

FRANK G. PATRICK & ASSOCIATES
CORPORATE LAWYERS P.C.

Attorneys At Law

P.O. Box 231119

Address for Messenger: 11040 SW Barbur Blvd.

Portland, OR 97281

Phone: 503-245-2828 Fax: 503-245-1448

November 16, 2009

Public Utility Commission of Oregon

Attn: Filing Center

550 Capitol St. NE, Ste. 215

PO Box 2148

Salem, OR 97308-2148

To: Hon. Allan Arlow

Public Utility Commission of Oregon

RE: NORTHWEST PUBLIC COMMUNICATIONS COUNCIL V. QWEST CORP.
Docket DR 26/UC600
Second Amended Complaint of NPCC et al
Precautionary Motion to Allow Amendment

Dear Judge Arlow,

Please find enclosed the Second Amended Complaint of the individually appearing litigants and the NPCC in the captioned matter. There has been no answer ever lodged in this matter nor any ruling so the Complainants are entitled as a matter of course to the filing of the Second Amended Complaint. I have however, not been contacted by Mr. Reichman from my call of Friday, November 13, 2009 and feel confident he will oppose both the motion and the Filing.

If you should want briefing on this matter please advise that I anticipate that a conference would be in order.

Sincerely,

/s/

Frank G. Patrick
Attorney at Law

Cc: Lawrence Reichman (email; US Mail) reicl@perkinscoie.com
Jason W. Jones (email; US Mail) Jason.w.jones@state.or.us
Alex M. Duarte (email; US Mail) alex.duarte@qwest.com

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3 BEFORE THE PUBLIC UTILITY COMMISSION
4 OF OREGON
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8 THE NORTHWEST PUBLIC
9 COMMUNICATIONS COUNCIL, on behalf of
10 Unidentified PSPs A to Z, and NPCC
11 MEMBERS: Central Telephone, Inc;
12 Communication Management Services, LLC;
13 Davel Communications a/k/a Phonetel
14 Technologies, Inc., Interwest Tel, LLC;
15 Interwest Telecom Services Corporation;
16 NSC Communications Public Services
17 Corporation; National Payphone Services,
18 LLC; Pacific Northwest Payphones; Partners
19 in Communication; T & C Management,
20 LLC; Corban Technologies, Inc.; and Valley
21 Pay Phones, Inc.

22 Complainants,

23 v.

24 QWEST CORPORATION,

25 Defendant.
26

Docket No. DR 26/UC 600

SECOND AMENDED COMPLAINT FOR
DECLARATORY RELIEF AND REFUNDS OF
PAYPHONE SERVICES OVERCHARGES

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1 Communication Management Services, LLC; Davel Communications a/k/a Phonetel
2 Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC
3 Communications Public Services Corporation; National Payphone Services, LLC; Pacific
4 Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban
5 Technologies, Inc.; and Valley Pay Phones, Inc.; listed in **Exhibit A**, referred to herein
6 collectively with NPCC as the “Complainants”¹ request the Oregon Public Utilities Commission
7 (“Commission” or the “OPUC”) to issue an Order Declaring valid and enforcing the
8 Commission’s Order numbers 06-515 and 07-497 in UT-125, and directing Qwest Corporation
9 (“Qwest” or “Defendant”) to calculate and pay refunds for payphone services overcharges that
10 Qwest has collected from the Payphone Service Providers since May 1, 1996 (the “Oregon
11 Refund”). The Oregon Refund is required pursuant to the laws of Oregon and the Orders of the
12 Commission. A refund (the “Federal Refund”) is also required to be paid to Complainants
13 pursuant to the 1996 Telecommunications Act (TCA) of United States and orders of the Federal
14 Communications Commission (FCC) and the Federal Wire Competition Bureau (WCB fka the
15 Common Carrier Bureau or CCB).² The Oregon Refund was Ordered by the OPUC and was
16 established by the Ratemaking process of the OPUC (UT-125) as alleged. The Complainants
17 allege as follows:

18 **I. THE PARTIES**

19 **A. THE COMPLAINANTS:**

20 1. The NPCC is a regional trade association representing competitive payphone
21 service providers in Idaho, Montana, Oregon and Washington. The NPCC’s purpose is to
22 advance the interests of non-LEC payphone providers. The “Payphone Service Providers,”
23 (“PSPs”) including NPCC members, purchase or have purchased Payphone Services from
24

25 ¹ The NPCC was formerly known as the Northwest Payphone Association (NPA and sometimes
26 NWP in prior filings). The Complainants are identified in Exhibit A to this Complaint.

² Complainants have used herein those acronyms that are used in the industry as established by
the FCC and the TCA.

1 Qwest in Oregon.

2 2. Payphone Services include any service subject to a tariff of the OPUC including
3 but not limited to: (1) Public Access Lines (“PAL”) that enable the Payphone Service Providers
4 to connect their payphones to the telephone network for placement of local and long distance
5 telephone calls, and (2) a service variously called Fraud Protection, CustomNet, Selective Class
6 of Call Screening, or Originating Line Screening (“CustomNet”), which prevents the billing of
7 certain calls, such as operator-assisted long distance and third party billing calls, to a payphone
8 or a payphone from which the call is placed. CustomNet is an important payphone service
9 because, in its absence, the Payphone Service Providers are exposed to billing for calls
10 fraudulently placed from payphones.

