

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.

QWEST CORPORATION'S MOTION TO
STRIKE SECOND AMENDED
COMPLAINT AND RESPONSE TO
COMPLAINANTS' PRECAUTIONARY
MOTION TO ALLOW SECOND
AMENDMENT TO THE COMPLAINT

10
11 **I. MOTION AND INTRODUCTION**

12 **A. Motion to Strike Second Amended Complaint**

13 Qwest Corporation ("Qwest") respectfully moves the Commission to strike the Second
14 Amended Complaint filed by Complainants The Northwest Public Communications Council
15 ("NPCC"), the payphone service providers ("PSPs") who are members of the NPCC and listed in
16 the Second Amended Complaint ("NPCC's Members"), and the unidentified PSPs who are not
17 members of the NPCC ("Unidentified Non-Members"). (NPCC, NPCC's Members, and the
18 Unidentified Non-Members are collectively referred to as "Complainants.") The Commission
19 should strike the Second Amended Complaint because Complainants filed it without leave of the
20 Commission as required by Oregon law, and because it violates an existing order of the
21 Commission.

22 **B. Response to Precautionary Motion To Allow Second Amendment to the Complaint**

23 This memorandum also is filed in response to the Complainants' Precautionary Motion
24 To Allow Second Amendment to the Complaint (the "Motion"). The Commission should deny
25 the Motion for several reasons. First, it does not comply with Order No. 09-155 (the "Order") of
26 the Commission which denied in part and granted in part NPCC's Motion for Leave to Amend

1 Complaint ("Motion for Leave"). Specifically, the proposed Second Amended Complaint
2 includes a claim for refund of CustomNet charges that the Commission specifically ruled NPCC
3 and NPCC's Members could not make in this case.

4 Second, the proposed Second Amended Complaint includes *several* additional claims that
5 have nothing to do with a refund under the FCC's payphone orders and would, therefore,
6 significantly expand the scope of this case, which has been pending for over eight years. In
7 addition to seeking a refund under 47 U.S.C. § 276 and the FCC's Waiver Order, Complainants
8 now want to pursue a claim that they are also entitled to a refund in connection with Qwest's last
9 general rate case, Docket UT 125, in which the Commission resolved all refund-related issues in
10 2000, and Qwest made all required refunds in 2000-01. Complainants also seek to add statutory
11 claims for unlawful discrimination and prohibited acts, and to seek both damages and attorneys'
12 fees. Not only would these claims significantly expand the scope of this case, they also are
13 patently without merit and have no place in this docket, which are the third and fourth reasons
14 the Commission should deny the Motion.

15 Finally, the proposed Second Amended Complaint purports to bring claims on behalf of
16 the Unidentified Non-Members. NPCC has no standing to bring claims on behalf of such
17 entities, and the Commission lacks statutory authority to order refunds to such non-parties. For
18 all of these reasons, the Commission should deny the Motion and require NPCC and NPCC's
19 Members to file an amended complaint that complies with the Commission's Order on the
20 Motion for Leave.

21 II. BACKGROUND

22 A. NPCC's Motion for Leave to Amend, the Commission's Order, and the First 23 Amended Complaint

24 On February 26, 2009, NPCC filed the Motion for Leave, seeking an order of the
25 Commission permitting NPCC and NPCC's Members to file an Amended Complaint in the form
26 attached to the motion as Exhibit A. Details regarding NPCC's Motion for Leave, the

1 Commission's Order granting in part and denying in part the Motion for Leave, and the First
2 Amended Complaint that NPCC and NPCC's Members filed on November 16, 2009, are relevant
3 to this memorandum and are set forth in detail in the "Background" section of Qwest's Motion to
4 Strike the First Amended Complaint ("Motion to Strike"), also filed on this date. For the sake of
5 brevity, Qwest will not repeat that discussion in this memorandum, but wishes to incorporate the
6 "Background" section of Qwest's Motion to Strike by reference. (For the same reasons, Qwest
7 also incorporates by reference herein certain arguments from its Motion to Strike and its
8 response to NPCC's Motion for Leave.)

