BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL et al., Complainants, v. QWEST CORPORATION, Respondent.	QWEST CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 4

A. Qwest Did Not Rely on the Waiver Order. 4

1. What does it mean to "rely on" the Waiver Order? 4

2. The Payphone Orders did not require intrastate tariffs to be filed, reviewed, approved, and effective by April 15, 1997. 6

3. Qwest did not rely on the Waiver Order. 13

4. Qwest has no liability to make a refund to Complainants. 18

B. The Doctrine of Judicial Estoppel Does Not Apply. 18

C. Complainants' Claim Is Barred by the Statute of Limitations. 20

1. The refund period was limited to 45 days so Complainants' claim accrued on May 19, 1997 and is completely barred. 20

2. Complainants' claim did not accrue for the first time in 2007. 22

3. Even if the refund period were open-ended, any claim prior to May 21, 1999 is time-barred. 24

D. The Commission Has Jurisdiction Over Complainants' Claim. 24

III. CONCLUSION 27

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TABLE OF AUTHORITIES

Cases

AT&T Corp. v. Couer d'Alene Tribe, 295 F.3d 899 (9th Cir. 2002) 25

Christ v. Southwestern Bell Telephone Company, L.P., et al, Case No. TC-2003-0066 (Missouri Public Service Commission, Jan. 9, 2003) 27

Davel Communications, Inc. v. Qwest Corporation, 460 F.3d 1075 (9th Cir. 2006) 21, 22, 23

Global Crossing Telecommunications, Inc. v. Federal Communications Commission, 259 F.3d 740 (D.C. Cir. 2001) 15

Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc., 550 U.S. 45 (2007) 26

Greene v. Sprint Communications Company, 340 F.3d 1047 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004) 25, 26

In the Matter of Ameritech Illinois, U S WEST Communications, Inc. et al. v. MCI Telecommunications Corporation, DA 99-2449, 14 FCC Rcd 18643 (1999) 15

In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions etc., Docket No. 2003-AD-927 (Mississippi Public Service Commission, Sept. 1, 2004) 27

In the Matter of Independent Payphone Association of New York, Inc. v. Public Service Commission of the State of New York, 5 A.D.3d 960, 774 N.Y.S.2d 197 (2004) 15, 16, 21

In the Matter of the Application of the Kansas Payphone Association etc., Docket No. 02-KAPT-651-GIT (Kansas State Corporation Commission, Dec. 10, 2002) 27

Investigation Into Certain Payphone Issues as Directed in Docket 97-0255, ICC Docket No. 98-0195, Interim Order (Illinois Commerce Commission, Nov. 12, 2003) 26

New York v. United States, 505 U.S. 144 (1992) 8

Payphone Association of Ohio v. Public Utilities Commission of Ohio et al., 109 Ohio St.3d 453, 849 N.E.2d 4 (2006) 27

Re: Bellsouth Telecommunications, Inc., 2004 WL 2359261 (Florida Public Service Commission, Oct. 7, 2004) 26

Southern Public Communication Association v. Bellsouth Telecommunications, Inc., Docket 29172 (Alabama Public Service Commission, April 13, 2004) 26

Sprint Communications v. F.C.C., 76 F.3d 1221 (D.C. Cir. 1996) 23

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Phone: 503.727.2000
Fax: 503.727.2222

TABLE OF AUTHORITIES
(continued)

TON Services, Inc. v. Qwest Corporation, 493 F.3d 1225 (10th Cir. 2007) 15

Statutes

47 U.S.C. § 201(b) 26

47 U.S.C. § 206 ..... 25, 26

47 U.S.C. § 207 ..... 25, 26

47 U.S.C. § 276 25

47 U.S.C. § 415 23

Regulations and Rules

ORCP 21 G(4) 24

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I. INTRODUCTION

Qwest Corporation ("Qwest") respectfully submits this reply memorandum in support of its motion for summary judgment. Complainants' Memorandum of Law in Opposition to Qwest's Motion for Summary Judgment ("Complainants' Memo") does not dispute any of the material facts and is replete with unsupported assertions and mischaracterizations of the FCC orders at issue. Based upon the undisputed, material facts, Qwest is entitled to an order dismissing Complainants' claim as a matter of law.

The central question in this case is whether Qwest "relied on" the extension granted by the Waiver Order[1] such that it has an obligation to make a refund to Complainants. Qwest showed in its Opening Brief that Qwest did not rely on the Waiver Order and, therefore, has no obligation to make any refund to Complainants. Instead of relying on the Waiver Order by filing new or revised PAL tariffs during the 45-day period following April 4, 1997, Qwest based its certification of compliance with the Payphone Orders on its existing tariffs. In their response, Complainants attempt to expand and distort the requirements of the Payphone Orders and, consequently, the scope of the waiver granted by the Waiver Order. From this mistaken premise, Complainants build their argument that Qwest relied on the Waiver Order because it did not timely satisfy one of the purported requirements that Complainants invented.

Complainants repeat over and over again that the Payphone Orders required LECs to have tariffs for basic payphone services (like PAL) that were "filed, **reviewed**, **approved**, and effective" by April 15, 1997 in order to qualify for dial-around compensation ("DAC") for payphones they owned. The fundamental error in the premise of Complainants' argument is that none of the Payphone Orders required that tariffs be "**reviewed**" and "**approved**" by April 15, 1997. Indeed, none of Complainants' citations to the Payphone Orders support these assertions. In fact, the Payphone Orders required only that LECs **file** and have **effective** by April 15, 1997

[1] All terms defined in Qwest's Memorandum in Support of Motion for Summary Judgment (the "Opening Brief") shall have the same meaning in this memorandum.

