

1                                   **BEFORE THE PUBLIC UTILITY COMMISSION**  
2   **OF OREGON**  
3   **DR 26/UC 600**

4                   THE NORTHWEST PUBLIC  
5                   COMMUNICATIONS COUNCIL,

6   Complainant,

7   v.

8                   QWEST CORPORATION,

9   Defendant.

DECLARATION OF LAWRENCE  
REICHMAN IN SUPPORT OF QWEST'S  
MOTION TO STRIKE FIRST AMENDED  
COMPLAINT

11                   1.       I, Lawrence Reichman, am one of the attorneys representing Qwest Corporation  
12                   ("Qwest") in this proceeding. I make this declaration in support of Qwest's Motion to Strike the  
13                   First Amended Complaint filed by Complainants on November 16, 2009.

14                   2.       At my direction, an electronic comparison of the proposed amended complaint  
15                   NPCC filed with the Commission on February 26, 2009, and the First Amended Complaint filed  
16                   by NPCC and its members on November 16, 2009, was performed, comparing the entire text of  
17                   these two documents through, but not including, the date and signature blocks on the last page.  
18                   The document attached as Exhibit A is a true and correct copy of the result of that comparison.  
19                   While the formatting of Exhibit A is a bit different from the two documents it compared, every  
20                   change in the wording of the document from the proposed amended complaint to the First  
21                   Amended Complaint is marked therein with revision lines.

22                   3.       As will be apparent from a review of Exhibit A, the only changes in the document  
23                   were as follows. First, in the caption, the title of the pleading was changed from "Amended  
24                   Complaint . . ." to "First Amended Complaint . . ." Exhibit A at 1. Second, in paragraph 2, the  
25                   name and address of the contact person for NPCC were changed. Exhibit A at 2. Finally, there  
26                   was a change in the numbering of the paragraphs beginning with paragraph 11 of the proposed

1 amended complaint. Exhibit A at 3-6. There were no other changes in the wording of the  
2 amended complaint.

3 *I hereby declare that the above statement is true to the best of my knowledge and belief,*  
4 *and that I understand it is made for use as evidence in court and is subject to penalty of perjury.*

5 DATED this 8<sup>th</sup> day of December, 2009.

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8 Lawrence Reichman

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BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, ET AL.	Docket No. DR 26/UC 600
Complainants,	<u>FIRST AMENDED COMPLAINT OF THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, ET AL.</u>
v.	FOR REFUNDS OF PAYPHONE SERVICES OVERCHARGES
QWEST CORPORATION,	
Defendant.	

The Northwest Public Communications Council (“NPCC”) and the payphone service provider members of the NPCC listed in Exhibit A (“Payphone Service Providers,” referred to collectively with NPCC as the “Complainants”)<sup>1</sup> request the OPUC (“Commission”) to issue an order directing Qwest Corporation (“Qwest” or “Defendant”) to pay refunds for payphone services overcharges that Qwest has collected from the Payphone Service Providers since April 15<sup>th</sup>, 1997. The Complainants allege as follows:

I. THE PARTIES

A. THE COMPLAINANTS

1. The NPCC is a regional trade association representing competitive payphone service providers in Idaho, Montana, Oregon and Washington. The NPCC’s purpose is to advance the interests of non-LEC payphone providers. The Payphone Service Providers, which are NPCC members, purchase or have purchased Payphone Services from Qwest in Oregon. Payphone Services include: (1) Public Access Lines (“PAL”) that enable the Payphone Service Providers to connect their payphones to the telephone network for placement of local and long distance telephone calls and (2) a service variously called Fraud Protection, CustomNet, Selective Class of Call Screening, or Originating Line Screening (“CustomNet”), which prevents the billing of certain calls, such as operator-assisted long distance calls, to the payphone from which the call is placed. CustomNet is an important payphone service because, in its absence, the Payphone Service Providers are exposed to billing for calls fraudulently placed from payphones. This Complaint refers to the foregoing services (PAL and CustomNet) collectively as the “Payphone Services.”

<sup>1</sup> The NPCC was formerly known as the Northwest Payphone Association. The Complainants are identified in Exhibit A to this Complaint.

2. The NPCC's address and telephone number are NPCC, c/o ~~Bret Kragerud, CostTel Communications, 23815 156th Avenue, Kent, Washington 98042, tel: (253) 630-5989, fax: (253) 630-1625, costtel@nefweb.net.~~ Randy Linderman, 2373 NW 185TH AVE #310 HILLSBORO OR 97124. The Payphone Service Providers' contact information appears in Exhibit A.