9 **B. The Second Amended Complaint**

10 On the same date NPCC and NPCC's Members filed the First Amended Complaint,
11 Complainants also filed the Second Amended Complaint. Complainants neither moved for nor
12 obtained leave from the Commission prior to filing the Second Amended Complaint. Indeed,
13 Complainants have taken the position that no such leave is required: "There has been no answer
14 ever lodged in this matter nor any ruling so the Complainants are entitled as a matter of course to
15 the filing of the Second Amended Complaint." Letter of Frank G. Patrick to the Commission
16 dated November 16, 2009, as cover to filing of the Second Amended Complaint.

17 **1. Includes claim for refund of CustomNet charges**

18 The proposed Second Amended Complaint would expand this case in several ways.
19 Counts One and Two seek a refund of rates paid for Payphone Services under 47 U.S.C. § 276
20 and the FCC's Waiver Order. Second Amended Complaint, ¶¶ 35-43. These are the same counts
21 that NPCC included in the proposed amended complaint filed with its Motion for Leave. While
22 these legal theories are the same as those NPCC previously asserted, it is important to note that
23 the Second Amended Complaint would impermissibly expand the subject of these claims to
24 include CustomNet services, which claims the Commission has already decided are time-barred
25 and may not be included in this case. *See* Order at 7-8. Similar to the First Amended Complaint,
26 the Second Amended Complaint includes CustomNet within the definition of the term

1 "Payphone Services" which is the operative term in the Second Amended Complaint. *See*
2 Second Amended Complaint, ¶¶ 2-3; Motion to Strike at 3.

3 **2. Includes new, additional claims for relief**

4 Count Three of the proposed Second Amended Complaint includes a "claim" for
5 estoppel. Second Amended Complaint, ¶¶ 44-50.

6 Count Four of the proposed Second Amended Complaint seeks a refund of alleged
7 "overcharges" under "ORS 759.185 et seq." based on activities in Qwest's last general rate case,
8 Docket UT 125. Second Amended Complaint, ¶¶ 51-54.

9 In addition, following Count Four in the Second Amended Complaint are additional
10 claims, not stated as counts or claims, but clearly raising claims and issues under other statutes.
11 Paragraphs 55-58 of the proposed Second Amended Complaint allege in relatively vague terms
12 that Qwest provided "preferential and discriminatory treatment" to its own payphone services
13 and to an entity known as "FSH Communications, LLC." In the heading preceding those
14 paragraphs, and in their prayer of relief, Complainants seek attorneys' fees and other relief under
15 ORS 759.900, 183.497, 759.275, and 759.455, and under 47 U.S.C. § 276. Second Amended
16 Complaint at 16, Heading XI.

17 Further, in Heading XII and paragraphs 59-60 that follow, Complainants seek damages
18 and attorneys' fees under ORS 759.900. Second Amended Complaint at 16, Heading XII and
19 ¶¶ 59-60.

20 **3. Includes new, unidentified complainants**

21 In the Motion for Leave, NPCC sought, and obtained, Commission approval to add
22 NPCC's Members to the case as complainants. The proposed Second Amended Complaint
23 purports also to add unidentified PSPs who are *not* members of NPCC to this case. NPCC
24 purports to "represent such Unidentified Payphone Service Providers A to Z in a 'representative'
25 capacity." Second Amended Complaint, ¶ 5.

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III. ARGUMENT

A. **The Commission Should Strike the Second Amended Complaint Because It Was Filed Without Commission Approval.**

1. **Commission approval is required to file a further amended complaint.**

Complainants have already filed the Second Amended Complaint, but without first seeking or obtaining leave of the Commission to do so. The Second Amended Complaint should be stricken because it was filed without Commission approval.

As noted above, Complainants have taken the position that they do not need Commission approval to file the Second Amended Complaint because "[t]here has been no answer ever lodged in this matter nor any ruling . . ." Complainants are relying on Oregon Rule of Civil Procedure ("ORCP") 23 A, which states, in part: "A pleading may be amended by a party once as a matter of course at any time before a responsive pleading is served . . ." See Motion at 2, ¶ 1. ORCP 23 A does not entitle Complainants to file the Second Amended Complaint without Commission approval for several reasons.

