.

ORS 756.500(4) gives the Commission the authority to order the amendment of a complaint before the completion of taking of evidence. ORCP 23 A provides, in pertinent part, that “a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” ORCP 23 C. Relation back of amendments states, in pertinent part, “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original date of the pleading.”

According to NPCC, CustomNet charges were on the very same invoices from the PAL charges about which it originally complained. Nevertheless, NPCC's initial complaint was narrow and explicit. Even though CustomNet charges were ostensibly listed on the invoices and could have been challenged at the time, NPCC made no *general* allegations of overcharging by Qwest (which might therefore have encompassed CustomNet), but took pains to confine the “new services test” to PAL rates, although NPCC now claims that the same

<sup>28</sup> ALJ Ruling at 7-8 (Mar. 23, 2005) (emphasis added).

legal theories as in the PAL case apply to CustomNet. Furthermore, based upon NPCC's representations, we find that CustomNet service purchases were severable from PAL services, that they viewed them as such and thus do not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The CustomNet claims which NPCC seeks to add to the case via amendment thus do not "relate back" under ORCP 23 C.

In light of our findings that the CustomNet claims do not relate back to the original complaint, we are faced with the question of the applicability of the statute of limitations in barring the amendment. Even if we were of the view that, under ORCP 23, justice should require amending the complaint, we find that the most recent relevant case law unequivocally concluded that the applicable statute of limitations of two years poses an absolute bar to the addition of CustomNet services to the instant case.<sup>29</sup>

For all of the aforementioned reasons, we decline to allow NPCC to amend the complaint by the addition of claims for CustomNet services.

## **B. Addition of New Plaintiffs**

Litigation undertaken by a trade association on behalf of its members and seeking monetary compensation from a single defendant is a common occurrence. The defendant is aware that discovery and examination of witnesses will likely encompass not the trade association's executives or counsel, but the association's aggrieved constituent members.

In this instance, Qwest would be expected to seek discovery on the members, as they were the customers who received PAL services, paid Qwest, had correspondence relating to their knowledge and awareness of the FCC litigation and would be seeking refunds, if NPCC prevailed on the merits. Qwest was on notice that the individual companies and not their umbrella organization were the true parties in interest with respect to the funds at stake.

Furthermore, Qwest never objected to the Commission that NPCC lacked any standing to bring the complaint, even though NPCC itself would not be eligible to receive any refunds. By adding specific members to the claim, NPCC's case is not bolstered nor is Qwest's burden increased. There is only an objective acknowledgement of the already-known parties with a pecuniary interest in the outcome of the litigation. We find that the parties may be added under the four tests of the *Forsi* case: (1) the proposed amendment's nature and relationship to the existing pleadings, (2) prejudice to the opposing party, (3) timing, and (4) the merit of the proposed amendment. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint;

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<sup>29</sup> *Davel Communications, Inc., v. Qwest Corporation*, 460 F.3d 1075, 1089 (9<sup>th</sup> Cir. 2006), applied the two-year statute of limitations to a claim for refund for CustomNet-like fraud protection rates. The court rejected the argument that the claim did not accrue until Qwest filed new services test-compliant rates in 2003, holding that the plaintiff's claim accrued in 1997, when Qwest was required to file compliant rates. 460 F.3d at 1092. The court found that refunds could only be claimed for the two-year period prior to filing the complaint.



Qwest is not prejudiced because it knew or should have known that these parties were the most likely targets of its efforts at discovery and cross-examination; there is no significance in the timing of mentioning their names specifically as the parties; and the amendment serves to clarify the true parties with a pecuniary interest in and knowledge of the transactions that are the subject of the complaint. Therefore, Qwest is not prejudiced by their inclusion as parties-plaintiff.

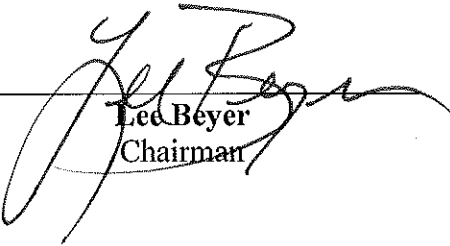
**ORDER**


IT IS ORDERED that:

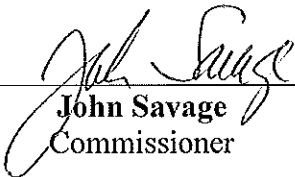
1. The Motion for Leave to Amend Complaint with respect to the addition of new claims filed by the Northwest Public Communications Council is denied.
2. The Motion for Leave to Amend Complaint with respect to the addition of new plaintiffs filed by the Northwest Public Communications Council is granted.

MAY 04 2009

Made, entered and effective \_\_\_\_\_

  
Lee Beyer  
Chairman

  
Ray Baum  
Commissioner

  
John Savage  
Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request 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 by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.