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PAL tariffs that the LEC believed satisfy the federal requirements; they did not require that they also be reviewed and approved by state commissions by that date. Complainants also assert that LECs could not qualify for DAC based upon their self-certification of compliance with the Payphone Orders, but instead were required to have state commissions certify such compliance. Complainants are again mistaken. The FCC's orders and court cases establish that the FCC required only that LECs **be able to certify** that their tariffs complied with the federal requirements to start receiving DAC; state approval was not also required.

Complainants argue that because the Payphone Orders required that PAL tariffs be filed, **reviewed, approved**, and effective by April 15, 1997, the RBOCs requested the Waiver Order because they did not think that the state commissions could accomplish review and approval by April 15, 1997. In other words, Complainants assert that the RBOCs requested and obtained a waiver of the purported requirement that their PAL tariffs be reviewed and approved as new services test-compliant by April 15, 1997. Complainants then conclude that because Qwest's PAL tariffs were not reviewed and approved by the Commission as new services test-compliant by April 15, 1997, Qwest relied on the Waiver Order when it started collecting DAC as of April 15, 1997. Complainants argue that Qwest is liable to make a refund for the period from April 15, 1997 through November 15, 2007 because the Commission did not review and approve Qwest's tariffs as new services test-compliant until that latter date.

In making this novel argument, Complainants fail even to address the one court case Qwest cited that is precisely on point. Addressing facts identical to those presented in this case, the New York appellate court decided that the RBOC did not rely on the Waiver Order because it did not file any new tariffs during the 45-day period after the RBOCs requested that waiver, so it was not required to make any refund, *even if its tariffs were determined at a later date not to comply with the new services test.* This case completely disposes of Complainants' claim, and their failure to respond to the case is astounding.

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Instead of facing up to the defects in their position, Complainants make an irrelevant argument based upon "judicial estoppel." The point of Complainants' judicial estoppel argument is somewhat mysterious. Complainants assert that Qwest made representations in connection with requesting the Waiver Order and that because the FCC granted the waiver requested, Qwest is estopped from taking any position inconsistent with its representations. The only representations Qwest made, however (as part of the RBOC Coalition), are that: it would review its existing tariffs to decide if they meet the federal requirements; if they do, Qwest would base its certification on them; if they do not, Qwest would file new tariffs by May 19, 1997, and make a refund if the rates in any such new tariffs were lower than its existing rates. Qwest does not take any inconsistent position in this case, so there is no basis to apply the doctrine of judicial estoppel.

Complainants' response to Qwest's argument that their claim is barred by the statute of limitations is based on the same incorrect premise as their argument that Qwest relied on the Waiver Order. It assumes that the refund period was open-ended – extending until the state commission finally approved PAL tariffs as new services test-compliant, which happened in Oregon in 2007 – and that their claim did not accrue until that approval was made. In fact, the refund period was limited to 45 days. Complainants' claim (if they have one) accrued by May 19, 1997, and is time-barred by the two-year statute of limitations because they did not file it until May 2001.

Finally, Complainants dispute the Commission's jurisdiction to consider Complainants' claim. It does not appear that this issue is before the Commission because no party has moved to dismiss this case on that ground. Nevertheless, Qwest will show that the Commission has jurisdiction to decide Complainants' claim and there is no basis for Complainants' argument that it does not.

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II. ARGUMENT

A. Qwest Did Not Rely on the Waiver Order.

1. What does it mean to "rely on" the Waiver Order?

The central issue in this case is whether Qwest relied on the extension granted by the Waiver Order such that it may have an obligation to make a refund under the terms of that order. If the answer is "no" – as Qwest believes – then Complainants' claim should be dismissed because "the only remaining claim in the case is the claim for refund under the Waiver Order." Complainants' Memo at 1.[2] The terms of the Waiver Order, informed by the letter requesting the FCC to issue that order and the preceding Payphone Orders, make clear what it means for an RBOC to "rely on" the Waiver Order. Specifically, a LEC "relied on" the Waiver Order and could be required to make a refund **only** if, during the period between April 4 and May 19, 1997, the LEC (1) determined that it could not base its certification of compliance with the Payphone Orders on its existing, effective tariffs and (2) made a tariff filing that lowered its payphone service rates. Complainants, however, assert that relying on the Waiver Order means something radically different from what the order itself says. Therefore, it is necessary for Qwest to spend some more time explaining what it means for a LEC to rely on the Waiver Order.

The Waiver Order must be viewed in the context of the FCC's preceding Payphone Orders because the requirement the FCC waived in the Waiver Order was established in those prior orders. The requirement that the FCC waived – as relevant to this case – is that a LEC have filed and in effect as of April 15, 1997 tariffs for basic payphone services upon which the LEC

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[2] Complainants include in their response a discussion of refunds and other issues related to Docket UT 125. *See, e.g.*, Complainants' Memo at 6, 12-14. These issues are beyond the scope of this case under Order No. 10-027, so Qwest will not respond to them. Qwest will also not respond to Complainants' unsupported statement that: "It is beyond dispute that it has already been judicially determined that Qwest had grossly overcharged Complainants . . . in violation of federal law, and . . . in violation of Oregon State law." Complainants' Memo at 1. Even though these statements are brazenly false, they have nothing to do with the issues before the Commission.