First, while the Commission has adopted the ORCP for its proceedings, that is subject to exception "as modified by these [i.e., the Commission's] rules, by order of the Commission, or by ruling of the ALJ." OAR 860-011-0000(3). More fundamental, however, is the fact that ORS 756.500(4) requires an order of the Commission for a party to amend a complaint ("The complaint may, at any time before the completion of taking of evidence, be amended *by order of the commission.*") (emphasis added). The Commission's adoption of the ORCP's procedural rules cannot displace this statutory requirement. The requirement for a Commission order is further evidenced by the fact that NPCC itself, *in this very case*, sought leave of the Commission to file a first amended complaint.

Second, even if the language of ORCP 23 A quoted above applies, which it does not, the Second Amended Complaint would not be the *one* "free" amendment that rule permits ("A pleading may be amended by a party *once* as a matter of course . . .") (emphasis added). NPCC

1 has already sought and obtained leave to file an amended complaint (even though the First
2 Amended Complaint it and NPCC's Members filed does not conform to the Commission's
3 Order). Even under the language of ORCP 23 A, Complainants plainly require Commission
4 approval to *further* amend the complaint.

5 Third, it cannot be said that no responsive pleading has been filed. In November 2004,
6 NPCC filed a motion for summary judgment and, in January 2005, Qwest filed a dispositive
7 cross-motion for summary judgment. At that point, the issues in the case were joined and Qwest
8 responded to the original complaint by filing a dispositive motion. In these circumstances, even
9 ORCP 23 A would require leave of the Commission to amend the complaint.

10 Finally, it cannot be disputed that adding parties to the action, which Complainants
11 attempt to do with the Unidentified Non-Members, requires Commission approval. As noted in
12 the Order at 3, NPCC previously sought to add NPCC's Members as Complainants under
13 ORCP 30. That rule provides that "[p]arties may be dropped or added *by order of the court* on
14 motion of any party . . ." (emphasis added). ORCP 30 does not permit new parties to join the
15 case without an order of the Commission.

16 **2. The claim for refund of CustomNet charges violates the Order.**

17 Not only did Complainants improperly file the Second Amended Complaint without
18 Commission approval, the Second Amended Complaint is plainly improper because it includes a
19 claim for refund of CustomNet charges, which the Commission in no uncertain terms decided
20 was time-barred and refused to permit NPCC and NPCC's Members to include in this case.

21 Complainants argue that the addition of NPCC's Members and the Unidentified Non-
22 Members to the Second Amended Complaint somehow permits them to skirt the Commission's
23 Order and include a claim for refund of CustomNet charges. Motion at 3, ¶ 4. This argument is
24 based on the unfounded assumption that NPCC's Motion for Leave was not filed on behalf of
25 NPCC's Members, and is further defeated by the doctrine of the law of the case. Rather than
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1 burden the record, Qwest respectfully incorporates its response to this argument in the Motion to
2 Strike at 4-7.

3 Complainants also seem to argue that the substitution of counsel for Complainants
4 entitles them to relitigate this issue. See Motion at 3-4, ¶¶ 5, 7. It should go without saying that
5 NPCC and NPCC's Members are bound by the arguments made by their former counsel in this
6 case and cannot relitigate any issues simply because they have changed lawyers.

7 For all of these reasons, the Commission should strike the Second Amended Complaint.

8 **B. The Commission Should Deny Complainants' Motion for Leave.**

9 **1. Legal standard**

10 As discussed in the Order at 4, *Forsi v. Hildahl*, 194 Or. App. 648, 652, 96 P.3d 852
11 (2004), articulates four factors courts apply in exercising their discretion whether to allow or
12 deny an amended complaint: "(1) the proposed amendment's nature and its relationship to the
13 existing pleadings; (2) the prejudice, if any, to the opposing party; (3) the timing of the proposed
14 amendment; and (4) the colorable merit of the proposed amendment." Applying these factors,
15 the Commission denied NPCC leave to amend the complaint to include a claim for refund of
16 CustomNet charges, finding that such a claim would "broaden the scope of the case," does not
17 "relate back" to the filing of the original claim, and is barred by the applicable statute of
18 limitations. Order at 7-8. Applying these factors to Complainants' current Motion even more
19 strongly supports the Commission's denying Complainants leave to file the Second Amended
20 Complaint.

