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BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

UT 125

In the Matter of  
QWEST CORPORATION, fka U S WEST  
COMMUNICATIONS, INC.

QWEST'S RESPONSE TO NORTHWEST  
PUBLIC COMMUNICATIONS  
COUNCIL'S MOTIONS FOR AN ORDER  
TO SHOW CAUSE OR, IN THE  
ALTERNATIVE, TO CLARIFY ORDER  
NO. 07-497

**I. INTRODUCTION**

Qwest Corporation ("Qwest") respectfully submits this response to the Northwest Public Communications Council's ("NPCC") Motions for an Order To Show Cause or, in the Alternative, To Clarify Order No. 07-497 (the "Motions"). NPCC's Motions effectively ask the Commission to initiate a proceeding to consider new claims that are unrelated to any issue ever raised in this proceeding, which was concluded in 2007, more than nine years ago. The Commission should deny the Motions because they are untimely, not authorized or supported by the statutes and rules that govern practice before the Commission, and factually and legally unsupported.

The Commission issued a final order in this docket on November 15, 2007, 12 years after the docket was opened in 1995. Although NPCC actively participated in the entire case, NPCC did not ask the Commission to order additional refunds when the Commission set final rates for payphone services in 2006-07. Accordingly, NPCC waived any claim it may have had for

1 additional refunds (as will be shown below, it had no such claim). No party appealed the final  
2 order and this docket has been inactive and effectively closed since 2007. The Commission  
3 formally closed this docket on January 4, 2017, after NPCC withdrew its previous, ill-advised  
4 motion.

5 Under the Commission's rules, a motion must pertain to a matter that is pending in a  
6 proceeding. Not only is there is no matter currently pending before the Commission in this  
7 proceeding, NPCC never before raised in this case the new claims NPCC wishes to pursue.  
8 Therefore, the Commission should deny the Motions. If NPCC still wants to pursue these new  
9 claims (notwithstanding their utter lack of merit and the excessive litigation NPCC has already  
10 pursued), it should be required first to file a complaint with the Commission under ORS 756.500,  
11 clearly stating the basis for its claims and allowing Qwest the opportunity to defend itself on all  
12 available grounds.

13 By filing motions in this closed case, NPCC attempts to downplay the highly improper  
14 nature of its requests. The claims NPCC wishes to make are entirely without merit. Contrary to  
15 NPCC's repeated assertion, no Commission order requires Qwest to make any additional  
16 refunds. If NPCC had such a claim, it should have asserted it in this case over 10 years ago.  
17 Instead, NPCC litigated these and related claims in four separate cases in federal court (which  
18 NPCC never mentions in the far-ranging discussion in its 30-page Motions), so the claims are  
19 barred by issue preclusion and claim preclusion. The courts also decided that the claims are  
20 time-barred and that NPCC does not have authority to assert a claim that Qwest violated the  
21 Commission's orders.

22 On the merits, NPCC's principal motion, for an order to show cause, is completely  
23 unfounded. Here, NPCC asks the Commission to order Qwest to show cause why it should not  
24 make additional refunds under orders the Commission entered in this and another docket, dating  
25 back over 20 years. The Commission should deny this motion because Qwest timely and

1 completely fulfilled all of its obligations to make such refunds over 16 years ago, and neither  
2 Commission Staff nor any other party or customer has even suggested that Qwest owes any  
3 additional refunds since then. NPCC's motion is based on a gross misstatement of the  
4 Commission's prior orders. Qwest should not be ordered to do anything; rather, NPCC should  
5 be required to carry its impossible burden to show that Qwest owes additional refunds.

6 NPCC's alternative motion, to "clarify" Order No. 07-497, could be characterized as an  
7 understatement if it were not so monumentally misleading. NPCC wants the Commission to  
8 "clarify" and "amend" a final order issued almost 10 years ago by ordering relief based on claims  
9 that were never made, let alone decided, in this case. NPCC asserts that Qwest owes additional  
10 refunds based on "Order Nos. 96-107, 00-190, 00-191, 06-515, and 07-497, the  
11 Telecommunications Act of 1996, and state law." Motions at 1. NPCC was an active participant  
12 in this case, including the proceedings that led to Order No. 07-497, which established the rates  
13 for Qwest's payphone services. At no time during those proceedings did NPCC (or any other  
14 party) ever assert that, in addition to approving final rates for payphone services, the  
15 Commission should order Qwest to make additional refunds to customers of those services  
16 (NPCC's members). To the contrary, NPCC stipulated at the time that the proposed resolution  
17 of this case complied with all federal requirements and satisfied the Court of Appeals' remand.  
18 The Commission cannot clarify or amend an order to require relief based on claims that were  
19 never asserted or decided in this ancient and closed proceeding, and NPCC is judicially estopped  
20 to assert otherwise. NPCC's claims are also barred by waiver and claim preclusion based on its  
21 failure to raise them over 10 years ago during the remand proceeding (if not sooner).