11 3. This Complaint refers to those services provided by Qwest to the Complainant
12 PSPs (PAL and CustomNet) as well as those services which were the subject of the OPUC Rate
13 Case UT-125 (the “Rate Case”) and its related proceedings including the Appeal to and Remand
14 by the Oregon Court of Appeals in November 2004 and as governed by Federal Law as set forth
15 herein collectively as the “Payphone Services.”

16 4. The NPCC’s address and telephone number are NPCC, c/o Randy Linderman,
17 2373 NW 185TH AVE #310 HILLSBORO OR 97124. The Payphone Service Providers’
18 contact information appears in **Exhibit A**.

19 5. Those PSPs that are not members of NPCC are to be identified in this proceeding
20 and until such time the NPCC will continue to represent such Unidentified Payphone Service
21 Providers A to Z in a “representative” capacity.

22 **B. QWEST**

23 6. Qwest is the Incumbent Local Exchange Carrier (ILEC)³ for most of Oregon.

24
25 ³ An ILEC is defined by the TCA as being a LEC which was performing such Local Exchange
26 All the Bell Operating Companies (BOCs) were ILECs. After the break up of
AT&T, the resulting separate Regional Bell Operating Companies (RBOCs)
Page 3 SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND REFUNDS

1 Qwest's main corporate office in Oregon is at 421 SW Oak Street, Portland, Oregon 97204,
2 (503) 242-7454. Qwest Corporation was formerly known as US WEST Communications, Inc.
3 and prior to that Pacific Northwest Bell, and will be referred to as Qwest throughout this
4 Complaint. Qwest is a Bell operating company as defined in 47 U.S.C. §153.

5 **II. JURISDICTION**

6 7. The Commission has jurisdiction over this Complaint under ORS 756.500,
7 756.040, 756.160 through 756.200, OAR 860-013-0015, and FCC Orders in Docket
8 Nos. CC 96-128 and CC 91-35.

9 **III. APPLICABLE STATUTES AND RULES**

10 8. The statutes and rules at issue are 47 U.S.C. §§201, 202, 206, 207, 276, 407 &
11 416 et seq and 47 C.F.R. § 61.49 et seq, including related FCC and OPUC orders. The
12 following specific sections and the related sections to ORS 756.040, 756.515, 757.020, 757.310,
13 757.325, 757.330, 759.180, 759.185, 759.260, 759.275, 759.280, 759.455 and 759.900 et seq
14 and other Oregon statutes involving discrimination are also at issue, which will be established
15 during the course of this proceeding.

16 **IV. BACKGROUND REGARDING SECTION 276** 17 **AND THE FCC WAIVER ORDER**

18 9. Section 276 of the Telecommunications Act of 1996 prohibited RBOCs,
19 including Qwest, from discriminating in favor of their own payphone services:

- 20 (a) Nondiscrimination safeguards. After the effective date of the rules prescribed
21 pursuant to subsection (b) of this section, any Bell operating company that
22 provides payphone service—
23 (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.

24 47 U.S.C. § 276(a) (emphasis added).

25 _____
26 also were the largest owners of payphones in their areas of operations. As regulated utilities the
RBOCS were capable of competing unfairly against non-ILECs which owned and operated
Payphones. The TCA was the Federal legislation intended to remedy that inequity.

Page 4 SECOND AMENDED COMPLAINT FOR DECLARATORY RELIEF AND REFUNDS

1 10. Section 276 further required the FCC to “prescribe a set of non-structural
2 safeguards for Bell operating company payphone service [. . .] which safeguards shall, at a
3 minimum, include the nonstructural safeguards equal to those adopted in the Computer
4 Inquiry-III (CC Docket No. 90-623) proceeding.”⁴

5 11. In response, in a proceeding before the Common Carrier Bureau captioned In the
6 Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions
7 of the Telecommunications Act of 1996, CC Docket No. 128 (the “Implementation
8 Proceeding”), the FCC released a series of orders implementing Section 276. The FCC set
9 specific requirements for all Payphone Services tariffs, which must be:

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

14 Order on Reconsideration, 11 FCC Rcd. 21,233 at ¶ 163 (1997) (“Order on Reconsideration”).
15 The “Computer III tariffing guidelines” incorporate the “new services test.”⁵

16 12. Under the new services test, Qwest must calculate its payphone services rates in
17 a manner that does not “recover more than the direct costs of the service, plus ‘a just and
18 reasonable portion of the carrier’s overhead costs.’ ”⁶

19 13. Qwest must file tariffs containing rates that meet the new services test for PAL
20 with state commissions and file tariffs for “[u]nbundled features and functions provided by
21 [BOCs] to their own payphone operations or to others” like CustomNet at state commissions

22 _____
23 ⁴ 47 U.S.C. § 276(b)(1)(C).

24 ⁵ *Id.* at n. 492.

25 ⁶ In the Matter of Wisconsin Public Service Commission, Order Directing Filings, 17 FCC Rcd.
26 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.