21 **2. The claim for refund of CustomNet charges violates the Order.**

22 As a threshold matter, the Commission should deny the Motion because Complainants
23 are acting in utter disregard of the Commission's Order by including a claim for refund of
24 CustomNet charges. See Motion to Strike at 3-4. This is a sufficient reason by itself to deny the
25 Motion.

1 **3. The Second Amended Complaint includes new claims which would expand**
2 **the scope of the case, are baseless, and do not belong in this proceeding.**

3 In addition to impermissibly including a claim for refund of CustomNet charges, the
4 proposed Second Amended Complaint includes a number of new and different claims, each of
5 which would significantly expand the scope of this proceeding, are baseless, and should not be
6 addressed in this proceeding. It also includes a number of new, albeit unidentified,
7 complainants. An examination of each of the other new claims and parties Complainants attempt
8 to add to this case further demonstrates why the Commission should deny the Motion.

9 **a. The claim for estoppel would expand the case, and is baseless.**

10 While the new claim for "estoppel" relates to circumstances surrounding the FCC's
11 issuance of the Waiver Order in 1997 – unlike the other new claims, discussed below, which are
12 based on entirely different facts and laws – it still raises several new legal issues, such as:
13 whether an affirmative claim for estoppel even exists; whether Qwest made any representations
14 and promises as alleged; and whether Complainants relied on any representations and promises
15 Qwest allegedly made. Each of these issues would considerably expand the scope of the case
16 from its current posture, and would require additional discovery, motion practice, and additional
17 evidence at any hearing.

18 In addition, any new claim for estoppel is barred by the applicable statute of limitations.
19 Such a claim would be subject to the same two-year statute of limitations of 47 U.S.C. § 415(b),
20 which the Commission already applied to NPCC's and the NPCC's Members' proposed claim for
21 a refund of CustomNet charges. The "estoppel" claim is nothing other than a claim against a
22 carrier for a refund (described in that claim as the "Federal Refund"). Second Amended
23 Complaint, ¶¶ 45-49. 47 U.S.C. § 415(b) establishes a two-year statute of limitations for claims
24 against carriers for the recovery of damages not based on overcharges. Further, as the
25 Commission already decided with respect to the claim for a refund of CustomNet charges, this
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1 claim accrued in 1997 and does not relate back to the filing of the original claim in 2001.¹ Being
2 brought for the first time in 2009, 12 years after it accrued, the claim for estoppel is patently
3 time-barred.

4 **b. The claim for refund in connection with Qwest's last general rate case**
5 **would expand this case, is baseless, and does not belong in this**
6 **proceeding.**

7 Even more baseless and inappropriate is Complainants' new claim that they are entitled to
8 a refund of PAL and CustomNet charges in connection with Qwest's last general rate case in
9 Oregon, Docket UT 125, quite apart from their claims under Section 276 of the
10 Telecommunications Act and the FCC's Waiver Order. Complainants' theory seems to be that
11 because Qwest's retail rates at the time of commencement of that rate case in 1996 (including
12 rates for intrastate payphone services) were deemed to be interim and subject to refund based on
13 the resolution of revenue requirement issues in Docket UT 125, somehow they are entitled to a
14 further refund – outside that docket – for the rates they paid for PAL and CustomNet service.
15 Second Amended Complaint, ¶¶ 52-54. There are so many things wrong with this argument that
16 it is difficult to know where to begin to respond.

17 As the Commission is well aware, the nature and scope of Qwest's refund obligation in
18 connection with Docket UT 125 was the subject of significant dispute spanning several
19 Commission dockets (including UT 125 and UT 80) as well as court appeals. *See* discussion in
20 Order No. 00-190 at 1-2. Indeed, NPCC (under its former name, the Northwest Payphone
21 Association ("NPA")) participated in the rate case with respect to refund as well as rate design
22 issues. *See* Order No. 00-190 at 6-7.

23 For present purposes, two points alone should persuade the Commission that
24 Complainants should not be allowed to pursue a refund in this proceeding based on anything that
25 happened in UT 125. First, the rate case was bifurcated between revenue requirement and rate

26 ¹ In the interest of brevity, Qwest respectfully refers the Commission to its full briefing on this
topic in its Response to NPCC's Motion for Leave to Amend Complaint, filed March 13, 2009, at 6-9, 11-
12.

