

BEFORE THE PUBLIC UTILITY COMMISSION**OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL, on behalf
of PSPs A to Z, and NPCC MEMBERS:
Central Telephone, Inc.; *et al.*,

Complainants,

v.

QWEST CORPORATION,

Defendant.

ORDER

DISPOSITION: MOTION FOR SUMMARY JUDGMENT GRANTED;
COMPLAINT DISMISSED; DOCKET CLOSED

I. INTRODUCTION

In this docket, the Northwest Public Communications Council (NPCC) asserts that Qwest Corporation is liable for refunds under an order issued by the Federal Communications Commission's Common Carrier Bureau known as the *Waiver Order*. We conclude the refund obligation created in the *Waiver Order* was not triggered in this case because Qwest did not rely on the waiver granted in that order. We therefore grant the motion for summary judgment filed by Qwest on April 30, 2010, dismiss NPCC's complaint, and close this docket.

II. BACKGROUND

NPCC is a regional trade organization that represents companies providing public payphone services. These companies are known as payphone service providers (PSPs). Some of NPCC's members purchase payphone services from Qwest. Qwest is a regional Bell operating company (RBOC) that owned almost 80 percent of the payphone lines in Oregon until it sold its payphone services business in 2004.

On May 14, 2001, NPCC filed a complaint against Qwest, initiating this docket. NPCC alleges that Qwest's rates for public access line (PAL) services were excessive.

NPCC claims that its members are entitled to a refund for paying rates that did not comply with the “new services test” (NST), as required by a series of Federal Communication Commission (FCC) orders implementing Section 276 of the Telecommunications Act of 1996. NPCC asserts only one legal basis for its refund claim—an order issued by the FCC’s Common Barrier Bureau known as the *Waiver Order*.¹

Section 276 of the Telecommunications Act of 1996 was enacted to “promote competition among PSPs, and promote the widespread deployment of payphone service to the benefit of the general public.”² To advance these goals, Congress directed the FCC to prescribe regulations preventing the RBOCs from subsidizing or discriminating in favor of their own payphone service. Section 276(b) requires the FCC to meet five specific requirements, including “prescribing a set of non-structural safeguards for BOC payphone service * * * equal to those adopted in the Computer Inquiry III proceeding.”³

The FCC implemented Section 276 in a series of orders.⁴ The *First Payphone Order*, released September 30, 1996, addresses the five statutory requirements in Section 276(b). That decision requires that “in order to receive compensation for completed calls originating from its payphones, a LEC [local exchange carrier] PSP must be able to certify that it has complied with several requirements, including the institution of “effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate [payphone] subsidies.”⁵ To implement the nonstructural safeguards requirement of Section 276(b)(1)(C), the FCC held that LECs must unbundle payphone line services and file tariffs using the “new services test” (NST).⁶ The FCC concluded that LEC PSPs could begin receiving dial-around compensation (DAC) for the

¹ NPCC attempted to amend its complaint twice. First, NPCC sought to add specific named plaintiffs and to include claims related to Qwest’s “CustomNet” service. The Commission allowed NPCC to add named plaintiffs, but did not allow NPCC to include the CustomNet claims because those claims were time barred. Order No. 09-155 (May 4, 2009). Second, NPCC attempted to again add CustomNet claims and to add claims related to the Commission’s decisions in Docket UT 125. The Commission again denied NPCC’s motion to amend the complaint. Order No. 10-027 (Feb 1, 2010).

² 47 USC § 276(b).

³ *New England Public Communications Council, Inc., v. FCC, et al.*, 334 F.3d 69, 71 (DC Cir 2003); see also, *In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (Dec 20, 1991).

⁴ *In the Matter of the 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 F3d 555 (DC 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 F3d 606 (DC 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 F3d 51 (DC Cir 2000). The *First Payphone Order* and the *Payphone Reconsideration Order* are collectively referred to as the *Payphone Orders*.