1 and the FCC.⁷ Qwest must file “cost-support data” along with these tariffs. The FCC issued a
2 number of orders establishing regulations to implement Section 276.⁸ These orders make clear
3 that Qwest bears the burden to prove that its rates comply with the new services test.⁹

4 14. Qwest must pay refunds to its customers when rates exceed the tariffs that
5 comply with the new services test. The FCC clarified this duty in an order dated April 15, 1997
6 waiving the original Payphone Services intrastate tariff filing deadline (the “Waiver Order”).¹⁰
7 Initially, the FCC ordered that RBOCs file their new tariffs with state commissions on January
8 15, 1997 and that such tariffs be reviewed and found compliant with the new services test and
9 made effective by State Commissions by April 15, 1997.¹¹ The “RBOC Coalition,” including
10 Qwest, requested both a delay in the filing requirement and that it be permitted to begin to
11 collect dial around compensation, which, Qwest could not receive under the Reconsideration
12 Order, with respect to any state in which intrastate tariffs compliant with the new services test
13 (NST) had not been reviewed, approved and made effective by the State Commission on or
14 before April 15, 1997. The receipt of Dial Around Commissions (DAC) was expressly
15 conditioned not only on there being NST compliant rates filed by April 15, 1997, but that the
16 ILEC as a condition had to continue to be in compliance with all the conditions imposed by the
17 FCC on a continuing basis.¹² The FCC responded by granting a 45 day waiver of the filing
18 deadline to review all filed tariffs for compliance with the new services test and where not
19 compliant to replace them with compliant tariffs.¹³ However, the FCC noted that a RBOC “who
20 seeks to rely on the waiver granted in [the Waiver Order] must also reimburse their customers
21 or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower

22 ⁷ *New Services Order* at ¶ 14.

23 ⁸ *Waiver Order*, DA 97-805 at ¶ 18 (1997) (the “Implementation Proceeding”).

24 ⁹ *New Services Order* at ¶ 56.

25 ¹⁰ *Waiver Order*, DA 97-805.

26 ¹¹ *Id.* at ¶ 19.

¹² *Id.* at ¶ 13.

¹³ *Id.* at ¶ 21.

1 than the existing tariffed rates.”¹⁴ Qwest relied on the waiver by accepting dial around
2 compensation without having new services test compliant rates on file and made effective by
3 the State Commissions including the OPUC on April 15, 1997. Qwest’s New Services Test
4 compliant rates were not made effective until the finalization of UT-125, appeals to some of the
5 Orders thereunder, and a final Stipulation of Qwest, OPUC Staff and NPCC was reach on
6 October 15, 2007 and Ordered by the OPUC on November 15, 2007.¹⁵

7 15. The FCC has issued many orders that contain the above-listed requirements,
8 including orders in 1996, 1997, 2000 and 2002. The D.C. Circuit Court of Appeals upheld the
9 2000 and 2002 orders in response to a RBOC appeal.¹⁶ Since then, other federal appeals courts
10 have held that these requirements apply to Qwest.¹⁷

11 16. The Commission has been considering the issues raised by Section 276 as part of
12 its Docket UT-125, which is a general review case for all Qwest service rates in Oregon. The
13 outcome of Docket UT-125, which is *res judicata*, was that Qwest’s Payphone Services rates
14 did not comply with the new services test and Section 276, as explained below.¹⁸

15 **V. BACKGROUND REGARDING OPUC DOCKET CASE UT-125**

16 17. The background of the OPUC Docket UT-125 is as follows. On February 8,
17 1996, when Section 276 was adopted, Qwest was operating under an alternative form of
18 regulation (“AFOR”) in Oregon. This AFOR was adopted on November 25, 1991, to provide
19 Qwest with the pricing flexibility necessary to respond to dramatic changes in the
20 telecommunications industry which resulted from the breakup of the Bell Telephone System,
21

22 ¹⁴ *Id.* at ¶ 20. During the Implementation Proceeding, the RBOC Coalition “concede[d] that the
23 Commission’s payphone orders, as clarified by the *Bureau Waiver Order*, mandate that
24 payphone services LEC tariffs at the 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.

¹⁵ OPUC Order No. 07-497.

¹⁶ *New Eng. Pub. Comm. Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

¹⁷ *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).

¹⁸ OPUC Order No. 07-497.

1 the emergence of competition and rapid technological advancement.¹⁹ The hope at its
2 implementation was that it would motivate Qwest to improve efficiency, modernize its
3 infrastructure, and provide services which met the challenges of the then changing
4 telecommunications environment.²⁰

5 18. Under the terms of the AFOR, nine months before December 31, 1996, the
6 scheduled termination of the AFOR, Qwest was to submit new tariffs for all its services.²¹
7 Qwest submitted new tariffs pursuant to this requirement in December 1995 and the
8 Commission opened the new rate case, UT 125. By order dated April 24, 1996, the
9 Commission terminated Qwest's existing AFOR effective May 1, 1996, due to a severe increase
10 of service quality problems over the prior four years, and the Commission reaffirmed that upon
11 termination of the AFOR all of Qwest's tariffs issued under the AFOR would be treated as fully
12 regulated tariffs and that such tariffs were interim subject to refund including Payphone
13 Services.²² As a result, on May 1, 1996, Qwest's then-existing Payphone Services rates became
14 interim rates subject to refund under Oregon law.²³ The Payphone Services rates remained
15 interim for years, until November 15, 2007, due to protracted litigation before the Commission
16 and Oregon Courts.

17 19. In 1995 through 1997, the Commission advised NPCC that all issues regarding
18 Qwest's Payphone Services rates, whether under the new services test or otherwise, should be
19 taken up in Qwest's rate case, Docket No. UT-125.