22 The Commission should reject the latest chapter in NPCC's extravagant forum-shopping,  
23 deny the Motions, and help put an end to the 16 years of vexatious litigation NPCC has pursued  
24 against Qwest. If the Commission is inclined to give NPCC yet another opportunity to pursue its  
25 meritless claims in a new forum, then the Commission should require NPCC to file a complaint

1 pursuant to ORS 756.500, and first show the Commission why its new claims are not barred by  
2 prior litigation and the passage of time even before it attempts to show that they have any merit  
3 (which they do not have). In the context of a complaint proceeding, Qwest would be afforded  
4 adequate procedural rights unavailable in responding to a motion, including the ability to assert  
5 defenses to the claims and to have an evidentiary hearing on the record.<sup>1</sup>

## 6 II. PROCEDURAL BACKGROUND

### 7 A. Docket UT 125.

8 This case, Docket UT 125, was a general rate case under ORS 759.180, commenced in  
9 1995. The Commission bifurcated the case into two phases, a revenue requirement phase and a  
10 rate design phase, which were conducted consecutively. At the conclusion of the first phase of  
11 the case, the revenue requirement phase, and following an appeal, the Commission issued Order  
12 Nos. 00-190 and 00-190, approving a settlement among Qwest, Staff and other parties. Those  
13 orders established two different revenue requirement figures: (1) a reduction of \$53 million per  
14 year, which was the amount of revenue Qwest was required to refund to its customers for the  
15 period from May 1, 1996 through the date of the refund, which was made in full at the end of  
16 2000; and (2) a reduction of \$63 million per year, which represented the prospective revenue  
17 reduction and was implemented through temporary bill credits during the rate design phase and  
18 in final rates. Order No. 00-190 at 10.

19 Qwest made the full refund required by the Commission's orders in late 2000, returning  
20 over \$283 million to its customers.<sup>2</sup> The amounts of the refund for individual customers were  
21 based on five broad categories of services, and bore no relationship to the amounts customers  
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23 <sup>1</sup> NPCC does not even appear to have authority to file the Motions or a new complaint.  
24 According to the Oregon Secretary of State's website as of March 24, 2017, NPCC is "inactive" in  
25 Oregon and had its authority revoked as of Dec. 20, 2013.  
[http://egov.sos.state.or.us/br/pkg\\_web\\_name\\_srch\\_inq.show\\_detl?p\\_be\\_rsn=1419216&p\\_srce=BR\\_INQ  
&p\\_print=FALSE](http://egov.sos.state.or.us/br/pkg_web_name_srch_inq.show_detl?p_be_rsn=1419216&p_srce=BR_INQ&p_print=FALSE). Thus, NPCC does not have authority to maintain a lawsuit, and presumably any other  
26 proceeding, in this state. ORS 60.704(1).

<sup>2</sup> <http://www.puc.state.or.us/Pages/news/2000/2000044.aspx>.

1 paid for specific services or the new rates the Commission would set for those services in the  
2 second phase of the proceeding, rate design. Moreover, the Commission did not require any  
3 additional refunds to be made following the rate design phase of the case. These points will be  
4 discussed in more detail below as they are fatal to NPCC's claims.

5 The Commission issued Order No. 01-810 in the second phase of this case, establishing  
6 the final rate design, on Sept. 14, 2001. NPCC appealed the rates the Commission established  
7 for payphone services, and the Court of Appeals remanded those rates for further consideration  
8 in 2004. *Northwest Public Communications Council v. Public Utility Commission of Oregon*,  
9 196 Or. App. 94, 100 P.3d 776 (2004) (the "Rate Case Appeal"). The court's remand order did  
10 not require additional refunds; it simply required the Commission to reexamine the rates it  
11 established for payphone services that Qwest would charge on a prospective basis.

12 This proceeding concluded in 2007, when the Commission issued its final order  
13 establishing rates for payphone services. Order 07-497 adopted a stipulation among NPCC,  
14 Commission Staff and Qwest. Notably, NPCC did not assert a right to additional refunds during  
15 the remand proceeding in 2006-07. Instead, NPCC stipulated to entry of the final order, did not  
16 ask the Commission to order additional refunds, and allowed the appeal period for the order to  
17 run. There has been no further activity whatsoever in this case since 2007, and the Commission  
18 formally closed this docket on January 4, 2017.

19 Significantly, NPCC was a very active passive participant in the remand proceeding that  
20 led to Order No. 07-497. On Feb. 9, 2006, NPCC filed a Motion To Set Procedural Conference  
21 To Establish Issues and Procedures on Remand, requesting the Commission, among other things,  
22 to identify the issues that needed to be addressed on remand. Following the prehearing  
23 conference that NPCC requested, the ALJ identified only two issues that needed to be addressed  
24 by the Commission on remand:

1 Issue No. 1: The calculation of revised rates for Public Access  
2 Line (PAL) service and Fraud Protection Service (formerly known  
as CustomNet service).

3 Issue No. 2: Whether and to what extent other Qwest rates should  
4 be adjusted because of the recalculation of the rates for PAL and  
Fraud Protection service.

5 First Conference Report, Docket UT 125 (March 21, 2006). Neither NPCC nor any other party  
6 identified any issue relating to the possible issuance of additional refunds.

7 The Commission treated the second issue identified above as a threshold question, and  
8 resolved it in Order No. 06-515, based on written briefs. The question presented was whether  
9 Qwest could raise the rates for other services, on a prospective basis, to offset the revenue  
10 reduction Qwest would experience from reducing its rates for payphone services. As stated in  
11 the order, the Commission “decide[d], as a threshold matter, whether Qwest may raise any  
12 customer rates to offset reduced revenues resulting from a Commission decision approving lower  
13 payphone service rates.” Order No. 06-515 at 2. Contrary to NPCC’s arguments, the issue  
14 addressed in that order had nothing to do with refunds. Qwest discusses this order further below.