Complainants also submit the Declaration of Charles W. Jones that was filed in U.S. District Court in connection with another motion. Much of this declaration concerns Docket UT 125, CustomNet, and other irrelevant matters. In addition, any statements by Mr. Jones that characterize the FCC's orders and purported legal requirements (such as paragraph 16) are inadmissible and should be ignored.

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could self-certify compliance with the FCC's orders. The waiver that the FCC granted in the Waiver Order was to allow the LECs an additional 45 days (from April 4 through May 19, 1997) to review their existing tariffs to determine whether they could make the self-certification required to begin collecting DAC based on those existing tariffs, or whether they needed to file new tariffs upon which to base that self-certification. If a LEC filed new tariffs within the extension period, it "relied on" the Waiver Order and may be required to make a refund if the new tariff rates were lower than the existing rates. If a LEC did not file new tariffs within that extension period, it did not rely on the Waiver Order and could not be required to make any refund.

The fundamental error in Complainants' argument is that they assert that the Payphone Orders required a LEC to have its tariffs for basic payphone services filed, **reviewed and approved** by a state commission, and effective by April 15, 1997 in order to be eligible to start collecting DAC. While Complainants' addition of the two words "reviewed" and "approved" may seem minor, it enormously expands the purported requirements of the Payphone Orders and, consequently, distorts and expands the relief that the Waiver Order purportedly provided and the circumstances in which LECs may be liable for a refund. There is no basis whatsoever for Complainants' assertion that the Payphone Orders required LEC tariffs to be reviewed and approved by April 15, 1997. None of the citations Complainants provide support that interpretation. Indeed, the terms of the Payphone Orders, including the Waiver Order, make clear beyond any dispute that the FCC *did not* require state commissions to review and approve the intrastate tariffs by April 15, 1997 (which the FCC could not require in any event). Complainants do not – and cannot – support their assertion. Instead, they seem to think that if they repeat it enough times,[3] perhaps the Commission will just believe them.

[3] Complainants assert the purported "approval" requirement no fewer than 12 times in Complainants' Memo.

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2. The Payphone Orders did not require intrastate tariffs to be filed, reviewed, approved, and effective by April 15, 1997.

Qwest's Opening Brief (at 4-12) discusses each of the Payphone Orders to establish what the FCC required before LECs could receive DAC and which of those requirements the Waiver Order waived. Complainants purport to cite the Payphone Orders in support of their assertions that the FCC required RBOCs to have their intrastate tariffs filed, **reviewed, approved,** and effective by April 15, 1997. To clarify the actual requirements of the Payphone Orders which the Waiver Order waived, Qwest will discuss each of the orders in turn, review the citations Complainants provide, and show that the FCC required intrastate tariffs to be filed and effective, but did not require them to be reviewed and approved as new services test-compliant, by April 15, 1997.

a. The First Payphone Order.

The FCC issued the First Payphone Order on Sept. 20, 1996. With respect to intrastate payphone services, the FCC required LECs to file tariffs with the FCC by January 15, 1997 to be effective by April 15, 1997. (*See* discussion and citations in Qwest's Opening Brief at 5-6.) Complainants describe the purported requirements of the First Payphone Order as follows: "All payphone tariffs had to be filed with the FCC by January 15, 1997 and were to be reviewed, approved and made effective by April 15, 1997. First Payphone Order ¶¶ 146 and 351." Complainants' Memo at 5. A review of the provisions Complainants cite, and those they did not, reveals that the FCC did not contemplate that these tariffs would be "reviewed" and "approved" by April 15, 1997.

Paragraph 146 of the First Payphone Order required ILECs to file tariffs for "central office coin services" (*i.e.*, Qwest's "Smart PAL") by January 15, 1997. As such, that paragraph has nothing to do with the tariffs at issue (for Basic PAL). In any event, even if that paragraph did relate to Basic PAL, it requires only that tariffs be filed and effective, not reviewed and

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approved.[4] The only other part of the First Payphone Order Complainants cite is paragraph 351. That paragraph simply summarizes some of the requirements of the order. Insofar as it discusses any tariff requirements, it says only that LECs had to "file" certain tariffs; it says nothing about such tariffs needing to reviewed and approved by any date.

The actual requirements of the First Payphone Order as they pertain to tariffing of intrastate payphone services are set forth succinctly in paragraph 370 of that order: "IT IS FURTHER ORDERED, that local exchange carriers SHALL FILE tariff revisions required by paras. 180 to 187 herein on January 15, 1997 to be effective April 15, 1997." Paragraphs 180 to 187 are the ones that include the pricing requirements for PAL service. This order requires only that LECs **file** tariffs to be **effective** by April 15, 1997; it did not require that they also be reviewed and approved by that date.

b. The Reconsideration Order.

In the Reconsideration Order, the FCC determined that tariffs for certain intrastate payphone services, including PAL, should be filed with the state commissions, not the FCC. The FCC did not change any other requirements applicable to such filings. This order is significant because the FCC could not control when a state commission would review and approve these tariffs, nor did the FCC purport to do so.