## B. QWEST

3. Qwest is the incumbent local exchange carrier for most of Oregon. Qwest's main corporate office in Oregon is at 421 SW Oak Street, Portland, Oregon 97204, (503) 242-7454. Qwest was formerly known as US WEST Communications, Inc. and will be referred to as Qwest throughout this Complaint.

## II. JURISDICTION

4. The Commission has jurisdiction over this Complaint under ORS 756.500, 756.040, 756.160 through 756.200, OAR 860-013-0015, and FCC Orders in Docket Nos. CC 96-128 and CC 91-35.

## III. APPLICABLE STATUTES AND RULES

5. The statutes and rules at issue are 47 U.S.C. §§ 276 and 47 C.F.R. § 61.49, including related FCC and OPUC orders. ORS 756.040, 756.515, 757.020, 757.310, 757.325, 757.330, 759.260, 759.275 and 759.280 and other Oregon statutes involving discrimination may also be at issue, which will be established during the course of this proceeding.

## IV. BACKGROUND REGARDING SECTION 276

### AND THE FCC WAIVER ORDER

6. Section 276 of the Telecommunications Act of 1996 prohibited Regional Bell Operating Companies ("RBOCs") like Qwest from discriminating in favor of their payphone services:

(a) Nondiscrimination safeguards. After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

47 U.S.C. § 276(a) (emphasis added).

7. Section 276 further required the FCC to "prescribe a set of non-structural safeguards for Bell operating company payphone service . . . which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding." 47 U.S.C. § 276(b)(1)(C).

8. In response, the FCC released a series of orders implementing Section 276. The FCC set specific requirements for all Payphone Services tariffs, which must be:

- a. cost based;
- b. consistent with the requirements of Section 276;
- c. nondiscriminatory; and
- d. consistent with Computer III tariffing guidelines.

Id. Order on Reconsideration, 11 FCC Rcd. 21,233 at ¶ 163 (1997) (“Order on Reconsideration”). The “Computer III tariffing guidelines” incorporate the “new services test.” Id. at n. 492.

9. Under the new services test, Qwest must calculate its payphone services rates in a manner that does not “recover more than the direct costs of the service, plus ‘a just and reasonable portion of the carrier’s overhead costs.’” In the Matter of Wisconsin Public Service Commission, Order Directing Filings, 17 FCC Rcd. 2051 at ¶ 23 (2002) (“New Services Order”) (emphasis added); see Order on Reconsideration at ¶ 163; see also 47 C.F.R. § 61.49(h); see also Report and Order, In the Matter of Amendments to Part 69 of the Commission’s Rules, 6 FCC Rcd. 4524 at ¶ 44 (1991); see also 47 C.F.R. § 61.49(h). Direct costs are those directly attributable to a service. Overhead costs are attributable to many different services, like marketing.

10. Qwest must file tariffs containing rates that meet the new services test for PAL with state commissions and file tariffs for “[u]nbundled features and functions provided by [BOCs] to their own payphone operations or to others” like CustomNet at state commissions and the FCC. New Services Order at ¶ 14. Qwest must file “cost-support data” along with these tariffs. Order, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996, DA 97-805 at ¶ 18 (1997) (“Waiver Order”). Qwest bears the burden to prove that its rates comply with the new services test. New Services Order at ¶ 56.11.— Qwest must pay refunds to its customers when rates exceed the new services test. The FCC clarified this duty in an order waiving the original Payphone Services tariff filing deadline. Initially, the FCC ordered RBOCs to file their new tariffs with state commissions by April 15, 1997. Waiver Order at ¶ 19. The “RBOC Coalition,” including Qwest, requested a delay in the filing requirement so that it could begin to collect dial around compensation, which the FCC would have otherwise prohibited given that the RBOC Coalition’s Payphone Services rates did not comply with the new services test. Id. at ¶ 13. The FCC responded by granting a 45 day waiver of the filing deadline. Id. at ¶ 21. However, the FCC noted that a RBOC “who seeks to rely on the waiver granted in [the Waiver Order] must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates.” Id. at ¶ 20.<sup>2</sup> Qwest relied on the waiver by accepting dial around compensation without having new-services-test compliant rates on file.

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<sup>2</sup> During the proceeding, RBOC Coalition “concede[d] that the Commission’s payphone orders, as clarified by the Bureau Waiver Order, mandate that payphone services a LEC tariffs at the

~~12~~.11. The FCC has issued many orders that contain the above-listed requirements, including orders in 1996, 1997, 2000 and 2002. The D.C. Circuit Court of Appeals upheld the 2000 and 2002 orders, in response to an RBOC appeal. *New Eng. Pub. Comm. Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). Since then, other federal appeals courts have held that these requirements apply to Qwest. See *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006); see *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225 (10th Cir. 2007).