⁵ *Payphone Reconsideration Order*, ¶ 131.

⁶ *Id.*, ¶ 199; see also *In the Matter of Wisconsin Pub. Serv. Comm’n*, Order Directing Filings, Bureau/CPD No. 00-01, FCC 02-25 (rel. Jan 31, 2000), ¶ 12.

use of their payphones if intrastate payphone tariffs complying with the requirements of the *First Payphone Order* were in effect by April 15, 1997. Qwest was both an RBOC and a LEC PSP.

On November 8, 1996, the FCC released its *Payphone Reconsideration Order*, modifying certain requirements for LEC tariffing of payphone services and unbundled network functions. The FCC clarified that the states, not the FCC, would review the LEC's intrastate payphone tariffs. The states were directed to ensure that intrastate payphone service tariffs are cost-based, consistent with the requirements of Section 276, nondiscriminatory, and in compliance with the Computer Inquiry III tariffing guidelines (meaning NST-compliant).⁷ The *Payphone Reconsideration Order* acknowledged that, in those cases where a LEC had already filed intrastate payphone tariffs, the state could conclude that the LEC's existing tariffs complied with the requirements of the *Payphone Orders*, in which case no further filings would be required. LECs that did not have intrastate payphone tariffs in compliance with the *Payphone Orders* were directed to file tariffs with the states no later than January 15, 1997. Rates were to be effective by April 15, 1997.⁸

Qwest filed new tariffs for public access line (PAL) service with the Public Utility Commission of Oregon (Commission) on January 15, 1997. Qwest stated that the tariffs were intended to meet the requirements in the *Payphone Orders*, including the requirement in the *Payphone Reconsideration Order* that intrastate PAL rate filings must comply with the NST.

The Commission considered and approved Qwest's new intrastate PAL rates at its April 1, 1997 Public Meeting. A Staff report presented at the public meeting reiterated that the filing was intended to meet the requirements established by the FCC in the *Payphone Orders*. The Commission-approved PAL rates became effective on April 15, 1997.⁹ No party appealed the Commission's approval of Qwest's PAL rates.

On April 15, 1997, the FCC's Common Carrier Bureau adopted and released its *Waiver Order*.¹⁰ The *Waiver Order* granted a request by a coalition of RBOCs, including Qwest, to extend the time to file intrastate tariffs for payphone services:

Because some LEC intrastate tariffs for payphone services are not in full compliance with the [FCC's] guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the

⁷ *New England Pub. Communications Council, Inc. v. FCC*, 334 F3d at 72.

⁸ *Payphone Reconsideration Order*, ¶ 163.

⁹ The transcript of the April 1, 1997 Commission public meeting does not indicate that NPCC entered an appearance or submitted comments regarding Qwest's proposed PAL rates. See Declaration of Lawrence Reichman in Support of Qwest's Motion for Summary Judgment, Ex. 3 (Apr 30, 2010) ("Reichman Decl.").

¹⁰ *In the Matter of Implementation of the Pay Telephone Reclassification Provisions of the Telecommunications Act of 1996*, DA 97-805. 12 FCC Rcd 21370 (1997) (*Waiver Order*).

terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the “new services” test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. *A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed* other requirements with which the LECs must comply before receiving compensation.¹¹

Qwest took no action in response to the *Waiver Order* in Oregon because it believed that the rates approved by the Commission effective April 15, 1997, complied with all of the FCC’s requirements.

During this period, Qwest had a general rate proceeding, Docket UT 125, pending before the Commission. As part of that case, NPCC argued that Qwest’s PAL rates were not NST compliant. The Commission approved new PAL rates in 2001, and NPCC appealed. The Oregon Court of Appeals held that the Commission did not appropriately evaluate whether the PAL rates were NST compliant.¹² While the appeal was pending, Qwest filed new PAL rates in March 2003. In 2007, NPCC stipulated that the March 2003 rates were NST compliant. The stipulation was approved by the Commission in Order No. 07-497.