20 20. On May 19, 1997, the Commission entered an Order determining Qwest's
21 revenue requirement, establishing the first refund under UT-125, for the period May 1, 1996 to
22 April 30, 1997 and holding that Qwest's rates would remain as "interim" and subject to
23

24 ¹⁹ OPUC Order No. 91-1598 at 1.

25 ²⁰ *Id.*

26 ²¹ *Id.* at 29.

²² OPUC Order No. 96-107 at 3-4. The FCC had also ordered in the TCA that all PSP service rates were made interim pursuant to 12 FCC Rcd. 21370 at 21379.

²³ *Id.* at 3. And OPUC Order No. 00-190 at 2.

1 additional refund pending further investigation and conclusion of the rate design phase of the
2 rate case in its Docket No. UT-125.²⁴ OPUC Order No. 97-171 also provided that the refund
3 ordered would be calculated in accordance with Order 96-183 which established that the refund
4 would be the difference between the revenues generated under the final approved tariffs and the
5 revenues generated pursuant to the higher interim tariffs.²⁵

6 21. Qwest appealed Order No. 97-171 as well as the refund methodology established
7 in Order No. 96-183. Ultimately, the appeal was settled pursuant to which the amount of refund
8 determined in Order No. 97-171 was changed, but the refund methodology established in Order
9 No. 96-183 was retained.²⁶ The major changes that were made to Order No. 97-171 included the
10 reduction of the interest rate due on refunds from 11.8% to 8.77%, and the expansion of the
11 refund class to include former customers.²⁷ This settlement is reflected in OPUC Orders No. 00-
12 190 and its companion order No. 00-191. These Orders resolved the revenue requirements
13 phase of the Rate Case.²⁸

14 22. Throughout the UT-125 proceeding, Qwest attempted to justify its Payphone
15 Services rates using methodologies prohibited by Section 276 and the new services test. Qwest
16 refused to provide supporting cost information for its rates because "...the Oregon Commission
17 rules have not incorporated the FCC's rules for new services and there is no requirement in
18 Oregon for Qwest to file cost information that utilizes the FCC new services test."²⁹ Rather
19 than calculating rates based on the new services test, Qwest stated that "PAL rates are priced in
20 alignment with business rates" and "Message and Flat Smart PAL are priced at an equal
21 price/cost ratio as Basic PAL to ensure no pricing discrimination occurs between these

22 ²⁴ OPUC Order No. 97-171 at 105 (May 19, 1997).

23 ²⁵ *Id* at 103.

24 ²⁶ OPUC Order No. 00-191 at 2-3.

25 ²⁷ *Id*.

26 ²⁸ Ultimately all the Orders and Stipulations were merged into the two operative Orders of UT-125; 06-515 and 07-497 which modified Order 01-810 as required by the various Remands and Stipulations.

²⁹ Qwest filing at 04-039, Docket UT-125 (May 29, 2001).

1 services,” but which the new services test does not permit.³⁰ Qwest presented a witness, David
2 L. Teitzel, to support these claims. Qwest and Mr. Teitzel made no mention of costs, overhead,
3 or any of the elements of the new services test and related tariff filing requirements. Also, to
4 the best of NPCC’s knowledge, Qwest did not submit complete cost-support data to the
5 Commission on this issue.

6 23. At the conclusion of the design phase of the Rate Case hearing, the Commission
7 entered Order No. 01-810 on September 14, 2001 approving Qwest’s proposed Payphone
8 Services rates with minor changes and largely rejecting NPCC’s arguments that Qwest’s
9 proposed Payphone Services rates did not comply with the new services test or Section 276.
10 The total revenue reduction allowed with respect to Payphone Services was \$13,000 annually.³¹
11 The NPCC appealed the OPUC’s Order No. 01-810 as it related to the Payphone Services
12 Rates.

13 24. While NPCC was appealing Order No. 01-810, Qwest in February and March of
14 2003 filed proposed Payphone Services rates and costs with the Commission purportedly in
15 compliance with the Commission’s orders and the New Services Test.³² These rates were
16 substantially lower than the Payphone Services rates that Qwest charged the Complainants
17 during the pendency of UT-125, and from May 1, 1996. However, the refund Ordered and Paid
18 pursuant to Order No. 01-810 was based solely on the higher rates established in 2001. The rate
19 reduction in 2001 applicable to these rates was \$13,000 annually. There has never been a refund
20 paid based on the corrected final rates as determined effective November 15, 2007.³³

21 25. The Oregon Court of Appeals reversed OPUC Order No. 01-810 in an order
22 issued on November 10, 2004.³⁴ Consistent with NPCC’s arguments, the Court of Appeals held

23 _____
24 ³⁰ *Id.*

25 ³¹ OPUC Order No. 01-810 at 49.

26 ³² Advice #1935.

³³ OPUC Order No. 07-497.

³⁴ *Northwest Public Comm’s Council v. PUC*, 100 P.3d 776 (2004)
 (“Oregon Court of Appeals Order”).

1 that “[t]he District of Columbia Circuit Court of Appeals treats the FCC’s orders under section
2 276 as binding on every state, and so do we.”³⁵ The Oregon Court of Appeals reversed the
3 Commission’s holding that Qwest’s rates complied with relevant law and specifically found that
4 the then PAL rates were not compliant with the new services test and that with respect to the
5 CustomNet rates insufficient cost data had been supplied by Qwest to make a determination as
6 to whether such rates complied with the new services test.