~~13~~.12. The Commission has been considering the issues raised by Section 276 as part of its Docket UT-125, which is a generic case for all Qwest rates. The outcome of Docket UT-125, which is *res judicata*, was that Qwest's Payphone Services rates did not comply with the new services test and Section 276, as explained below.

~~14~~.13. The background of Docket UT-125 is as follows. On the date of passage of Section 276, Qwest was operating under an alternative form of regulation ("AFOR") in Oregon. The Commission terminated Qwest's AFOR effective May 1, 1996 and commenced a rate case.<sup>3</sup> As a result, on May 1, 1996, Qwest's then-existing Payphone Services rates became interim rates subject to refund under Oregon law.<sup>4</sup> The Payphone Services rates remained interim for years due to protracted litigation before the Commission and Oregon Courts.

~~15~~.14. In 1995 through 1997, the Commission advised NPCC that all issues regarding Qwest's Payphone Services rates, whether under the new services test or otherwise, should be taken up in Qwest's rate case, Docket No. UT-125. On information and belief, the Commission also advised Qwest to take up Payphone Services rate issues involving the new services test in Docket No. UT-125. Consistent with that advice, Qwest did not file any Payphone Services rates or costs between June 1, 1996 and May 19, 1997.

~~16~~.15. On May 19, 1997, the Commission entered an order holding that Qwest's Payphone Services rates would remain as "interim" and subject to refund pending further investigation in its Docket No. UT-125. OPUC Order No. 97-171 (May 19, 1997) (emphasis added).

~~17~~.16. Throughout the UT-125 proceeding, Qwest attempted to justify its Payphone Services rates using methodologies prohibited by Section 276 and the new services test. Qwest refused to provide supporting cost information for its rates because "the Oregon Commission rules have not incorporated the FCC's rules for new services and there is no requirement in Oregon for Qwest to file cost information that utilizes the FCC new services test." See Qwest Response to NPCC 04-040, Docket UT-125. Rather than calculating rates based on the new services test, Qwest stated that "PAL rates are priced in alignment with business rates" and "Message and Flat Smart PAL are priced at an equal price/cost ratio as Basic PAL to ensure no pricing discrimination occurs between these services," which the new services test does not permit. See Qwest Response to NPCC 04-039, Docket UT-125. Qwest presented a witness, David L. Teitzel, to

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state level are subject to the new services test and that the requisite cost-support data must be submitted to the individual states." *Id.* at ¶ 18.

<sup>3</sup> OPUC Order No. 96-107.

<sup>4</sup> *Id.*

support these claims. Qwest and Mr. Teitzel made no mention of costs, overhead, or any of the elements of the new services test and related tariff filing requirements. Also, to the best of NPCC's knowledge, Qwest did not certify to the Commission that its Payphone Services rates met the new services test and did not submit complete cost-support data to the Commission on this issue.

~~18.~~17. Following a hearing, the Commission entered Order No. 01-810 on September 14, 2001 approving Qwest's proposed Payphone Services rates with minor changes and largely rejecting NPCC's arguments that Qwest's proposed Payphone Services rates did not comply with the new services test or Section 276. The NPCC appealed the OPUC's Order No. 01-810.

~~19.~~18. While NPCC was appealing Order No. 01-810, Qwest in March of 2003 filed proposed Payphone Services rates and costs with the Commission purportedly in compliance with the Commission's orders and the new services test. These rates were substantially lower than the Payphone Services rates that Qwest charged the Complainants.

~~20.~~19. The Oregon Court of Appeals reversed OPUC Order No. 01-810 in an order issued on November 10, 2004. Northwest Public Comm's Council v. PUC, 100 P.3d 776 (2004) ("Oregon Court of Appeals Order"). Consistent with NPCC's arguments, the Court of Appeals held that "[t]he District of Columbia Circuit Court of Appeals treats the FCC's orders under section 276 as binding on every state, and so do we." *Id.* at 778. The Court reversed the Commission's holding that Qwest's rates complied with relevant law and remanded the case back to the Commission. The Court specifically held that "the PUC must reconsider its order in light of the New Service Order and other relevant FCC orders." *Id.*

~~21.~~20. On March 31, 2006, Qwest filed new, proposed Payphone Services rates in OPUC Docket No. UT-125.