In its complaint, NPCC asserts that Qwest’s Oregon intrastate PAL tariffs were not NST compliant until 2007. NPCC further claims that because Qwest did not file NST-compliant Oregon intrastate PAL tariffs within the 45-day waiver period specified by the *Waiver Order*, but nevertheless began collecting DAC effective April 15, 1997, Qwest is subject to the refund requirement set forth in the *Waiver Order*. According to NPCC, the applicable refund period extends from April 15, 1997, until the Commission finally approved NST-compliant PAL rates in 2007 in Docket UT 125.

III. QWEST’S MOTION FOR SUMMARY JUDGMENT

Qwest filed a motion for summary judgment in these proceedings on April 30, 2010. Qwest makes two arguments. First, Qwest claims that it did not rely on the FCC’s

¹¹ *Id.*, ¶ 2 (footnotes omitted) (emphasis added).

¹² *NPCC v. Pub. Util. Comm’n of Oregon*, 196 Or App 94, 100 P3d 776 (2004).

Waiver Order in Oregon, and therefore the order's refund obligation was never triggered. Second, Qwest argues that the refund obligation was limited, ending on May 19, 1997, and therefore a claim for refunds needed to be filed by May 19, 1999, or the claim is barred by the applicable two-year statute of limitations. Because NPCC's complaint was not filed until May 21, 2001, Qwest asserts that it is entitled to summary judgment because NPCC's claims are time barred.

As explained further below, we can resolve Qwest's motion based solely the question of whether Qwest "relied on" the *Waiver Order*. We therefore do not discuss Qwest's second argument.

A. Applicable Legal Standard

Summary judgment is appropriate where there is no genuine issue of material fact and, based on those facts, the moving party is entitled to a judgment as a matter of law.¹³ In determining whether this standard has been met, we must review the record in the light most favorable to the party opposing summary judgment.¹⁴

B. Parties' Arguments

1. Qwest

Qwest argues that it did not rely on the waiver in Oregon, so the refund obligation was never triggered. According to Qwest, the *Waiver Order* "imposes a refund obligation only on a LEC 'who seeks to rely on the waiver granted in' the order."¹⁵ Qwest asserts that the *Waiver Order* gave LECs two options: (1) LECs could review existing tariffs and decide that those tariffs complied with the FCC's requirements, including the NST, in which case no further filings would be required; or (2) LECs could decide that existing tariffs are not NST compliant, in which case they would be required to file new tariffs by May 19, 1997. Qwest argues that a refund obligation was created only if the LEC filed new tariffs between April 4, 1997, and May 19, 1997, and the rates in the newly filed tariffs were higher than those in the existing tariffs. Qwest contends that the refund obligation in the *Waiver Order* should be construed narrowly because it was volunteered by the LECs when they requested the waiver.

Qwest states that, in Oregon, Qwest filed new payphone rates on January 15, 1997, in compliance with the *Payphone Orders*. Qwest believed that these rates complied with all of the FCC's requirements. Those rates were approved by the Commission on April 1, 1997, and were effective April 15, 1997. When it became clear that the NST applied to existing services as well as new services, the RBOCs requested the waiver ultimately

¹³ ORCP 47 C. See *Jones v. General Motors Corp.*, 325 Or 404 (1997); *Seeborg v. General Motors Corp.*, 284 Or 695 (1978); *In the Matter of the Petition of Metro One Telecommunications, Inc., for Enforcement of an Interconnection Agreement with Qwest Corporation*, Docket No. IC 1, Order No. 02-126 at 2 (Feb 28, 2002); *City of Portland v. Portland General Electric Co.*, Docket No. UM 1262, Order No. 06-636 at 1-2 (Nov 17, 2006). (citing Order No. 02-126 at 2).