1 design issues, and the refund in UT 125 – which totaled well over \$200 million – was based on
2 the new, overall revenue requirement the Commission established for Qwest in the revenue
3 requirement phase of that case. *Id.* at 3. The refund was ordered to be made *before* the
4 Commission concluded the rate design portion of the case and was not in any way based on the
5 final retail rates established in that case. *Id.* at 3-4, 13. Complainants misunderstand the nature
6 of the refund mechanism (which was the subject of much litigation) and appear to believe that
7 refunds were to be made in that case on a service-by-service basis, based on the difference
8 between the initial, interim rate for a service and the final rate for such service. To the contrary,
9 the refund was based on the difference in the overall revenue requirement and was distributed to
10 customers in an administratively simpler way which had nothing to do with the actual interim or
11 final rates for any specific service. *See id.* at 4 and Stipulation (Exhibit A to the order).

12 Second, even if Complainants could somehow claim additional refunds in connection
13 with the rate case – which they plainly cannot do – the place for them to do that would be in
14 Docket UT 125, not in this case. Indeed, NPA did assert and obtain the right to additional
15 refunds in that case, for former customers of Qwest. *Id.* at 15. It is entirely inappropriate for
16 Complainants to seek a refund based on proceedings in Docket UT 125 at this late date and in
17 this docket.

18 Complainants state, without any citation, that "In UT-125, the rate making case out of
19 which the right of the Complainants are entitled to refunds [sic], the OPUC advised that the
20 refunds due under UT-125 should be accomplished in this proceeding, DR-26." Motion at 4, ¶ 7.
21 The Commission said no such thing in Docket UT 125. Indeed, the refunds due under Docket
22 UT 125 were made *in 2000-01* pursuant to the Commission's orders in that docket. Order No.
23 00-190 at 20 (ordering refunds to be made within 45 days after final disposition of any motions
24 to reconsider order approving settlement). *In fact, NPCC's Members already received very*
25 *significant refunds in that case based on the Commission's orders.*

1 Complainants may be referring to the fact that in Order 00-190 in Docket No. UT 125, at
2 15, the Commission stated:

3 NPA notes that federal law may require USWC to provide refunds
4 to payphone service providers, based on the FCC payphone orders.
5 NPA itself, however, notes that the record does not contain enough
6 evidence to clarify whether USWC's 1997 PAL rate qualifies it for
7 a waiver from the FCC. This is not an issue that can be decided on
8 the record before us.

9 All the Commission said there is that it could not decide NPA's claim *under the FCC's payphone*
10 *orders* in Docket UT 125. It is undisputed, however, that all PSPs, including NPCC's Members,
11 received substantial refunds in Docket UT 125, and there is no basis whatsoever for NPCC's
12 statement that "the OPUC advised that the refunds due *under UT-125* should be accomplished in
13 this proceeding, DR-26" (emphasis added).

14 Nor does ORS 759.185 provide the basis for any additional refunds to Complainants,
15 based on the result of UT 125. By its terms, ORS 759.185(4) provides for a refund only in
16 narrow circumstances not applicable to UT 125:

17 If the commission is required to or determines to conduct a hearing
18 on a rate or schedule of rates filed pursuant to ORS 759.180, but
19 does not order a suspension thereof, any increased revenue
20 collected by the telecommunications utility as a result of such rate
21 or rate schedule becoming effective shall be received subject to
22 being refunded. If the rate or rate schedule thereafter approved by
23 the commission is for a lesser increase or for no increase, the
24 telecommunications utility shall refund the amount of revenues
25 received that exceeds the amount approved as nearly as possible to
26 the customers from whom such excess revenues were collected, by
a credit against future bills or otherwise, in such manner as the
commission orders.

27 ORS 759.185(4) provides for refunds only in the very limited circumstances where a utility files
28 for a rate increase, the Commission does not suspend the proposed tariffs, and the Commission
29 subsequently allows a smaller increase than the utility requested. That section, however, does
30 not apply to UT 125 because the Commission bifurcated the rate case into separate revenue
31 requirement and rate design phases and did not allow a new schedule of rates to go into effect at

1 the commencement of the case, so there was no "increased revenue" that Qwest received during
2 that case that was subject to refund under ORS 759.185(4). Order No. 00-190 at 1.