15 The stipulation NPCC executed in October 2007 identifies only two “unresolved issues  
16 on remand”: whether Qwest’s proposed PAL and fraud protection rates “comply with federal  
17 requirements.” Stipulation at 3. The stipulation was entered after the parties “held several  
18 settlement conferences to discuss whether the proposed rates are consistent with the Court of  
19 Appeals remand and federal requirements.” *Id.* The stipulation sets forth the parties’ (including  
20 NPCC’s) agreement that the proposed PAL and fraud protection rates “comply with federal  
21 requirements” and “satisfy the Court of Appeals Remand Order.” *Id.* Notwithstanding this  
22 stipulation freely entered by NPCC in 2007, NPCC now makes a directly contrary assertion: that  
23 Qwest’s payphone service rates violated federal law and the Court of Appeals remand order, and  
24 that requiring Qwest to make additional refunds is necessary to remedy that violation. *See, e.g.,*  
25 Motions at 28. NPCC waived and is barred from raising any such claim by failing to raise it in a

1 timely manner. NPCC is also judicially estopped from asserting such a claim 10 years after it  
2 obtained a benefit from a contrary assertion.

3 It is worth noting that NPCC intervened in this proceeding on Sept. 13, 1996, and was  
4 represented in this case by attorney Brooks Harlow of the law firm Miller Nash since at least Jan.  
5 26, 1998. Mr. Harlow, an experienced telecommunications lawyer and PUC practitioner,  
6 continued to represent NPCC in this case through its conclusion in 2007, and executed the  
7 stipulation on behalf of NPCC. Mr. Harlow's failure to raise the issue of additional refunds  
8 during the remand proceeding in 2006-07 was presumably not due to oversight, but rather was  
9 based on his thorough understanding of the Commission's prior orders in this case and the fact  
10 that Qwest had already fulfilled its refund obligation.<sup>3</sup>

11 **B. Subsequent Changes in Qwest's Ratemaking Treatment.**

12 In 1999, while UT 125 was pending, Qwest elected price cap regulation pursuant to ORS  
13 759.400 et seq. Order No. 01-810 at 3. This meant that Qwest was no longer "subject to any  
14 other retail rate regulation, including but not limited to any form of earnings-based, rate-based or  
15 rate of return regulation." ORS 759.410(2). The rates established in this docket became the  
16 maximum rates Qwest could charge under ORS 759.410. ORS 759.415(1).

17 After being subject to price cap regulation for several years, Qwest applied for, and in  
18 2008 the Commission approved, a price plan pursuant to ORS 759.255. Docket UM 1354; Order  
19 No. 08-408. The price plan established other price caps and provided Qwest with additional  
20 pricing flexibility. Qwest continues to operate under the price plan the Commission approved  
21 almost nine years ago.

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24 <sup>3</sup> Mr. Harlow also represented NPCC in a declaratory ruling/complaint proceeding against Qwest  
25 seeking refunds for NPCC's members (Docket DR 26/UC 600, discussed below) from its inception on  
26 May 14, 2001 until July 22, 2009, when Frank Patrick, NPCC's current attorney, replaced him. In  
addition to representing NPCC in Docket DR 26/UC 600 from July 2009 through the present, Mr. Patrick  
also filed four lawsuits against Qwest between 2009 and 2013 seeking refunds (discussed below), and  
filed the Motions in 2017.

1 Based upon these two changes in the ratemaking law applicable to Qwest, Qwest is no  
2 longer subject to the type of ratemaking treatment the Commission applied in this docket.  
3 Accordingly, it is no longer relevant to undertake further proceedings in this docket.

4 **C. NPCC Filed Five Other Proceedings Seeking Refunds, Including Four Lawsuits.**

5 **1. Commission Docket DR 26/UC 600 (NPCC I).**

6 NPCC already sought refunds from Qwest in Docket DR 26/UC 600 (“NPCC I”), based  
7 upon the FCC’s *Waiver Order*.<sup>4</sup> The Commission denied NPCC’s claim in 2011 (Order No. 11-  
8 504), and the Oregon Court of Appeals affirmed the Commission’s decision in 2016. *Northwest*  
9 *Public Communications Council v. Qwest Corporation*, 279 Or. App. 626, 379 P.3d 633 (2016);  
10 *reconsideration den’d* (March 9, 2017).

11 Significantly, NPCC sought to advance the same claims in *NPCC I* that it now seeks to  
12 pursue in the Motions in this proceeding, and the Commission rebuffed those attempts. First, in  
13 2009, NPCC sought to amend its complaint in *NPCC I* to add these same claims. The  
14 Commission denied those amendments to the complaint (Order No. 10-027) and the Court of  
15 Appeals affirmed that decision. 279 Or. App. at 646. Second, on Jan. 27, 2010, NPCC filed a  
16 Motion To Enforce Orders, which also sought to have the Commission adjudicate these claims;  
17 NPCC ultimately withdrew that motion.<sup>5</sup>

18 **2. NPCC filed, and lost, four separate lawsuits against Qwest seeking refunds.**

19 NPCC also filed four separate lawsuits seeking the same relief it now seeks in the  
20 Motions. The federal district court dismissed each of those four lawsuits, and two of the  
21 dismissals have, to date, been affirmed (NPCC did not appeal one judgment and one appeal is  
22 still pending). These cases merit some discussion as they would form part of the basis for  
23 Qwest’s motion to dismiss any further proceeding brought by NPCC before the Commission.