Complainants, once again, mischaracterize the requirements of this order: "It [the FCC] also confirmed its original determination that BOCs such as Qwest could not collect DAC until all their interstate and intrastate payphone tariffs had been reviewed for NST compliance, approved as NST compliant by the FCC or the appropriate State Commission and made effective." Complainants' Memo at 6. Complainants cite paragraph 127 of the First Payphone

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[4] Commission "approval" of a tariff is not required for it to become "effective." For example, the Commission allowed Qwest's Smart PAL tariff to go into effect, although it did not approve it as new services test-compliant. *See* Reichman Decl. ¶ 4, Ex. 3 at 3. Qwest's Basic PAL tariff was already effective as of January 15, 1997. Duarte Decl. ¶ 2, Ex. 1 at 1.

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Order and paragraphs 131 and 163 of the Reconsideration Order for this point. None of these references support Complainants' assertion.

Paragraph 127 of the First Payphone Order contains no requirements whatsoever regarding payphone service rates or tariffs. As for the Reconsideration Order, paragraph 131 states: "To receive compensation [*i.e.*, DAC] a LEC must be able to certify the following: . . . (5) it has in effect intrastate tariffs for basic payphone services (for 'dumb' and 'smart' payphones); . . .."[5] Once again, this paragraph of the Reconsideration Order requires only that a LEC "**be able to certify**" its compliance with the FCC's requirements, in this case to have tariffs that are "in effect."

Paragraph 163 of the order (the other paragraph cited by Complainants) confirms the extent of the tariffing requirement: "As required in the Report and Order [*i.e.*, the First Payphone Order], and affirmed herein, all required tariffs, both intrastate and interstate, must be **filed** no later than January 15, 1997 and must be **effective** no later than April 15, 1997." (Emphasis added.) Not only did the FCC *not* require the state commissions to review and approve the intrastate tariffs by April 15, 1997, it expressly recognized that the states might not **ever** be able to review those tariffs: "States unable to review these tariffs may require the LECs operating in their state to file these tariffs with the Commission." *Id.* Thus, once again, the FCC required only that LECs **file** tariffs by January 15, 1997 to be **effective** by April 15, 1997; it did not require (nor could it) that the state commissions also **review and approve** those tariffs by April 15, 1997.

Not only did the FCC not require the LECs to obtain state review and approval of their tariffs as new services test-compliant by April 15, 1997, it does not have the power to require the states to review and approve these tariffs at all, as that would violate the Tenth Amendment. *See New York v. United States*, 505 U.S. 144, 188 (1992) ("The Federal Government may not compel

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[5] None of the five other requirements listed in that sentence have anything to do with tariffs for PAL service.

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the States to enact or administer a federal regulatory program."). Because of these legal limitations on its own authority, the FCC could not require any particular action by the states. The FCC could authorize the states to review and approve the tariffs but could not, and did not, require the states to review and approve those tariffs, let alone to do so by any specific date. Instead, the only requirements the FCC could, and did, impose were on the LECs themselves: to file tariffs and have them effective by a certain date.

c. The Clarification Order.

The next FCC order Complainants cite as purportedly requiring PAL tariffs to be reviewed and approved as new services test-compliant by April 15, 1997, is the Clarification Order, issued April 4, 1997. Complainants cite this order for the following point: "Other than this exception [relating to the filing of interstate tariffs with the FCC], all other interstate and intrastate Payphone Service tariffs had to be **in fact** NST compliant, **reviewed** for NST compliance, **approved** by the FCC or a State Commission as NST compliant and made effective before Qwest could receive DAC." Complainants' Memo at 8 (emphasis added), citing Reconsideration Order ¶¶ 131-32[6] and Clarification Order ¶ 21.

Paragraph 21 of the Clarification Order relates only to the federal tariff filings the FCC required and has nothing to do with any state tariff filings. Even when it addresses the required federal tariffs, this paragraph required only that they be filed and effective by certain dates, not also reviewed and approved. Thus, this paragraph does not support Complainants' assertion that intrastate tariffs had to be "in fact NST compliant" or "reviewed" and "approved" as new services test-compliant before Qwest could receive DAC.

Other paragraphs of the Clarification Order confirm that the FCC did not require that intrastate tariffs be reviewed and approved as new services test-compliant by April 15, 1997. Paragraph 29 of that order reiterates that LECs "must be prepared to certify that they have

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[6] Qwest discussed paragraph 131 of the Reconsideration Order above. Paragraph 132 has nothing to do with filing – let alone review and approval – of tariffs for payphone services.

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complied with all the requirements of the Payphone Reclassification Proceeding, including those involving intrastate tariffs . . .." Paragraph 33 states: "the question of whether a LEC has **effective** intrastate tariffs is to be considered on a state-by-state basis." (Emphasis added.) Tellingly, fn 93 of that order states: "Any party who believes that a particular LEC's intrastate tariffs fail to meet these requirements has the option of filing a complaint with the Commission." This confirms that the FCC did not require that the state commissions review and approve the tariffs as new services test-compliant before the LEC could receive DAC, because if that had been done there would be no need to seek FCC review of the same question. All the FCC required is that the LEC be prepared to self-certify its compliance, and it invited parties who disagree to file a complaint with the FCC to have the tariffs reviewed for actual compliance.

d. The Waiver Order.