~~22.~~21. After further Commission Staff investigation, Qwest, the Commission Staff, and NPCC entered into a stipulation approving Qwest's 2006 proposed Payphone Services rates. Pursuant to the parties' stipulation, the Commission entered a Final Order on November 15, 2007. The Qwest Payphone Services rates approved by the Final Order are substantially lower than the rates that Qwest charged the Complainants.

~~23.~~22. The attached Final Order concludes over 11 years of continuous litigation regarding Qwest's Payphone Services rates and represents the first order of the Commission that has approved Qwest's Payphone Services rates that has not been overturned on appeal.

~~24.~~23. NPCC filed the original Complaint in this docket on May 14, 2001. This docket has been held in abeyance for several years while Docket UT-125 proceeded, until the abeyance order was lifted on February 5, 2009.

~~25.~~24. In sum, Qwest charged its Payphone Services customers illegally high rates for years. Now that rates have been set under Docket UT-125, the Commission should direct Qwest to refund the amount by which Qwest's rates exceeded the legal rates.

## V. THE PURPOSE OF THIS AMENDMENT

~~26-25.~~ The purpose of this Amendment is to join the Payphone Service Providers as named Complainants and to update and conform the Complaint to the evidence developed in the Docket UT-125 proceeding and the developments in the law that have occurred since NPCC filed the original complaint in May of 2001.

VI. COUNT ONE - SECTION 276 REQUIRES QWEST TO REFUND UNLAWFUL RATES FOR PAYPHONE SERVICES TO THE COMPLAINANTS

~~27-26.~~ The Complainants reallege paragraphs 1 through 26 above.

~~28-27.~~ As explained above, Section 276 of the Telecommunications Act of 1996 states that Qwest "(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and (2) shall not prefer or discriminate in favor of its payphone service." 47 U.S.C. § 276(a)(emphasis added).

~~29-28.~~ Qwest violated Section 276 by both preferring and discriminating in favor of its own Payphone Services division. It is res judicata that Qwest's rate-setting methodology did not comply with Section 276, as established by the Oregon Court of Appeals Order. Qwest lowered its rates once the Oregon Court of Appeals Order forced Qwest to comply with Section 276.

~~30-29.~~ Qwest must refund to the Payphone Service Providers the amount by which Qwest's Payphone Services rates exceeded the legal rates.

VII. COUNT TWO - THE FCC'S WAIVER ORDER REQUIRES QWEST TO REFUND UNLAWFUL RATES FOR PAYPHONE SERVICES TO THE COMPLAINANTS

~~31-30.~~ The Complainants reallege paragraphs 1-26 above.

~~32-31.~~ As explained above, Qwest, as a member of the RBOC Coalition, asked for a waiver from the FCC to continue charging Payphone Services rates in excess of the new services test while collecting dial-around compensation. Qwest relied on the waiver by accepting dial around compensation without having new-services-test compliant rates on file. It is res judicata that Qwest's rate-setting methodology did not comply with the new services test. See Northwest Public Comm's Council v. PUC, 100 P.3d at 778.

~~33-32.~~ Qwest must refund the unlawful rate charges to the Payphone Service Providers.

VIII. RELIEF REQUESTED

~~34-33.~~ Qwest has charged the Payphone Service Providers unlawfully high rates for Payphone Services since April 15, 1997, which was the deadline for having effective Payphone Service tariffs on file that comply with Section 276 and the new services test. The Payphone Service Providers are entitled to a refund. The Commission should order the refund to be based on the final Payphone Services rates set in Docket UT-125.

WHEREFORE, the Complainants request this Commission (having initiated this proceeding as requested in the original Complaint), at the conclusion of this proceeding, to issue an order holding that:



(1) Qwest's Payphone Services rates exceeded the lawful amount under Section 276 and the new services test since April 15, 1997;

(2) Qwest must refund to the Complainants the amount by which Qwest's Payphone Services rates exceeded the legal rates, and

(3) The refund should be calculated based on the amount by which the rates charged since April 15, 1997 exceeded the Payphone Services rates established in the Final Order in Docket UT-125.

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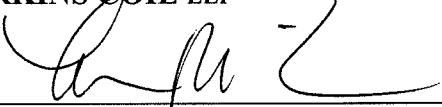
**CERTIFICATE OF SERVICE**

I hereby certify that I have this 8th day of December, 2009, served the foregoing DECLARATION OF LAWRENCE REICHMAN IN SUPPORT OF QWEST CORPORATION'S MOTION TO STRIKE FIRST AMENDED COMPLAINT upon all parties of record in this proceeding by causing a copy to be sent by electronic mail and U.S. mail to the following addresses:

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By   
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Attorneys for Qwest Corporation