¹⁴ *Id.*

¹⁵ Qwest's Memorandum in Support of Motion for Summary Judgment at 17 (Apr 30, 2010).

granted in the *Waiver Order*, and Qwest reviewed all of its state tariffs to determine compliance with the NST. In Oregon, Qwest decided that its January 15, 1997 tariff complied with the NST and no further filings were required, and Qwest did not file new tariffs between April 4, 1997, and May 19, 1997. Thus, according to Qwest, it did not rely on the waiver granted in the *Waiver Order* and no refund obligation was triggered.

Qwest further states that the FCC required only that a LEC be able to certify that it had tariffs that complied with the applicable requirements in effect by April 15, 1997, and did not require that those tariffs be reviewed and approved as NST compliant by that date. If a LEC certified compliance with the FCC requirements, including NST compliance, as of April 15, 1997, then the FCC authorized the LEC to collect DAC as of that date.

Qwest asserts that its interpretation of the *Waiver Order* is consistent with the only reported case to address a refund claim under the order: *In the Matter of Independent Payphone Assoc. of New York, Inc., v. Pub. Serv. Comm'n of the State of New York*, 5 AD 3d 960, 774 NYS2d 197 (2004) (“*IPANY*”). In that case, the New York appellate court concluded that Verizon was not required to refund portions of its PAL rates because Verizon did not rely upon the *Waiver Order*, even if the rates Verizon relied upon in 1997 to comply with the FCC’s *Payphone Orders* were later determined not to comply with the NST.

2. NPCC

NPCC makes two arguments in response to Qwest.¹⁶ First, NPCC argues that Qwest relied on the waiver order by collecting DAC as of April 15, 1997, even though Qwest did not have NST-compliant rates in effect on that date. NPCC claims that it was conclusively decided in *NPCC v. Pub. Util. Comm'n of Oregon* that Qwest’s PAL rates from April 15, 1997, through November 15, 2007, were not NST-compliant. According to NPCC, because Qwest did not have NST-compliant rates in effect as of April 15, 1997, but started collecting DAC on that date, Qwest necessarily relied on the FCC’s *Waiver Order* and is liable for refunds. NPCC interprets the *Waiver Order* as requiring rates that have been reviewed and approved as NST compliant by April 15, 1997; it is not sufficient to simply have rates that were filed and effective as of that date.

Second, NPCC asserts that Qwest is judicially estopped from disputing its refund obligation because it benefitted from the FCC’s waiver. NPCC states that Qwest, as one of the RBOCs requesting the waiver of the tariff filing deadline, told the FCC that it would provide refunds if it relied on the waiver granted in the *Waiver Order* and NST-compliant rates were greater than the rates in effect as of April 15, 1997, so Qwest cannot now argue that it is not liable for those refunds.

¹⁶ NPCC also inexplicably argues that this Commission does not have subject matter jurisdiction over its claims and states that it is pursuing its claims in federal court. The federal court has since dismissed NPCC’s claims, rejecting NPCC’s argument that the Commission does not have subject matter jurisdiction. Because NPCC invoked this Commission’s jurisdiction when it filed its complaint, the correct process is for NPCC to withdraw its complaint without prejudice if it now believes that it chose the wrong forum.

C. Resolution

As NPCC acknowledges, the only “claim in [this] case is the claim for refund under the Waiver Order[.]”¹⁷ Thus the key question is whether the *Waiver Order* applies.