Finally, and perhaps most critically, an examination of the Waiver Order itself, and the RBOCs' request for the FCC to issue that order, establishes that LECs were not required to have their intrastate tariffs reviewed and approved by the state commissions for new services test compliance before they could qualify for DAC, and that this is not the "requirement" that the FCC waived in the Waiver Order.

Complainants state that the letter requesting the Waiver Order "requested a waiver of the requirement that previously filed intrastate tariffs . . . be found by State Commissions to be NST compliant by April 15, 1997." Complainants' Memo at 8. Complainants do not cite the language they purport to rely on, and it is clear that the letter does not request such a waiver because no such requirement existed. As discussed in detail in Qwest's Opening Brief at 9-12, the RBOC Coalition requested an extension of time for RBOCs to file intrastate tariffs that they believed complied with the new services test. The RBOCs stated that **they** would review their existing tariffs in light of cost data and either (1) be able to certify that the existing tariffs satisfy the new services test or (2) file new tariffs by May 19, 1997 that they believe comply with the new

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services test. In the second case, and only in the second case, the RBOCs agreed voluntarily to make refunds to the extent any newly tariffed rates were lower than the existing rates. Thus, the refund the RBOCs agreed to make, and the FCC ordered, is required only where (1) an RBOC decided that its existing tariffs did not satisfy the new services test, (2) the RBOC filed new tariffs within the 45-day extension period, and (3) the newly tariffed rates were lower than the existing rates. If an RBOC decided to based its certification on existing rates and did not file any new rates pursuant to the waiver, it did not rely on the Waiver Order and is not required to make any refund. This is clear from the April 10, 1997 letter requesting the Waiver Order and a clarification filed on April 11, 1997, which states in part:

> The waiver will allow LECs 45 days (from the April 4 Order) to gather the relevant cost information and either be prepared to certify that the existing tariffs satisfy the costing standards of the "new services" test *or to file new or revised tariffs* that do satisfy those standards. Furthermore, as noted, *where new or revised tariffs are required* and the new rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs.

Reichman Decl. ¶ 3, Ex. 2 at 1 (emphasis added). Indeed, the RBOCs expected that in "most states," the RBOC would be able to certify that its existing tariffs met the new services test and would not need to file any new or revised tariffs. Reichman Decl. ¶ 2, Ex. 1 at 1.

The letters and the Waiver Order also confirm that neither the RBOCs, in requesting the waiver, nor the FCC, in granting it, expected that the state commissions would have time to review and approve the tariffs as new services test-compliant by May 19, 1997. The RBOCs told the FCC:

> [T]here is of course no guarantee that the States will act within 15 days on these new tariff filings, particularly where rates are being increased pursuant to federal guidelines. Provided, however, that we undertake and follow-through on our commitment to ensure that existing tariff rates comply with the "new services" test and, in those States and for those services where the tariff rates do not comply, to file new tariff rates that will comply, we believe that we should be eligible for per call compensation starting on April 15th.

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Id. at 2. This shows, once again, that compliance with the Payphone Orders required only that the LECs have effective tariffs that *they* believed complied with the new services test and other FCC requirements; self-certification, and not final state approval of compliance, was what the FCC required before LECs could begin to collect DAC.

Complainants cite paragraph 12 of the Waiver Order for the proposition that: "The Waiver Order made clear that in the absence of the Waiver Order, if a LEC's intrastate payphone tariffs had not been **reviewed** for compliance with requirements for NST compliance and **approved** as NST compliant and made effective by April 15, 1997 in a state, DAC could not be collected in that state." Complainants' Memo at 10. Complainants are, once again, wrong. Paragraph 12 refers only to the requirement that tariffs be "effective" or "in effect;" it does not refer to any requirement that a state commission also have reviewed and approved the tariffs as new services test-compliant by April 15, 1997.

The Waiver Order granted all LECs an extension through May 19, 1997 "to file intrastate tariffs consistent with the 'new services test' . . .." Waiver Order, ¶ 2. The FCC noted the RBOCs' representation that in most states, the RBOCs could certify compliance with the FCC's requirements based on their existing tariffs, but in some states it may be necessary for them to file new tariffs. *Id.*, ¶ 14. Only those RBOCs who "rely on" the waiver granted in the order would be required to make refunds, and only for the limited 45-day period. *Id.*, ¶¶ 23, 25.

In responding to the RBOCs' request, AT&T asked the FCC to rule "that a LEC is not eligible for payphone compensation 'until it has provided proof of state action verifying the LEC's compliance with Section 276.'" *Id.*, ¶ 16. The FCC rejected AT&T's request, stating that it had only required LECs to "be able to certify" their compliance with the FCC's requirements. *Id.*, ¶ 22. The FCC did not require the state commissions to review and approve these tariffs by any particular date, but only said that the states should act on those tariffs "within a reasonable period of time." *Id.*, n.60.

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3. Qwest did not rely on the Waiver Order.

In its Opening Brief at 17-22, Qwest showed that it did not "rely on" the Waiver Order because it based its self-certification of compliance with the FCC's requirements on its existing tariffs and did not file any new tariffs during the 45-day period following April 4, 1997 in reliance on the Waiver Order. Qwest's showing was based on a discussion of the FCC's Payphone Orders including the Waiver Order, that showed precisely what the FCC had required and what it meant for a LEC to "rely on" the Waiver Order, and Qwest's tariff filings and self-certification of compliance. Qwest also supported its argument with the **only** court case precisely on point, from an appellate court in New York, holding that the LEC in that case did not rely on the Waiver Order because it did not make any further tariff filings after April 4, 1997, and based its certification of compliance with the FCC's requirements on its existing tariffs, just as Qwest did.