7 26. The Court remanded the case to the Commission to re-evaluate the PAL and
8 CustomNet tariffs. The Court specifically held that “the PUC must reconsider its order in light
9 of the New Service Order and other relevant FCC orders.”³⁶

10 27. On March 31, 2006, Qwest filed new, proposed Payphone Services rates in
11 OPUC Docket No. UT-125.³⁷

12 28. All parties recognized that the effect of the Oregon Court of Appeals decision
13 was that the refunds due to the PSPs with respect to Payphone Tariffs had to be substantially
14 increased from the original refunds calculated.³⁸

15 29. Qwest sought to recoup the additional refunds due PSPs such as Complainants
16 from other rate payers. In Order No. 06-615 the Oregon PUC ruled that no such recoupment
17 would be permitted.³⁹

18 30. Ultimately, the Commission Staff, Qwest and NPCC entered into a Stipulation
19 approving Qwest’s 2006 proposed Payphone Services rates.⁴⁰ The Commission independently
20 found that such newly proposed Payphone Services rates complied with all FCC orders and the
21 new services test. Pursuant to the parties’ stipulation, and the independent evaluation of the
22

23 _____
24 ³⁵ *Id.* at 778.

25 ³⁶ *Id.* at ¶ 27.

26 ³⁷ OPUC Order No. 06-515 at 3.

³⁸ OPUC Order No. 06-515.

³⁹ *Id.* at 11.

⁴⁰ OPUC Order No. 07-497 at 4.

1 Commission, the Commission entered a Final Order on November 15, 2007.⁴¹ The Qwest
2 Payphone Services rates approved by the Final Order are substantially lower than the rates that
3 Qwest charged the Complainants.

4 31. The Commission Orders in UT-125 06-515 and 07-497 concludes over 11 years
5 of continuous litigation regarding Qwest's Payphone Services rates and represents the first
6 Orders of the Commission that has approved Qwest's Payphone Services rates, consistent with
7 the TCA that have not been overturned on appeal.

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

11 33. In sum, Qwest charged its Payphone Service Providers customers, including
12 Complainants herein, illegally high rates for years. Now that rates have been set under Docket
13 UT-125, as required by the Remand of The Oregon Court of Appeals, the Commission must
14 direct Qwest to calculate and pay a refund in an amount equal to the difference between the
15 higher interim rates Qwest has charged since May 1, 1996 and final rates established in the
16 stipulated order entered on November 15, 2007, which interim Qwest's rates exceeded the legal
17 rates as required by Oregon Law and its own Orders and the FCC Orders.

18 **VI. THE PURPOSE OF THIS AMENDMENT**

19 34. The purpose of this Amendment is to join those Payphone Service Providers,
20 known to the NPCC as its Members as named herein "Complainants" and to update, conform
21 the Complaint to the evidence developed in the Docket UT-125 proceeding and the
22 developments in the law that have occurred since NPCC filed the original complaint in May of
23 2001, to assert claims arising from the same series of original transactions and related actions
24 that led to the filing of the original Complaint and to take additional evidence as Ordered by the
25

26 _____
⁴¹ *Id.*

1 Marion County Circuit Court, if necessary to show that the Complaint of the Complainants is
2 not and was not made moot by the OPUC Orders 01-810 and 02-009 in UT-125.

3
4 **VII. COUNT ONE 47 USC 276 REQUIRES QWEST TO REFUND UNLAWFUL
RATES FOR PAYPHONE SERVICES TO THE COMPLAINANTS**

5 35. The Complainants re-allege paragraphs 1 through 34 above.

6 36. As explained above, Section 276 of the Telecommunications Act of 1996 states
7 that Qwest “(1) shall not subsidize its payphone service directly or indirectly from its telephone
8 exchange service operations or its exchange access operations; and (2) *shall not prefer or*
9 *discriminate* in favor of its payphone service.”⁴²

10 37. The FCC has determined through a series of orders that any intrastate Payphone
11 Services tariff that is higher than a tariff that is compliant with the new services test is a
12 discriminatory tariff in violation of Section 276.

13 38. Qwest violated Section 276 by both preferring and discriminating in favor of its
14 own Payphone Services division. It is *res judicata* that Qwest’s rate-setting methodology did
15 not comply with Section 276, as established by the Oregon Court of Appeals Order. Qwest
16 lowered its rates once the Oregon Court of Appeals Order forced Qwest to comply with
17 Section 276.

18 39. All Qwest’s Oregon PSP tariffs that were higher than the tariffs made effective
19 November 15, 2007 violated Section 276.

20 40. Qwest must refund to the Payphone Service Providers the amount by which
21 Qwest’s Payphone Services rates exceeded the legal rates during the period April 15, 1997 to
22 November 15, 2007.

23 **VIII. COUNT TWO - THE FCC’S WAIVER ORDER REQUIRES QWEST TO
REFUND
24 UNLAWFUL RATES FOR PAYPHONE SERVICES TO THE COMPLAINANTS**

25 41. The Complainants re-allege paragraphs 1-40 above.

26

⁴² 47 U.S.C. § 276(a)(*emphasis added*).

1 42. As explained above, Qwest, as a member of the RBOC Coalition, asked for a
2 waiver from the FCC to continue charging Payphone Services rates in excess of the new
3 services test while collecting dial-around compensation. Qwest relied on the waiver by
4 applying for and accepting dial around compensation without having new-services-test
5 compliant rates on file and in effect prior to such receipt. It is *res judicata* that Qwest's rate-
6 setting methodology did not comply with the new services test.⁴³

7 43. Qwest must refund the unlawful rate charges to the Payphone Service Providers
8 during the period May 1 1996 to November 15, 2007 pursuant to the TCA and OPUC UT-125.