Under the *Payphone Orders*, LECs like Qwest were required to file payphone tariffs with state commissions that met certain requirements. The FCC ordered an April 15, 1997 effective date for the tariffs. If a LEC had a state tariff in effect as of April 15, 1997, that met all of the FCC’s requirements, including compliance with the NST, then the LEC could begin collecting DAC from PSPs as of that date.¹⁸ Because of a misunderstanding about the application of the NST to existing payphone services, the RBOC LECs requested additional time to ensure that their state tariffs complied with the NST.¹⁹ This request was granted in the *Waiver Order*, which allowed LECs to begin collecting DAC from PSPs on April 15, 1997, even if the LEC’s state payphone tariff did not comply with the NST.²⁰ To take advantage of this extension, a LEC must have a payphone tariff in place, effective as of April 15, 1997, that complied with all of the other requirements of the *Payphone Orders*. The extension gave the LECs an additional 45 days (from April 4, 1997) to file NST-compliant tariffs (by May 19, 1997). To remedy any inequity caused by allowing LECs to recover DAC before NST-compliant rates were in effect, the FCC required LECs to refund the difference between the rates in effect on April 15, 1997, and “newly filed” tariff rates.²¹

The *Waiver Order* made it clear that the right to DAC was determined on a state-by-state basis, and failure to meet the FCC requirements in one state did not affect the right to compensation in a state where the requirements had been met. Thus, it is irrelevant if Qwest relied on the waiver granted in the *Waiver Order* in other states. The only question is whether Qwest relied on the waiver in Oregon.

We agree with Qwest that it is clear from the plain language of the *Waiver Order* that the refund obligation is triggered only if a LEC relied on the waiver to comply with the FCC requirements. The order states:

A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide a credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.²²

If a LEC certified that the tariffs in effect by April 15, 1997, met all of the FCC requirements, including the NST, then the LEC met the original filing deadline and did not rely on the waiver of that deadline. In Oregon, Qwest filed an intrastate payphone

¹⁷ NPCC’s Memorandum in Opposition to Qwest Motion for Summary Judgment at 1 (Jul 29, 2010).

¹⁸ *Waiver Order*, ¶¶ 6, 7, 10.

¹⁹ *Id.*, ¶ 14.

²⁰ *Id.*, ¶ 2.

²¹ *Id.*, ¶ 20.

²² *Id.*, ¶ 25.

tariff on January 15, 1997, that was intended to meet all of the FCC requirements. The Commission approved the tariff on April 1, 1997, and the tariff was effective April 15, 1997.²³ Qwest did not file another payphone tariff between April 4, 1997, and May 19, 1997.²⁴ Instead, Qwest certified on May 20, 1997, that the tariff in effect in Oregon on April 15, 1997, met all of the FCC requirements.²⁵ Qwest therefore did not avail itself of the extension granted in the *Waiver Order*.

NPCC acknowledges that Qwest did not file a new payphone tariff between April 4, 1997, and May 19, 1997, but argues that Qwest nonetheless “relied on” the *Waiver Order* because the rates in effect on April 15, 1997, did not actually comply with the NST, so Qwest was collecting DAC in Oregon even though its tariff did not comply with the requirements of the *Payphone Orders*. NPCC claims that the Oregon Court of Appeals conclusively determined that Qwest’s PAL rates as of April 15, 1997, did not comply with the NST. Thus, according to NPCC, the refund obligation was triggered and Qwest owes refunds from April 15, 1997, until NST-compliant rates were filed, reviewed, and approved.

We are not persuaded by NPCC’s arguments. Contrary to NPCC’s assertions, the *Waiver Order* did not require that intrastate payphone tariffs be reviewed and conclusively determined to be NST compliant by May 19, 1997. The order required only that LECs be able to certify that it had effective state tariffs that met the FCC requirements. Qwest made such a certification on May 20, 1997. Nothing in the *Waiver Order* indicates that the FCC required tariffs to be filed, reviewed, approved, and all appeals exhausted before the requirements of the *Payphone Orders* would be deemed satisfied. Furthermore, in *NPCC v. Pub. Util. Comm’n of Oregon*, the Court of Appeals found that the Commission did not appropriately evaluate whether the PAL rates adopted in 2001 in Docket UT 125 complied with the NST. The court did not conclusively determine that Qwest’s PAL rates as of April 15, 1997, were not NST compliant. Qwest’s 1997 PAL rates were never appealed and have never been declared (by the Court of Appeals or this Commission) to be inconsistent with the NST.