Complainants' response to this argument is set forth on exactly one page, and the seriousness with which Complainants treat this argument is summarized in the first sentence: "Qwest's claim that the [sic] 'did not rely' on the Waiver Order borders on the ludicrous." Complainants' Memo at 21-22. Complainants then repeat their mischaracterizations of the requirements of the Payphone Orders upon which premise they base their argument that Qwest relied on the Waiver Order. Specifically, Complainants state:

> Qwest could not receive DAC in a state where intrastate payphone tariffs had not been reviewed for NST compliance, approved as NST compliant and made effective by a State Commission. Under the First Payphone and Reconsideration Orders, Qwest could not qualify for DAC by self-certifying that it had NST compliant rates. Only review and approval of NST compliance by the FCC or the PUC by April 15, 1997 could qualify Qwest to receive DAC beginning April 15, 1997 under those orders.

Complainants' Memo at 21. Complainants provide no citations for any of these statements and, as discussed above, the citations they provided for similar points earlier in their brief do not support these statements.

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The premise of Complainants' opposition to Qwest's motion on this central issue of whether Qwest relied on the Waiver Order is that the Payphone Orders required Qwest to have its intrastate tariffs for PAL service not only filed and effective, but also reviewed and approved by April 15, 1997, in order to receive DAC. Complainants then imply that the Waiver Order waived the requirement that LECs have their intrastate tariffs reviewed and approved by April 15, 1997, and concludes that because the Commission did not review and finally approve Qwest's tariffs until November 15, 2007, Qwest must have relied on the Waiver Order. As explained above, the premise of Complainants' argument is wrong. The Payphone Orders required LECs only to file certain tariffs and to have them effective by April 15, 1997; they did not require the state commission to review and approve the tariffs by that date.

The Waiver Order did not waive any requirement that tariffs be reviewed and approved for new services test compliance by April 15, 1997, because there was no such requirement. It waived only the requirement that tariffs upon which LECs could base their certification of compliance be filed and effective by April 15, 1997, and waived that for only 45 days. Moreover, and most importantly, the Waiver Order required refunds to be made only by LECs who decided they could not base their certification on tariffs filed before April 4, 1997 and who filed tariffs within 45 days following that date upon which they certified their compliance with the Payphone Orders. Qwest did not rely on the Waiver Order because it based its certification of compliance for Oregon on its existing, effective tariffs and not on new or revised tariffs filed after April 4, 1997.

Complainants are also wrong when they say that LECs could not qualify for DAC based on their self-certification. In fact, self-certification, and not state or FCC approval, is all the FCC required to trigger IXCs' obligation to pay DAC. That is clear from the language of the different Payphone Orders discussed above. It is also clear from an FCC order in which an IXC challenged Qwest's self-certification, discussed in Qwest's Opening Brief at 14-15. In *In the*

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Matter of Ameritech Illinois, U S WEST Communications, Inc. et al. v. MCI Telecommunications Corporation, DA 99-2449, 14 FCC Rcd 18643 (1999), the FCC ruled that IXCs are obligated to pay DAC after receiving the LEC's certification of compliance; no further approvals were required. *See also Global Crossing Telecommunications, Inc. v. Federal Communications Commission,* 259 F.3d 740, 747 (D.C. Cir. 2001) (to be eligible for DAC, LEC is required only to be able to certify its compliance; it is not required to prove compliance or to obtain certification of compliance from states or FCC). Moreover, in *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225, 1229-33 (10th Cir. 2007) , the Tenth Circuit discussed "the relatively easy process of LEC 'certification' for the purposes of receiving per-call compensation [*i.e.,* DAC] . . .." Thus, it is clear that the FCC required that LECs only be able to **self-certify** compliance with the Payphone Orders to receive DAC and did not require that the state commissions also finally approve such tariffs as complying with the new services test. For this reason, the Waiver Order did not waive any such review and approval requirements, because they did not exist, and Qwest did not rely on the Waiver Order simply because this Commission did not finally review and approve Qwest's PAL tariffs as complying with the new services test until 2007.

In contrast to Complainants' unsupported arguments, Qwest's argument that it did not rely on the Waiver Order is directly supported by the only court case Qwest could find that considers the question, discussed in Qwest's Opening Brief at 19-21. In *In the Matter of Independent Payphone Association of New York, Inc. v. Public Service Commission of the State of New York*, 5 A.D.3d 960, 774 N.Y.S.2d 197 (2004), the court decided that Verizon was not required to refund portions of PAL rates because Verizon did not rely upon the Waiver Order, ***even if the rates Verizon relied upon in 1997 to comply with the FCC's Payphone Orders were later determined not to comply with the new services test.*** To comply with the FCC's Payphone Orders, Verizon filed with the New York PSC new rates for its "smart" payphone lines on

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January 15, 1997, to become effective on April 15, 1997, just as Qwest did in Oregon. Also like Qwest, Verizon left unchanged its rates for basic PALs. Like Qwest, Verizon did not file any new tariffs by May 19, 1997, but continued to rely upon its pre-existing basic PAL rates to comply with the Payphone Orders.