9 **IX. COUNT THREE – ESTOPPEL - THE ACTIONS BY QWEST TO OBTAIN DIAL**
10 **AROUND COMMISSION AND THE BENEFIT OF THE FCC'S WAIVER ORDER**
11 **REQUIRES QWEST TO REFUND UNLAWFUL RATES FOR PAYPHONE SERVICES**
12 **TO THE COMPLAINANTS**

13 44. The Complainants re-allege paragraphs 1-43 above.

14 45. Qwest made material representations and promises to the FCC and the OPUC in
15 the letter dated April 10, 1997 requesting a waiver. (The Waiver Request Letter). Complainants
16 being customers of the Defendant a regulated company by the OPUC was entitled to and had
17 no option but to rely on the representations of Qwest and the OPUC in the business of, or
involved with, the provision of Payphone Services in the State of Oregon.

18 46. Complainants, reasonably relied on the Qwest representations and promises
19 made in the "Waiver Request Letter" and certifications made with respect to Qwest tariff filings
20 before the OPUC.

21 47. Plaintiffs were among the persons represented by APCC in the Implementation
22 Proceeding.

23 48. Qwest is estopped from denying their obligation to pay the Federal Refund to
24 Plaintiffs equal to the difference between higher non NST compliant Payphone Services Tariffs
25 and NST compliant Payphone Services Tariffs during the period April 15, 1997 to November
26

⁴³ *Northwest Public Comm's Council v. PUC*, 100 P.3d at 778.

1 15, 2007

2 49. Although due demand has been made for payment of such refunds, Qwest has
3 failed and refused to pay the amount of such Federal Refunds.

4 50. As a result of Qwest's unlawful conduct, Complainants have been damaged.

5 **X. COUNT FOUR – REFUND UNDER ORS 759.185 ET SEQ**

6 51. Complainants repeat and re-allege paragraphs 1-50 with the same force and
7 effect as though fully set forth at length herein.

8 52. Effective May 1, 1996, Qwest's Payphone Services Tariffs and its other tariffs
9 were held to be interim pending final determination of tariffs in the Oregon rate case UT-125.
10 Such rates were unlawfully established by OPUC Orders 01-810 and 02-190, which order the
11 calculation and payment of refunds thereunder to all Qwest ratepayers, and such Orders were
12 lawfully appealed and ultimately corrected to establish lawful rates which from November 15,
13 2007 served as the basis to correctly calculate and pay refunds due as ordered by the OPUC.⁴⁴

14 53. The interim rates in effect from May 1, 1996 were higher than the Payphone
15 Services Tariffs that were compliant with the new services test and made effective November
16 15, 2007 (the NST compliant Payphone Services Tariffs²⁷) were discriminatory and subject to
17 mandatory refund in accordance with Chapter 759.185 of the Oregon Revised Statutes.

18 54. As a result of the wrongful rates, Complainants suffered overcharges.
19 Complainants are entitled to a refund of all overcharges paid under rates pursuant to tariffs that
20 were higher than the rates that could be charged had the NST compliant Payphone Intrastate
21 Tariffs been in effect throughout the period May 1, 1996 to November 15, 2007, together with
22 interest at the highest rate allowed by law.

23
24
25
26 _____
⁴⁴ OPUC Order No. 07-497.

1 **XI. AS A RESULT OF DEFENDANTS' UNLAWFUL CONDUCT, PLAINTIFFS ARE**
2 **ENTITLED TO RECOVERY OF THEIR ATTORNEYS' FEES UNDER ORS 759.900;**
3 **183.497 AND 47 USC 206. AND FOR DISCRIMINATION UNDER ORS 759.275 AND**
4 **759.455**

5 55. Plaintiffs repeat and re-allege paragraphs 1-54 with the same force and effect as
6 though fully set forth at length herein.

7 56. Upon information and belief, Qwest has provided preferential and discriminatory
8 treatment in terms of telephone exchange access and telephone exchange services, including in
9 relation to basic services, to its own payphone services that it did not make available to
10 independent PSPs such as Complainants.

11 57. Upon information and belief, in or about August 2004, Qwest sold all of its
12 payphone assets to FSH Communications, LLC ("FSH").

13 58. Upon information and belief, since the sale of such payphone service assets to
14 FSH, Qwest has continued to provide preferential and discriminatory treatment to FSH not
15 provided to independent PSPs including the Complainants.

16 **XII. AS A RESULT OF DEFENDANTS' UNLAWFUL CONDUCT, PLAINTIFFS ARE**
17 **ENTITLED TO RECOVERY OF DAMAGES AND OF THEIR ATTORNEYS' FEES**
18 **UNDER ORS 759.900.**

19 59. Plaintiffs repeat and re-allege paragraphs 1-58 with the same force and effect as
20 though fully set forth at length herein.