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26 <sup>4</sup> *In re Payphone Docket*, Order, 12 F.C.C. Rcd. 21370 (1997) (the “*Waiver Order*”).

<sup>5</sup> Transcript of Feb. 4, 2010 Telephone Prehearing Conference, Docket DR 26/UC 600, at 16-17.



1                   **a.       NPCC’s 2009 federal court lawsuit (NPCC II).**

2                   NPCC filed *The Northwest Public Communications Council et al., v. Qwest Corporation,*  
3 *et al.*, 2010 WL 4260341 (D. Or. 2010), *aff’d*, 538 Fed. Appx. 822 (9th Cir. 2013) (“*NPCC II*”),  
4 in November 2009, after suffering a number of adverse rulings from the Commission in *NPCC I*.  
5 NPCC sought the same relief in *NPCC II* as in *NPCC I*, on the same grounds, and also asserted a  
6 number of additional claims under state law, including the claims contained in the Motions. The  
7 district court granted Qwest’s motion to dismiss the complaint because it concluded that NPCC’s  
8 federal-law claims were barred by the statute of limitations. Having dismissed the federal-law  
9 claims, the court declined to exercise supplemental jurisdiction over the state-law claims and did  
10 not reach the numerous other bases for dismissal urged by Qwest. NPCC appealed the final  
11 judgment to the Court of Appeals for the Ninth Circuit, which affirmed.

12                   **b.       NPCC’s 2010 federal court lawsuit (NPCC III).**

13                   NPCC filed a second federal court lawsuit against Qwest and the Commission in federal  
14 court in June 2010, also following adverse rulings by the Commission in *NPCC I*. *The*  
15 *Northwest Public Communications Council et al., v. Oregon Public Utility Commission et al.*,  
16 805 F. Supp. 2d 1058 (D. Or. 2011) (“*NPCC III*”). NPCC asked the court to review the  
17 Commission’s orders in *NPCC I* denying NPCC’s motions to add claims such as those presented  
18 in the Motions. Qwest and the Commission moved to dismiss *NPCC III* on a number of  
19 grounds. The court dismissed *NPCC III* in July 2011, and NPCC did not appeal that decision.

20                   **c.       NPCC’s 2011 federal court lawsuit (NPCC IV).**

21                   NPCC filed yet a third lawsuit against Qwest on December 16, 2011, the day after the  
22 Commission issued its final order in *NPCC I*. *State of Oregon, ex rel. Northwest Public*  
23 *Communications Council v. Qwest Corp.*, 877 F. Supp .2d 1004 (D. Or. 2012), *aff’d* 563 Fed.  
24 Appx. 547 (9th Cir. 2014) (“*NPCC IV*”). In *NPCC IV*, NPCC purported to act on behalf of the  
25 State of Oregon to enforce the same Commission orders NPCC seeks to enforce in this case,  
26 which NPCC claimed required Qwest to make additional refunds to payphone service providers

1 (“PSPs”) like NPCC’s members. The court granted Qwest’s motion to dismiss, on the principal  
2 basis that NPCC does not have authority to bring an action to enforce the Commission’s orders.  
3 The Ninth Circuit affirmed the district court’s decision.

4 **d. NPCC’s 2013 federal court lawsuit (NPCC V).**

5 NPCC filed its fourth separate lawsuit against Qwest on Nov. 15, 2013. *Communication*  
6 *Management Services, LLC, et al. v. Qwest Corporation*, 67 F. Supp.3d 1159 (D. Or. 2014),  
7 *appeal pending* (“NPCC V”). The claims in *NPCC V* included: (1) all of the claims the  
8 Commission addressed in *NPCC I* and the court addressed in *NPCC II*, based generally on  
9 federal law and the FCC’s Payphone Orders and the *Waiver Order* in particular; and (2) the same  
10 claims that the court addressed in *NPCC IV* and that NPCC seeks to relitigate in the Motions,  
11 seeking refunds based on the Commission’s orders issued in this docket and state law.

12 The district court dismissed NPCC’s complaint in its entirety, deciding that 11 of the  
13 claims were barred by the applicable statutes of limitation, one claim was barred under the  
14 doctrines of claim preclusion and issue preclusion by the final judgments in the other cases, and  
15 that NPCC failed to state claims upon which relief may be granted. Each of these grounds (and  
16 others) bar NPCC’s effort to relitigate these claims before the Commission.

17 **III. ARGUMENT**

18 **A. The Commission Should Deny NPCC’s Motion for an Order to Show Cause.**

19 **1. The motion is procedurally improper.**

20 NPCC filed its motion for an order to show cause “[p]ursuant to ORS 756.040.” Motions  
21 at 1. However, ORS 756.040 simply sets forth the “general powers” of the Commission; it does  
22 not authorize any type of proceeding, let alone a motion for order to show cause.

23 Under the Commission’s rules, motions “are requests seeking a ruling in a Commission  
24 proceeding ... such as a motion to dismiss.” OAR 860-001-0390(2). However, there is no  
25 proceeding pending in this docket, and there are no issues pending that require a ruling. All

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1 proceedings in this docket concluded in 2007 and the Commission has formally closed this  
2 docket. A motion is not the proper vehicle to initiate a proceeding. Rather, a “pleading,” such as  
3 a complaint, is used to initiate a proceeding. OAR 860-001-0390(1).