NPCC’s position is also contrary to the only reported decision involving a similar request for refunds of PAL rates under the *Waiver Order*. In *IPANY*, Verizon filed an intrastate payphone tariff on January 15, 1997, to be effective April 15, 1997. Although Verizon was also one of the RBOCs that requested the waiver granted in the *Waiver Order*, Verizon did not file another payphone tariff between April 4, 1997, and May 19, 1997, in New York. Instead, Verizon (like Qwest in this case) relied on the previously filed tariff, believing it to be NST compliant. The New York commission’s determination that those rates were NST compliant was appealed, and the PSPs asserted the right to a refund under the *Waiver Order*. The trial court concluded that the PSPs were entitled to a refund. The New York appellate court disagreed:

²³Declaration of Alex M. Duarte in Support of Qwest’s Motion for Summary Judgment, Ex. 2 (Apr 30, 2010).

²⁴*Id.* at 1.

²⁵Reichman Decl., Ex. 5.

The basis for the Supreme Court's conclusion was a letter from representatives of Verizon's predecessor requesting an extension of time in which to review existing rates and file new rates if it were determined that the existing rates were not compliant with the new services test, proposing an agreement to refund or provide a credit to PSPs for the difference if the newly filed rates were lower than existing rates and requesting an order of the [FCC] granting a 45-day extension for filing new rates and ordering a refund in the event such new rates were indeed lower than existing rates. Suffice to say that new rates were not filed and the refund order was thus never effective. The fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997.²⁶

NPCC did not address *IPANY* in its response to Qwest's motion. We agree with the court's reasoning, and conclude that Qwest did not rely on the waiver granted in the *Waiver Order*, and thus the refund obligation was never triggered.

NPCC's second argument – judicial estoppel – is dependent upon the conclusion that Qwest relied on the waiver order. Because we conclude that Qwest did not rely on the order in Oregon, we find that NPCC's judicial estoppel argument is meritless.

VI. CONCLUSION

We conclude that Qwest did not rely on the *Waiver Order* in Oregon, and therefore the refund obligation established in that order was never triggered. Because the *Waiver Order* is NPCC's only asserted basis for Qwest's refund liability, NPCC's complaint fails to state a cause of action as a matter of law. We therefore grant Qwest's motion for summary judgment and dismiss NPCC's complaint.

²⁶ See *IPANY*, 5 AD 3d at 963-964. The referenced letter is the RBOC's request for a waiver, which was granted in the *Waiver Order* as discussed above. See Reichman Decl., Ex. 1.

VII. ORDER

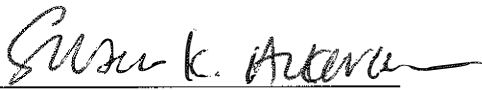
IT IS ORDERED that:

1. Qwest Corporation's motion for summary judgment is granted.
2. Northwest Public Communications Council's complaint is dismissed with prejudice.
3. This docket is closed.

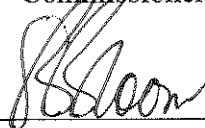
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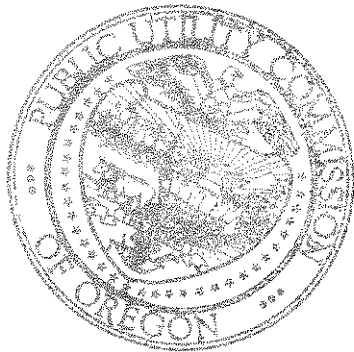
John Sayage
 Commissioner



Susan K. Ackerman
 Commissioner



Stephen M. Bloom
 Commissioner



A party may request rehearing or reconsideration of this order under 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 860-001-0720. A copy of the request must also be served on each party to the proceedings as provided in OAR 860-001-0180(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480 through 183.484.