21 60. Qwest has charged the Payphone Service Providers unlawfully high rates for
22 Payphone Services since May 1, 1996 as established by the OPUC Orders and Stipulations of
23 the parties that resulted in the NST Compliant Payphone Intrastate Tariffs under the TCA and
24 further as required to be filed not later than April 15, 1997, the deadline for having effective
25 Payphone Service tariffs on file that comply with Section 276 and the new services test. The
26 Payphone Service Providers are entitled to a refund of the difference between the NST
compliant rates and those charged by Qwest under the regulation of the OPUC. The
Commission should order the refund to be based on the final Payphone Services rates set in
Docket UT-125 and finally effective as required by the TCA, the FCC and the related

1 Regulations and Orders and that the Complaint has stated the cause for relief requested.
2

3 **RELIEF REQUESTED**

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

7 (1) Complaint has stated a Cause of Action for the refund as
8 set forth herein;

9 (2) Qwest's Payphone Services rates exceeded the final rates
10 established November 15, 2007 since May 1, 1996;

11 (3) Qwest must refund to the Complainants the amount by
12 which Qwest's Payphone Services rates exceeded the final rates,

13 (4) The refund should be calculated based on the amount by
14 which the rates charged since May 1, 1996 exceeded the Payphone Services
15 rates established in the Final Order in Docket UT-125 effective as of November
16 15, 2007; and

17 (5) Qwest must refund to the Complainants, pursuant to the
18 Waiver Order, the amount by which Qwest Payphone Services rates exceeded
19 the final rates established in the Final Order in Docket UT 125 effective as of
20 November 15, 2007 during the period April 15, 1997 and November 15, 2007.

21 (6) Complainants be awarded damages for Qwest's
22 discrimination and preferential treatment of its own Payphone Services and
23 those of any third party; and

24 (7) Complainants be awarded interest at the highest rate
25 allowed by law from the dates of the accrual of the overcharges to the date of
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EXHIBIT A

COMPLAINANTS – LEGAL ENTITY NAME AND ADDRESS

Central Telephone, Inc.
Richard Stevens
1505 S. Grant
P.O. Box 25
Goldendale, WA 98620

Communication Management Services, LLC
Manager, Charles Jones
14250 NW Science Park Dr Ste B
Portland, OR 97229

Corban Technologies, Inc.
Gregg Marshall, President
2204 NW Birdsedale Ave. #9
Gresham, OR 97030

Davel Communications aka
Phonetel Technologies, Inc.
Tammy Martin, President
200 Public Square, Suite 700
Cleveland, OH

Interwest Tel, LLC
Bob Santos, Manager
2850 Kyle Road
Kennewick, WA 99338

Interwest Telecom Services Corporation
Rich Magnuson, Pres.
229 S. Wenatchee Avenue
Wenatchee, WA 98801

NSC Communications Public Services Corporation
6920 Koll Center Prkwy
Pleasanton, CA

National Payphone Services, LLC
Troy Brosseau, Manager
1302 S. High School Rd.
Indianapolis, IN 46241

1 Pacific Northwest Payphones
Randy Linderman, Pres.
2 1315 NW 185th Ave #215
3 Beaverton, OR 97006

4 Partners in Communication
18790 SE Semple Rd.
5 Clackamas, OR 97015

6 T & C Management, L.L.C.
for Payphone Management, Inc.
7 d/b/a Digital Access Communications
Ken Cheatham and Donald E. Truman
8 13252 Garden Grove Blvd., Suite 205
Garden Grove, CA 92843

9 Valley Pay Phones, Inc.
10 906 Henning Way
Keizer, OR 97303

11 Northwest Public Communications Council
12 c/o Randy Linderman
2373 NW 185TH AVE #310
13 Hillsboro, OR 97124.

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1 CERTIFICATE OF SERVICE

2 I, the undersigned below, hereby certify that I served the foregoing SECOND AMENDED
3 COMPLAINT OF COMPLAINANTS on:

4 Lawrence Reichman
5 Perkins Coie
6 1120 N.W. Couch Street, 10th Floor
7 Portland, Oregon 97209-4128
8 reicl@perkinscoie.com

9 Jason W. Jones
10 Department of Justice
11 1162 Court Street NE
12 Salem, Oregon 97301
13 Jason.w.jones@state.or.us

14 Alex M. Duarte
15 Qwest Corporation
16 421 SW Oak St., Suite 810
17 Portland, Oregon 97204
18 alex.duarte@qwest.com

19 by the following indicated method or methods:

20 X by **mailing** a full, true, and correct copy thereof in a sealed, first-class
21 postage-prepaid envelope, addressed to the attorney as shown above, the last-known
22 office address of the attorney, and deposited with the United States Postal Service at
23 Seattle, Washington, and by electronic mail on the date set forth below.

24 _____ by sending full, true and correct copies thereof via **overnight courier** in
25 sealed, prepaid envelopes, addressed to the attorneys as shown above, the last-known
26 office addresses of the attorneys, on the date set forth below.

And Certify that I did electronically file same with the PUC Filing Center, with a hard
copy to PUC, Filing Center, 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR
97308-2148.

DATED this 16th day of November, 2009

27 _____
28 /s/
29 Frank G. Patrick, OSB 76022

1
2
3 BEFORE THE PUBLIC UTILITY COMMISSION
4 OF OREGON
5
6
7

8 THE NORTHWEST PUBLIC
9 COMMUNICATIONS COUNCIL, on behalf of
10 PSPs A to Z, and NPCC MEMBERS: Central
11 Telephone, Inc; Communication
12 Management Services, LLC; Davel
13 Communications a/k/a Phonetel
14 Technologies, Inc., Interwest Tel, LLC;
15 Interwest Telecom Services Corporation;
16 NSC Communications Public Services
17 Corporation; National Payphone Services,
18 LLC; Pacific Northwest Payphones; Partners
19 in Communication; T & C Management,
20 LLC; Corban Technologies, Inc.; and Valley
21 Pay Phones, Inc.