4 Even if any matter were currently pending in this case, the claims NPCC now wishes to  
5 assert go far beyond the subject matter of this docket. NPCC asserts that the Commission should  
6 “issue an order requiring Qwest ... to show cause why it is not in violation of Order Nos. 96-107,  
7 00-190, 00-191, 06-515, and 07-797, the Telecommunications Act of 1996, and state law.”  
8 Motions at 1. Only some of the referenced orders were issued in this proceeding. Moreover, this  
9 proceeding was a general rate case under ORS 759.180. It did not address any alleged violations  
10 of the Telecommunications Act of 1996 or state law (NPCC does not even specify which  
11 provisions of the Telecommunications Act or state law Qwest allegedly violated). Just like  
12 NPCC tried to do with its proposed Second Amended Complaint in Docket DR 26/UC 600 (*see*  
13 Order No. 10-027), NPCC now seeks to radically expand the scope of this proceeding, which has  
14 been closed and inactive for over nine years, simply by filing a motion. This NPCC may not do.  
15 If NPCC wants the Commission to consider its claims (the same claims that have already been  
16 rejected by the federal courts), then NPCC must file a complaint asking the Commission to  
17 initiate a new proceeding.<sup>6</sup>

18 ORS 756.500 authorizes any person to “file a complaint” before the Commission “against  
19 any person whose business or activities are regulated by some one or more of the statutes,  
20 jurisdiction for the enforcement or regulation of which is conferred upon the commission.” ORS  
21 756.500(1). ORS 756.500(3) requires the complaint to state all grounds on which the  
22 complainant seeks relief. Pleadings are subject to the certification in ORCP 17C. OAR 860-  
23 001-0400(1). ORS 756.512 provides the defendant an opportunity to respond to the complaint.

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25 <sup>6</sup> To avoid any doubt, Qwest does not think NPCC should be encouraged to file a new complaint  
26 to assert the meritless claims NPCC has already litigated. Qwest’s point is that the Motions are an  
improper way to present these new claims.

1 A defendant may also file a motion to dismiss the complaint. OAR 860-001-0390(2). ORS  
2 756.518 – 756.610 establish the applicable hearing procedures including, among other things,  
3 discovery, the right to present evidence, and resolution by an order containing findings of fact  
4 and conclusions of law that is subject to judicial review.

5 The Commission’s rules implement the statutory procedures for complaints. Specifically,  
6 a “pleading,” such as a complaint, is “used to address formal requests to initiate a proceeding....”  
7 OAR 860-001-0390. That is precisely what NPCC is improperly seeking with its Motions, the  
8 initiation of a proceeding.

9 The procedural flaws with the Motions are not simply matters of form; they also affect  
10 Qwest’s substantive rights to defend the claims NPCC wants to make. First, Qwest is entitled to  
11 a clear statement of the new claims that NPCC wishes to make. OAR 860-001-0400(2)(c).  
12 Second, Qwest is entitled to file a response, including answering the material allegations and  
13 asserting all affirmative defenses. OAR 860-001-0400(3)(c). As stated above, prior to  
14 defending NPCC’s claims on the merits, Qwest would assert a number of procedural defenses to  
15 NPCC’s claims. These include, among other things: (1) the claims are barred by issue  
16 preclusion, claim preclusion and waiver, having already been litigated by NPCC in five other  
17 cases, and by NPCC’s not raising them earlier in this case; (2) the claims are barred by the  
18 statute of limitations or laches, having accrued more than 10 years ago; (3) NPCC does not have  
19 a right of action to bring the claims or to seek relief; and (4) the Commission lacks subject-  
20 matter jurisdiction over the claims. Qwest will also assert other defenses, including that NPCC  
21 is judicially estopped by its 2006 stipulation in this docket from asserting that Qwest’s rates do  
22 not comply with federal law and the remand order in the Rate Case Appeal, and the claims  
23 should be dismissed based on intervening changes in Qwest’s ratemaking treatment. Qwest  
24 would have the right to assert these and other defenses in response to a complaint; it is not clear,  
25 however, how those matters would be raised in response to a “motion.”

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1 Third, Qwest has the right to present evidence and to have a decision based on an  
2 evidentiary record; such rights are not necessarily provided in the context of responding to a  
3 motion for an order to show cause. In contrast to complaints, the Commission decides motions  
4 based only upon the motion and a response. OAR 860-001-0420. Indeed, the Commission  
5 typically grants motions for an order to show cause in summary fashion, usually based upon a  
6 Staff recommendation, as it did in the three cases NPCC cites (Motions at 25-26). The  
7 Commission has issued orders to show cause based simply on one party's argument and without  
8 even providing the respondent an opportunity to respond, let alone to create an evidentiary  
9 record. Moreover, orders to show cause are used to address live issues in an active, pending  
10 docket.

11 Indeed, the context of a motion for an order to show cause, at least by its name, carries  
12 the risk of shifting the burden of proof from the moving party to the responding party; however,  
13 in this case, NPCC must have the burden to prove that Qwest violated orders and statutes and is  
14 somehow required to make additional refunds as NPCC claims. NPCC should not be permitted  
15 to raise new claims by filing Motions in a case that has been closed for over nine years,  
16 particularly where motions lack the procedural safeguards that would exist in a complaint  
17 proceeding.