Even though the courts thought that Verizon's rates as of April 15, 1997 may not have complied with the new services test, the appellate court decided that Verizon had no obligation to make a refund under the Waiver Order because Verizon did not rely on that order by filing new tariffs after April 4, 1997 but, instead, relied on its existing tariffs to certify compliance with the Payphone Orders:

> We differ with Supreme Court, however, with regard to its conclusion that petitioners will be entitled to a refund or credit in the event that the PSC concludes that new rates be established in accordance with the new services test and such rates prove to be lower than those presently in existence. The basis for Supreme Court's conclusion was a letter from representatives of Verizon's predecessor requesting an extension of time in which to review existing rates and file new rates if it were determined that the existing rates were not compliant with the new services test, proposing an agreement to refund or provide a credit to PSPs for the difference if the newly filed rates were lower than existing rates and requesting an order of the Federal Communications Commission granting a 45-day extension for filing new rates and ordering a refund in the event such new rates were indeed lower than existing rates. ***Suffice to say that new rates were not filed and the refund order was thus never effective.*** The fact that the PSC's prior approval of the preexisting rates has now been judicially called into question and the matter has been remanded for further consideration cannot be the basis of potential refunds that were only agreed to and contemplated for a period ending May 19, 1997.

5 A.D.3d at 963-64 (emphasis added). This is still the only case Qwest could find in which the applicability of the Waiver Order to a refund claim was litigated. Not only does this case establish that Qwest, like Verizon, did not rely on the Waiver Order, it also holds that the refund period was limited, not open-ended as Complainants argue, and ended on May 17, 1997.

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The facts of the instant case are indistinguishable from those in the Verizon-New York case. Qwest filed new Smart PAL rates in Oregon on January 15, 1997, and relied upon its existing basic PAL rates to satisfy the federal requirements. While Qwest also had the option to benefit from the Waiver Order, Qwest did not rely upon the Waiver Order because it did not file any new payphone tariffs by May 19, 1997. And even though a court remanded Qwest's existing PAL rates to the Commission for application of the new services test, and Qwest lowered those rates in 2003, no refund is available because Qwest did not rely upon the Waiver Order.

As discussed above, Complainants' Memo is remarkable for the many misstatements and unsupported propositions it contains. What is even more astounding, however, is the fact that Complainants never mention the New York case. They do not try to distinguish it (which they cannot do) nor do they even argue that the Commission should not follow it because it is not binding on this Commission. **They simply ignore it!** The New York case is compelling because it rationally considers whether the LEC "relied on" the Waiver Order based on facts that are identical to this case. Moreover, it was decided by an appellate court, and is the only court case on point. The Commission should follow this decision and decide that Qwest did not rely on the Waiver Order and has no obligation to make any refund to Complainants.

Complainants also casually state that Qwest "admitted" reliance on the Waiver Order in its May 20, 1997 letter to IXCs certifying compliance with the Payphone Orders for 13 states, although they do not cite the language they rely upon. Complainants' Memo at 22. Presumably, Complainants are referring to the following sentence in that letter: "Pursuant to the Commission's limited waiver of the 'new services' test granted in its Order of April 15, 1997 (DA 97-805), U S WEST has filed any rate changes required in the existing intrastate tariffs for unbundled functionalities to achieve compliance with the 'new services' test." Reichman Decl. ¶ 7, Ex. 5 at 2. The "unbundled functionalities" referenced in that sentence are different from the basic payphone services (*e.g.*, PAL) that are the subject of the claim in this case. Moreover,

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neither that sentence, referring to "any" rate changes, nor anything else in that letter shows that Qwest filed new PAL tariffs in Oregon during the period from April 4 to May 19, 1997.[7] If Qwest really had admitted reliance on the Waiver Order with respect to Oregon, Complainants likely would have more of that in their response.

4. Qwest has no liability to make a refund to Complainants.

The simple, dispositive facts of this case are that Qwest did not "rely on" the Waiver Order because it did not make any payphone service tariff filings between April 4 and May 19, 1997. Instead, Qwest relied on its previously filed and effective PAL tariffs to comply with the FCC's Payphone Orders. It is undisputed that Qwest based its certification for Oregon on its existing tariffs for Basic PAL and the tariff for Smart PAL it filed on January 15, 1997, and that Qwest did not file any other intrastate payphone service tariffs in Oregon between January 15, 1997 and May 19, 1997. *See, e.g.*, Duarte Decl. ¶ 4. For this reason, Qwest has no obligation to make any refund to Complainants and their Complaint should be dismissed.

B. The Doctrine of Judicial Estoppel Does Not Apply.

Complainants assert that Qwest is somehow judicially estopped from arguing that it is not obligated to make any refund to Complainants because of the representations it made as part of the RBOC Coalition in requesting the Waiver Order. Complainants' Memo at 17-21. The doctrine of judicial estoppel may apply where a party successfully asserts a position in one case, and then tries to assert a different position in a later case. The fundamental flaws in Complainants' argument, however, are that Complainants (1) mischaracterize the position Qwest allegedly asserted in the prior proceeding and (2) fail to identify any difference in the position that the RBOC Coalition actually asserted in requesting the Waiver Order and the position Qwest is asserting in this case.

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[7] Qwest did make a filing in Montana on May 16, 1997, to increase the rate of the Basic PAL. Reichman Decl. ¶ 7, Ex. 5 at 14 (*see* note "#").