3 Complainants' proposed new claim for refund of payphone service rates based on
4 proceedings in Docket UT 125 is utterly unfounded and has no place in this proceeding.

5 **c. The claims for discrimination and prohibited acts would expand the**
6 **case, are baseless, and do not belong in this proceeding.**

7 As discussed above, paragraphs 55-60 of the proposed Second Amended Complaint
8 purport to seek damages and attorneys' fees under a number of Oregon statutes and one federal
9 statute. Even if Complainants' sketchy allegations are considered to state a claim under any of
10 those statutes, it is beyond question that inclusion of any of those claims in this case would
11 significantly broaden the case. In addition, Complainants have offered no explanation for
12 bringing such claims at this late date. Moreover, these new claims are more properly asserted in
13 a separate proceeding. Finally, *none* of the statutes cited provides for the recovery of attorneys'
14 fees in a claim before the Commission, which appears to be the only reason Complainants seek
15 to include these additional claims.

16 **(i) Undue discrimination**

17 Complainants allege in vague and conclusory terms that Qwest provided "preferential and
18 discriminatory treatment in terms of telephone exchange access and telephone exchange services,
19 including in relation to basic services, to its own payphone services that it did not make available
20 to independent PSPs such as Complainants." Second Amended Complaint, ¶ 56. Complainants
21 further allege that Qwest sold its payphone assets to an entity known as "FSH Communications,
22 LLC ('FSH')" and, thereafter, "continued to provide preferential and discriminatory treatment to
23 FSH not provided to independent PSPs including the Complainants." Second Amended
24 Complaint, ¶¶ 57-58. Complainants seem to think that these allegations support claims under
25 ORS 759.275 and 759.455. *See* Second Amended Complaint at 16, Heading XI.
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1 With respect to the purported claim for discrimination under ORS 759.275, it is beyond
2 dispute that such a claim would broaden the scope of this proceeding. Until the filing of the
3 proposed Second Amended Complaint in November 2009, neither NPCC nor any of its members
4 had made any mention whatsoever in this case of discriminatory treatment of the sort alleged in
5 the Second Amended Complaint, nor, to the knowledge of the attorneys appearing for Qwest in
6 this case, have Complainants ever uttered a word to Qwest about such allegations. Such claims
7 simply have nothing to do with the issues presented in this case to date and would broaden the
8 scope of this case substantially.

9 Moreover, the claim is unfounded because Complainants may not seek damages or
10 attorneys' fees from the Commission in a case under ORS 759.900. That statute does provide a
11 remedy for damages and attorneys' fees to a person injured by a telecommunications utility's
12 violation of a statutory obligation. However, those remedies must be pursued *in court*, not from
13 the Commission. ORS 759.900(1) provides: "*the court* may award reasonable attorney fees to
14 the prevailing party in an action under this section." (Emphasis added.) Thus, it is plain that
15 Complainants may not seek either damages or attorney fees in this, or any, proceeding before the
16 Commission.

17 **(ii) Prohibited acts**

18 Complainants also claim that they are entitled to relief under ORS 759.455, which
19 proscribes a number of "prohibited acts." It is not apparent that Complainants are the type of
20 entity that may invoke the protections of this statute (most sections protect "providers of retail
21 telecommunications services"). Even if they could, however, it is clear that such a claim does
22 not belong in this case.

23 ORS 759.455 sets forth procedural and remedial schemes which are plainly inconsistent
24 with the scope of this case and the remedies Complainants seek. For example, ORS 759.455(2)
25 provides for expedited proceedings including a hearing within 30 days after the complaint is filed
26 and a final Commission decision within 45 days after the complaint is filed. Moreover, the

1 remedies provided for in that statute are, first, the issuance of a remedial plan and then, if the
2 utility does not perform according to the plan, the possibility that the *Commission* may seek
3 penalties through an enforcement action in court. ORS 759.455(3). The statute does not provide
4 for private damages or attorneys' fees, which is the only relief Complainants appear to seek.