18 **2. There is no basis for NPCC's assertion that Qwest owes additional refunds**  
19 **under the Commission's orders.**

20 As discussed above, the Commission should not address the merits of NPCC's claim that  
21 Qwest owes additional refunds to PSPs under the Commission's prior orders unless and until  
22 NPCC files a complaint stating such a claim and the complaint withstands a motion to dismiss  
23 based on various grounds. Nevertheless, so the Commission can understand the ultimate futility  
24 of such a complaint, Qwest will briefly explain why NPCC's assertion that Qwest owes  
25 additional refunds is based on a plainly incorrect interpretation of those orders.

1 NPCC asserts that the Commission ordered Qwest to make refunds based upon the  
2 difference between the rates Qwest charged while this rate case was pending and the final rates  
3 the Commission approved in 2007:

4 Qwest's PAL and CustomNet rates were interim and subject to  
5 refund until final rates were set in this docket, UT 125. The  
6 Commission set final rates for PAL and CustomNet in Order No.  
7 07-497, effectively concluding the rate-setting phase of UT 125  
8 and replacing the interim rates with final rates. Because the final  
9 rates are lower than the interim rates, Qwest is "subject to refund"  
10 the difference. To comply with Order No. 96-107, Qwest was  
11 required to refund the difference between the final rates and the  
12 interim rates.

13 Motions at 23-24. While NPCC acknowledges (at 8) that Qwest refunded over \$272 million in  
14 2000, NPCC's position is that was only a partial refund and that Qwest was required to make  
15 "additional refunds" once rates were finally set in this rate case. Motions at 20.

16 NPCC's argument is based on its assertions that: (1) the refund Qwest made in 2000 was  
17 based on the difference between the rates Qwest charged for specific services from the time the  
18 rate case commenced and the rates for those services the Commission established in the rate  
19 case; and (2) Qwest was required to make additional refunds to the extent rates were revised later  
20 in this docket. For example, NPCC states: "Those refunds were allocated among ratepayers  
21 based on an interim rate design that was later adopted as the final rate design in Order No. 01-  
22 810." Motions at 22.

23 NPCC is wrong on both counts. First, the refund was never based on rates for specific  
24 services established in this case at any time. Indeed, the refund was made at the conclusion of  
25 the revenue requirement phase of the case *before* any rates were changed in the rate design  
26 phase. The refunds the Commission required Qwest to make were never intended to bear any  
relationship to the rates the Commission established for specific services. Rather, they were  
intended to return money to customers *regardless* of whether the rates those customers paid were  
decreased, increased or stayed the same as a result of the rate case. Second, the refund the

1 Commission required was, in the Commission's own words, a "one-time refund" which Qwest  
2 would make as a "one time, lump sum credit on customers' bills." Order No. 00-190 at 3. The  
3 refund was not to be trued-up or supplemented after the rate case was concluded, as NPCC  
4 contends. Qwest made the complete refund in 2000, and is not required to make any additional  
5 refunds under the Commission's orders.

6 Understanding the full impact of the Commission's revenue requirement orders in this  
7 case helps put the "one-time refund" in its proper context and show why NPCC's claim is based  
8 on a mischaracterization of the Commission's orders and is completely unfounded. As NPCC  
9 notes, the Commission bifurcated this case into a revenue requirement phase and a rate design  
10 phase. At the conclusion of the revenue requirement phase, the Commission originally ordered  
11 Qwest to reduce its revenue requirement by approximately \$97 million per year. Order No. 00-  
12 190 at 1. Under the Commission's original revenue requirement order, Order No. 97-171, this  
13 reduction in revenue requirement would have been implemented both as a refund at that annual  
14 rate (plus interest) until such time as permanent rates were established in the rate design phase  
15 and, on a going-forward basis, in permanent rates. Order No. 00-190 at 1.

16 Qwest appealed the Commission's original revenue requirement order, which was  
17 reversed by the Marion County Circuit Court. *Id.* While a further appeal was pending, Qwest  
18 and Commission Staff reached a settlement of the revenue requirement issues, which the  
19 Commission approved in 2000. The settlement provided for two different revenue requirements:  
20 the revenue requirement reduction for the refund period would be at the rate of \$53 million per  
21 year, and the revenue requirement reduction for the going-forward period would be at the annual  
22 rate of \$63 million. *Id.* at 10. In order to implement the first part of this settlement, Qwest was  
23 required to make a "one-time refund" at the rate of \$53 million per year (plus interest) shortly  
24 after the Commission approved the settlement. *Id.* Since the refund period spanned more than  
25 four years (from May 1, 1996 through September 2000), the refund was in excess of \$283

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1 million. *Id.* at 3; *supra*, fn. 2. Note that this refund was made *before* the rate design phase of this  
2 case commenced, so the amount of the refund for any customer could not possibly bear any  
3 relationship to the rates the Commission established *later* in this proceeding.

4 The agreed-upon \$63 million per-year revenue reduction following the refund period was  
5 implemented in two ways. First, Qwest was required to issue temporary bill credits from the  
6 date of the refund until the rate design phase was concluded that would have a total revenue  
7 impact of \$63 million per year. *Id.* at 10. The Commission described the purpose of the  
8 temporary bill credits and distinguished it from the refund:

9 The refund is a separate item from the temporary bill credits. The  
10 refund is a return of revenues collected from customers, made in  
11 settlement of potential liability to make refunds at some future  
12 date. The bill credits reflect a reduction going forward in revenue  
13 requirement pending conclusion of the rate design portion of this  
14 docket.