22 Complainants,

23 v.

24 QWEST CORPORATION,

25 Defendant.

DOCKET NO. DR 26/UC 600

PRECAUTIONARY MOTION TO ALLOW
SECOND AMENDMENT TO THE COMPLAINT

26 TO: Oregon Public Utility Commission

AND TO: All Parties

Moving Counsel certifies under the UTCR that he has sought to confer with Larry Reichman but at the time of the filing had not heard from him and assumes that Qwest opposes the Motion.

1 Frank G. Patrick appearing for Frank G. Patrick attorney for and appearing for:
2 The Northwest Public Communications Council (“NPCC”) representative of those
3 unidentified Payphone Service Providers A to Z; and the payphone service providers
4 members of the NPCC formerly appearing by the NPCC and now appearing as the real
5 parties in interest individually to wit: Central Telephone, Inc; Communication
6 Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc.,
7 Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public
8 Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones;
9 Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and
10 Valley Pay Phones, Inc. hereinafter collectively the “Complainants”, hereby move the
11 Commission for an Order allowing the Second Amended Complaint in the event that the
12 Commission finds that the filing of the Second Amended Complaint filed
13 contemporaneously with this motion is not well taken.

14
15 1. This motion is filed as precautionary in that movants, assert that under ORCP
16 23(A), they are entitled to file the attached Second Amended Complaint as a matter of
17 right. Counsel for the Complainants has found no Answer to either the original
18 Complaint filed in May of 2001, nor to the First Amended Complaint filed
19 contemporaneously with this motion substantially in the form attached to prior counsel’s
20 Motion to Amend.

21 2. There has not been an Answer nor any motion or action by Qwest challenging
22 the allegations of fact in the original Complaint, nor has there ever been filed any
23 finding with respect to the allegations of the Complaint.

24 3. The movants herein have only just now been joined in this matter but are the
25 only parties to which the Oregon Public Utilities Commission (OPUC) can award any
26 financial remuneration pursuant to ORS 756.500(2); 756.500(4). Movants are the real

Page 2 PRECAUTIONARY MOTION TO ALLOW SECOND AMENDED COMPLAINT

1 parties interest, under ORCP 26 and ORS 756.500(2), and should be allowed to freely
2 amend. In the event that such an amendment works a hardship on the opposing party
3 the remedy as provided by ORS 756.500(4), is not to deny the amendment but rather to
4 avoid any prejudice by providing the opposing party the right to fully investigate the
5 matters plead so that it might fully respond to the Amended Complaint. The standard is
6 not that the amendment should be denied, but rather that it should be allowed and the
7 opposing party be granted time to fully respond.

8 4. The commission had granted prior counsel for The Northwest Public
9 Communications Council, (NPCC) leave to file an Amended Complaint with limitations on
10 the claims for relief, on May 4, 2009 (Order No. 09-155). The Complaint attached to the
11 Motion has been filed in substantially the form as attached to that Motion. It has now
12 been filed as the First Amended Complaint with the limitations as imposed by Order 09-
13 155. Such allowance was at the request of the NPCC but not the individual Complainants
14 as proposed in the Motion and now added by that Amendment.

15 5. The now individually named Complainants movants herein have never
16 appeared in this matter prior to the filing of the First Amended Complaint and now this
17 motion. Since the substitution by moving counsel for the added parties herein, counsel
18 has reviewed the record of UT-125 and its related proceedings as well as the matters on
19 record in this matter DR-26. The Second Amended Complaint as filed
20 contemporaneously with this filing as well as attached hereto, is essentially
21 supplementing the Complaint those items which could and should have been added to
22 the First Amended Complaint and are already a part of this proceeding based on the
23 provisions of the Orders and findings in UT-125 and the remand from the Oregon Court
24 of Appeals in UT-125, the Commission was obligated to proceed in UT-125 to comply
25 with the Remand.
26

1 Lawrence Reichman
2 Perkins Coie
3 1120 N.W. Couch Street, 10th Floor
4 Portland, Oregon 97209-4128
5 reicl@perkinscoie.com

6 Jason W. Jones
7 Department of Justice
8 1162 Court Street NE
9 Salem, Oregon 97301
10 Jason.w.jones@state.or.us

11 Alex M. Duarte
12 Qwest Corporation
13 421 SW Oak St., Suite 810
14 Portland, Oregon 97204
15 alex.duarte@qwest.com

16 by the following indicated method or methods:

17 X by **mailing** a full, true, and correct copy thereof in a sealed, first-class
18 postage-prepaid envelope, addressed to the attorney as shown above, the last-known
19 office address of the attorney, and deposited with the United States Postal Service at
20 Seattle, Washington, and by electronic mail on the date set forth below.

21 _____ by sending full, true and correct copies thereof via **overnight courier** in
22 sealed, prepaid envelopes, addressed to the attorneys as shown above, the last-known
23 office addresses of the attorneys, on the date set forth below.

24 And Certify that I did electronically file same with the PUC Filing Center, with a hard
25 copy to PUC, Filing Center, 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR
26 97308-2148.

DATED this 16th day of November, 2009

Frank G. Patrick, OSB 76022