5 **d. None of the other statutes provides for attorneys' fees.**

6 Complainants cite two other state and federal statutes in support of their claim for
7 attorneys' fees: ORS 183.497 and 47 U.S.C. § 206. ORS 183.497 allows the *Court of Appeals* to
8 award attorneys' fees in certain cases involving judicial review of agency orders; it does not
9 authorize the *Commission* to award attorneys' fees. 47 U.S.C. § 206 is similarly inapplicable. It
10 provides:

11 In case any common carrier shall do, or cause or permit to be done,
12 any act, matter, or thing in this chapter prohibited or declared to be
13 unlawful, or shall omit to do any act, matter, or thing in this
14 chapter required to be done, such common carrier shall be liable to
15 the person or persons injured thereby for the full amount of
16 damages sustained in consequence of any such violation of the
17 provisions of this chapter, together with a reasonable counsel or
18 attorney's fee, *to be fixed by the court in every case of recovery*,
19 which attorney's fee shall be taxed and collected as part of the
20 costs in the case.

21 (Emphasis added.) Not only is there no claim, even in the proposed Second Amended
22 Complaint, that Qwest is liable under this federal statute – or that the Commission would have
23 jurisdiction to hear such a claim – it is plain that attorneys' fees under this section are to be "fixed
24 by the court." Thus, this section provides no authority for Complainants to seek attorneys' fees
25 from the Commission in this or any other case.

26 **e. There is no basis for inclusion of the Unidentified Non-Members in this case.**

Perhaps even more unfounded than the additional claims Complainants seek to pursue in
this action is NPCC's assertion that it may assert claims, in a *representative* capacity, on behalf
of *unidentified* PSPs who are *not members of NPCC*. There are three fundamental problems with
this assertion.

1 First, the Commission has no authority to award reparations to any person who is not a
2 party to this proceeding. ORS 756.500(2) provides:

3 It is not necessary that a complainant have a pecuniary interest in
4 the matter in controversy or in the matter complained of, but the
5 commission shall not grant any order of reparation to any person
not a party to the proceedings in which such reparation order is
made.

6 Qwest relied on this section in its cross-motion for summary judgment, filed in January 2005,
7 when it argued that NPCC did not have statutory standing to seek refunds on behalf of its
8 members. NPCC sought and obtained leave to add the NPCC Members as complainants to this
9 action specifically to address the concern Qwest raised under that section. Now, NPCC purports
10 also to assert claims on behalf of *unidentified* PSPs who, by definition, are not parties to this
11 action. The Commission, however, may not award reparations to such non-parties, so this
12 amendment may not be allowed.

13 There is good reason – beyond the clear language of the statute – why PSPs need to be
14 made parties to this action in order to seek an award of reparations. A given PSP may already
15 have sought, or may desire to seek, a remedy in another proceeding, or may be barred from
16 obtaining a remedy for any number of reasons, including that it may have separately settled its
17 claim with Qwest. In addition, if the Commission were to award refunds, it would need to
18 consider the circumstances of each PSPs, including the number of services it subscribed to, the
19 period of time at issue, and any potential offsets for unpaid bills. Without that party specifically
20 appearing in the action, and being subject to discovery and any defenses that may apply
21 specifically to it, the Commission cannot fairly adjudicate that PSP's claim. Not only is that fair
22 to Qwest, it is also fair to the PSP, as further discussed below.

23 Second, NPCC may not bring a claim in its *representational* capacity on behalf of PSPs
24 who are *not* members of NPCC, which is the case with all of the Unidentified Non-Members.
25 The Oregon Supreme Court has held that "whether an organization has standing [to assert claims
26 on behalf of its members] depends on whether the statute under which the organization brings

1 suit allows it to do so." *Oregon Taxpayers United PAC v. Keisling*, 143 Or. App. 537, 541, 924
2 P.2d 853 (1996) (citing *Local No. 290, Plumbers and Pipefitters v. Oregon Dep't of Env.*
3 *Quality*, 323 Or. 559, 919 P.2d 1168 (1996)). The inquiry is limited to determining whether the
4 legislature intended that an organization would have standing to assert claims *on behalf of its*
5 *members*.