15 *Id.* at 4.<sup>7</sup> Second, once rates were set, the \$63 million per-year revenue reduction would be  
16 permanently implemented in the ongoing rate structure. *Id.* at 10.

17 Thus, seen in its proper context, the refund the Commission ordered was to be made “one  
18 time” and as a “lump sum credit on customers’ bills.” Qwest discharged its obligation to make a  
19 refund under the Orders when it refunded over \$283 million to customers, under the  
20 Commission’s supervision, in 2000. Qwest was not required to supplement the refund after final  
21 rates were established. Indeed, as the Commission stated, the refund amount was agreed upon  
22 “in settlement of potential liability to make refunds at some future date,” negating NPCC’s  
23 argument that an additional refund would be required at a future date. Indeed, given the full  
24 implementation of the revenue reduction through a refund, temporary rate credits, and final rates,  
25 if Qwest were required to make any additional refund now, that would require Qwest to reduce

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26 <sup>7</sup> NPCC’s confusion regarding the Commission’s refund order is partially displayed in the  
27 following statement in the Motions: “The refund was distributed among ratepayers, including PSPs,  
28 based on an interim rate design implemented by the Commission in the form of temporary bill credits.”  
29 Motions at 8-9. NPCC misunderstands the difference between the refund and the temporary bill credits  
30 ordered by the Commission, among other things.



1 its revenues *more* than the Commission required. NPCC's theory that Qwest is required to issue  
2 additional refunds following the conclusion of this rate case is NPCC's own invention, and  
3 entirely unsupported by the Commission orders NPCC purports to enforce.

4 One example helps illustrate these points. For purposes of the refund, the Commission  
5 established five groups of retail services. Order No. 00-191 at 165. Customers subscribing to  
6 services in each group were to receive the same one-time refund based on a ratio. The refund to  
7 residential customers was based on a ratio of 1.00. *Id.* That meant that each residential customer  
8 received a refund in the amount of \$123.92 per line.<sup>8</sup> However, the rate for basic residential  
9 service was never lowered in this case. The rate for basic residential service at the time the  
10 refund was made was the same rate that Qwest charged since the beginning of the rate case,  
11 \$12.80 per month. *Id.* The rate for basic residential service following the completion of the rate  
12 design phase was \$12.80 per month in Rate Group One, and higher in Rate Groups Two and  
13 Three. Order No. 01-810 at 57, 63. Regardless of the fact that the rate for residential service  
14 was not reduced at any time in this rate case, residential customers still received a large refund  
15 (equivalent to almost 10 months' worth of free service). Moreover, they received the entire  
16 amount of the refund so long as they were a customer for 60 days prior to the date of the refund.  
17 Order No. 00-190 at 20. (They also received the temporary bill credit in the amount of \$2.47 per  
18 month. Order No. 00-190 at 4.)

19 This shows that the refund the Commission required was not based on a reduction in the  
20 rate for any particular service. The refund also bore no relationship to the amount customers  
21 paid for a service since all customers in the group received the exact same refund whether they  
22 subscribed to the service for 60 days or the full four and one-half years since the rate case was  
23 commenced. Thus, NPCC's assertions that (1) the refund was based on the difference between  
24 the rates charged while the rate case was pending and the final rates set by the Commission and  
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26 <sup>8</sup> <http://www.puc.state.or.us/Pages/news/2000/2000044.aspx>.

1 (2) the refund would need to be trued up for final rates established by the Commission, are  
2 simply fantasies of NPCC's own invention.

3 **B. The Commission Should Deny NPCC's Alternative Motion to Amend Order**  
4 **No. 07-497.**

5 **1. The motion is procedurally improper.**

6 NPCC's alternative motion to "amend" Order No. 07-497 suffers from many of the same  
7 procedural infirmities discussed above, but in a more pronounced way. NPCC asks the  
8 Commission to "clarify Order No. 07-497 by amending it to expressly require Qwest to issue  
9 refunds for any excess revenue it collected under rates that failed to comply with Order Nos. 96-  
10 107, 00-190, 00-191, 06-515, and 07-497, the Telecommunications Act of 1996, and state law,  
11 less any refunds previously paid." Motions at 30.

12 As discussed above, neither NPCC nor any other party ever asserted in this case that  
13 Qwest was required to make additional refunds after the Commission established final rates for  
14 payphone services following the Court of Appeals remand. To the contrary, NPCC stipulated at  
15 the time that the proposed resolution of this case complied with all federal requirements and  
16 satisfied the Court of Appeals' remand. To suggest that the Commission could simply "clarify"  
17 an order to require relief that has never been requested or required in the proceeding, and that  
18 directly contradicts a party's earlier stipulation, is nothing less than outrageous. While the  
19 Commission has authority to amend its orders under ORS 756.598, it cannot exercise that  
20 authority in this case, to require refunds based on claims that have never been made, let alone  
21 decided.

22 Moreover, the claims that NPCC wishes to assert are vague. For example, NPCC does  
23 not even specify in its Motions what provisions of "the Telecommunications Act of 1996, and  
24 state law" allegedly require such additional refunds, and why.

25 Among other things, NPCC cites to the FCC's 2013 so-called "Refund Order" (*In the*  
26 *Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of*

1 *the Telecommunications Act of 1996*, CC Docket No. 96-128, 28 FCC Rcd. 2615 (Feb. 20,  
2 2013)) as providing the basis for a refund. Motions at 27. However, as the FCC made clear,  
3 refunds are not required by federal law, and whether a refund may be claimed under state law  
4 depends upon state law and the procedural posture of a given claim. “We recognize that each  
5 individual proceeding involves its own unique set of facts, procedural postures, and relevant state  
6 and federal statutes. With regard to similar proceedings and consistent with our previous  
7 direction to the states regarding their administration of intrastate payphone rates pursuant to  
8 section 276, we therefore leave to the states the responsibility for deciding whether refunds are  
9 appropriate.” *Id.* at 2640.<sup>9</sup>

10 In order for a state to adjudicate any such claim, the claimant must identify the state  
11 statutes that it relies upon, and any such claim is also subject to the substantive and procedural  
12 defenses that are available. Indeed, this is what NPCC tried and failed to do in its four lawsuits.  
13 NPCC cannot be allowed to make a motion to amend an order based on claims that are vaguely  
14 stated and have never been pled, let alone decided, in this proceeding. NPCC must file a  
15 complaint specifying the bases of its claims before Qwest can even be required to respond to  
16 such vague charges.

17 **2. There is no basis for the Commission to amend Order No. 07-497 to require**  
18 **refunds.**

19 NPCC’s alternative motion is largely based upon the same erroneous characterization of  
20 the Commission’s prior orders in this docket that infect and doom its primary motion. That is,  
21 the Commission’s prior orders did not require a refund based upon the difference between  
22 interim rates and final rates for specific services. NPCC’s citation to other orders does not  
23 improve its case.

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24 <sup>9</sup> NPCC also blatantly mischaracterizes a discussion in the FCC’s order when it states, without  
25 citation: “The Indiana Commission, *like Oregon’s Commission*, found that the telecommunications  
26 companies’ ‘payphone tariffs should only be approved on an interim basis, retroactive to April 15, 1997,  
and subject to refund pending further review.’” Motions at 15 (emphasis added). This Commission has  
never made any such ruling.

1 NPCC's reliance on Order No. 06-515 reflects NPCC's misunderstanding or distortion of  
2 that order. By the time the Court of Appeals issued its decision in the Rate Case Appeal, the  
3 Commission had already approved final rates in this case and Qwest had already implemented  
4 those rates, reducing its revenue by approximately \$63 million per year. The Court of Appeals'  
5 remand order ultimately meant that Qwest would be required to reduce its prospective payphone  
6 service rates even further than already ordered in this case, which resulted in an additional  
7 reduction of approximately \$1 million in revenue per year going forward. Order No. 06-515 at  
8 3. The request Qwest made of the Commission that led to Order No. 06-515 was that Qwest be  
9 allowed to raise the rate for one other service on a prospective basis to offset this additional  
10 revenue reduction. *Id.* (identifying the issue as "whether Qwest may raise any customer rates to  
11 offset reduced revenues resulting from a Commission decision approving lower payphone  
12 service rates.") As the Court of Appeals itself noted, and the Commission well knows, when the  
13 Commission engages in rate design, "reducing the rates for one service is likely to require raising  
14 the rates for another." 196 Or. App. at 96. Qwest's proposal to rebalance prospective rates in  
15 the remand was the only issue addressed in Order 06-515. Contrary to NPCC's argument,  
16 neither Qwest's request nor the Commission's decision had anything to do with whether Qwest  
17 would be required to make additional (retroactive) refunds as a result of the remand. NPCC's  
18 reliance on Order No. 06-515 adds nothing to its argument other than confusion.

19 Likewise, there is nothing in Order No. 07-497 that requires Qwest to make additional  
20 refunds. That order concluded the rate case, adopting a stipulation among Qwest, Staff *and*  
21 NPCC that the rates Qwest filed and had been charging since 2003 satisfied all federal  
22 requirements. At no time during that remand proceeding did NPCC, Staff or any other party  
23 request or even suggest that Qwest would be required to make additional refunds following the  
24 Commission's approval of those final payphone service rates. To the contrary, NPCC stipulated  
25 at the time that the proposed resolution of this case complied with all federal requirements and  
26

1 satisfied the Court of Appeals remand. NPCC is judicially estopped to assert otherwise, and has  
2 waived any claim for additional refunds by not raising it in a timely manner.

3 NPCC's counsel at that time, Brooks Harlow, who had been actively involved in this rate  
4 case since its inception, likely understood that Qwest was not required to make any additional  
5 refunds and, therefore, did not identify this as an issue for the remand proceeding. It has only  
6 been since NPCC retained new counsel in 2009, who initiated a frenzy of meritless litigation,  
7 that any party has asserted that Qwest owes refunds in addition to the over \$283 million Qwest  
8 refunded in 2000. Although NPCC did not have a valid claim for additional refunds, if it did  
9 have such a claim, the time for NPCC to raise it was in 2006-07, during the remand proceeding,  
10 not 10 years later.

11 The alternative motion is both procedurally improper and substantively unfounded and  
12 should be denied.

#### 13 IV. CONCLUSION

14 For the foregoing reasons, the Commission should deny NPCC's Motions.

15 DATED: March 24, 2017

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