6 In *Local No. 290*, the Supreme Court examined whether a union had standing under the
7 Oregon Administrative Procedure Act to challenge a state agency's decision on behalf of its
8 members. The statute at issue in that case, ORS 183.484(3), provides that a petition for judicial
9 review of an agency action in a case other than a contested case must demonstrate that the
10 petitioner is "adversely affected or aggrieved by the agency order." The Supreme Court decided
11 that the union was not "entitled to act in a representational capacity on behalf of certain of its
12 members who themselves would have standing." *Id.* at 563-64, 567.

13 The Court of Appeals followed *Local No. 290* in *Oregon Taxpayers United PAC v.*
14 *Keisling*, 143 Or. App. 537, 924 P.2d 853 (1996). In that case, a political action committee
15 sought a declaratory judgment that state statutes that required disclosure of the names of donors
16 who contribute to ballot measure campaigns were unconstitutional. The plaintiff argued that the
17 statutes violated the rights of its members, and that an injunction against disclosure was
18 necessary to protect its members. The court examined the declaratory judgment statute and
19 determined that the plaintiff did not have standing to assert a claim on behalf of its members.

20 No such detailed analysis is required in this case for two reasons. First, the only
21 circumstance where Oregon courts have even considered representational standing is where an
22 association sought to assert claims *for its members*. Asserting claims on behalf of *non-members*
23 – who presumably have their own reasons for not joining the association and have had no say
24 whatsoever in the association's decision to assert claims on their behalf – is simply unheard of in
25 Oregon jurisprudence. Second, the plain language of ORS 756.500(2) prohibits associations
26

1 from obtaining reparations even for their own members; thus, it plainly prevents them from
2 seeking reparations for non-members who are not parties to the case.

3 NPCC seems to desire to bring this claim as a form of class action, in which it prosecutes
4 claims on behalf of unnamed, absent parties who will either obtain relief or be bound by an order
5 denying relief. However, Qwest's counsel is not aware of this Commission's ever having
6 entertained a class action, nor does the express language of ORS 756.500(2) permit such a thing
7 to occur. Moreover, ORCP 32 includes many procedural safeguards applicable to class actions –
8 including the provision of notice to class members and the opportunity for potential class
9 members to opt out of the class – which are designed to ensure that any absent party who will be
10 bound by the judgment in the case has had a fair opportunity to decide whether it wants to be so
11 bound. No such procedural safeguards are available in this case.

12 For all of these reasons, NPCC may not bring claims on behalf of the Unidentified Non-
13 Members. For this additional reason, the Commission should deny the Motion.

14 4. Summary

15 *Forsi* advises the Commission to consider several factors in deciding whether to grant a
16 motion to amend the complaint, including whether the proposed amendment would broaden the
17 scope of the case, the timing of the proposed amendment, prejudice to the defendant, and the
18 colorable merit of the proposed amendment. Applying each of these factors weighs strongly
19 against allowing the Second Amended Complaint. The additional claims Complainants seek to
20 add to this case would considerably broaden its scope. Moreover, those additional claims are
21 patently unfounded and several are barred by the applicable statutes of limitation. Even if these
22 new claims had any merit, they should be raised in a different Commission proceeding, whether
23 already established (such as UT 125) or to be opened upon filing of an adequate complaint (such
24 as a claim for prohibited acts under ORS 759.455). Nor does NPCC's desire to assert claims on
25 behalf of the Unidentified Non-Members have any merit. Coming more than *eight years* after
26 this docket was opened and after the issues have been joined, it is simply far too late to expand


1 the scope of this case to such a degree. For all of these reasons, the Commission should deny the
2 Motion.

3 **IV. CONCLUSION**

4 For the foregoing reasons, the Commission should strike the Second Amended Complaint
5 filed by Complainants and further deny Complainants' Motion for Leave To Allow Second
6 Amendment to the Complaint.

7 DATED: December 8, 2009

Respectfully submitted,

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 8th day of December, 2009, served the foregoing QWEST
3 CORPORATION'S MOTION TO STRIKE SECOND AMENDED COMPLAINT AND
4 RESPONSE TO COMPLAINANTS' PRECAUTIONARY MOTION FOR LEAVE TO ALLOW
5 SECOND AMENDMENT TO THE COMPLAINT upon all parties of record in this proceeding
6 by causing a copy to be sent by electronic mail and U.S. mail to the following addresses:

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9 PO Box 231119
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11 Jason W. Jones
12 Jason.w.jones@state.or.us
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