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Complainants identify two representations that Qwest allegedly made to the FCC in requesting the Waiver Order:

> To assure the FCC and the representatives of the independent PSPs that they would operate on the basis of NST compliant payphone tariffs notwithstanding the waiver, they undertook to review all the previously filed intrastate payphone tariffs for NST compliance, and, where they found those tariffs not to be NST compliant, they would file new tariffs that were compliant. . . . The effect of this statement was a representation by the RBOCs that if no new tariff was filed, **the previously filed tariffs had been determined to be NST compliant**. Equally inherent in the representation is the commitment that **if the rates represented to be compliant were found not to be compliant, the RBOCs would refund the overcharge.**

Complainants' Memo at 19 (citation omitted)(emphasis added).

It is unclear whether Complainants contend that the first alleged representation – "that if no new tariff was filed, the previously filed tariffs had been determined to be NST compliant" – refers to a "determination" by a state commission or by Qwest itself. If Complainants mean to say that the RBOCs represented that *a state commission* had determined the previously-filed rates to be new services test-compliant, such a representation cannot be implied from the RBOCs' letter. That letter simply states that the RBOCs would review the cost data and "be prepared to certify" compliance. Complainants' argument, again, rests on its unsupported assertion that the FCC had required the LEC rates to have been reviewed and approved by a state commission as new services test-compliant before they could receive DAC, and that this is the requirement the FCC waived. As discussed in detail above, that is not what the FCC had required, so it is impossible to infer this representation from the letter. On the other hand, if Complainants simply mean that the RBOCs represented that ***they*** had reviewed their tariffs and found them compliant, that is entirely *consistent* with the position Qwest is taking in this case.

The second alleged representation – "the commitment that if the rates represented to be compliant were found not to be compliant, the RBOCs would refund the overcharge" – also cannot reasonably be inferred from the RBOCs' letter. The RBOCs carefully described the

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circumstances in which they agreed – in fact, volunteered – to make a refund, and the FCC adopted that offer. The RBOCs did not commit to refund charges if the rates they believed to be new services test-compliant were *ever* determined not to be so, as Complainants incorrectly assert.

Complainants' point seems to be that Qwest, as part of the RBOC Coalition, offered to make a refund and cannot now deny that it made such an offer. In fact, the RBOC Coalition offered to make a refund under specific, limited circumstances. Qwest does not take any position in this case that is inconsistent with the position it asserted before the FCC in 1997. Qwest simply denies that the circumstances in which it offered to make a refund have come into existence. The question in this case is whether the circumstances in which Qwest offered to make a refund in 1997 have come into existence or not. This cannot be resolved by a simplistic application of the doctrine of judicial estoppel, especially based upon the tortured and manufactured representations that Complainants assert.

C. Complainants' Claim Is Barred by the Statute of Limitations.

1. The refund period was limited to 45 days so Complainants' claim accrued on May 19, 1997 and is completely barred.

As Qwest showed in its Opening Brief, the refund period was limited to 45 days following April 4, 1997, and any claim Complainants may have had for a refund accrued no later than May 19, 1997 (assuming Qwest relied on the Waiver Order and was obligated to make a refund, which Qwest strongly denies). Opening Brief at 25-26. Any such refund claim is subject to a two-year statute of limitations and had to be brought by May 19, 1999, or face a time-bar. Complainants' Complaint, filed on May 21, 2001, is completely time-barred. In response, Complainants argue that the refund period was open-ended and that their claim did not accrue until November 2007 (even though they filed it in 2001).

Complainants' argument that the refund period was open-ended is, once again, based on their mischaracterization of the requirements of the Payphone Orders and the effect of the

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Waiver Order. Complainants assert: "The whole purpose of requesting the Waiver Order was because they did not believe State Commissions could act within the 60 day period allowed in the Clarification Order for the FCC to Act [sic]. . .." Complainants' Memo at 22-23. Again, Complainants' argument is based on the premise that the Payphone Orders required LECs to have intrastate tariffs reviewed and approved by the state commissions by April 15, 1997, and that is the requirement the Waiver Order waived. As shown above, that was not the case. The 45-day waiver was only to allow the LECs time to review their existing tariffs and, where necessary in their opinion, to file revised or new tariffs. It was not intended to provide the state commissions time also to review and approve such tariffs. The refund period corresponds to the purpose of the refund: it was triggered only if a LEC filed new tariffs within the 45 days after April 4, 1997, and ended once any such newly-filed tariffs were *effective*. It does not last until a state commission finally determines that a LEC's tariffs comply with the new services test, because that is not a requirement that the FCC waived.

The FCC itself described the waiver period as "limited." Waiver Order ¶ 2. Likewise, the Ninth Circuit has described it as "limited" and of "brief duration." *Davel Communications, Inc. v. Qwest Corporation*, 460 F.3d 1075, 1083 (9th Cir. 2006). In addition, the New York appellate court held that the "potential refunds" authorized by the Waiver Order "were only agreed to and contemplated for a period ending May 19, 1997." 5 A.D.3d at 964. Complainants cite no authority to support their argument that the refund period was open-ended.

Complainants also assert that the FCC had no authority to waive the purported requirement that LECs have new services test-compliant rates beginning April 15, 1997, because "[a]ny charges in excess of those rates is [sic] a violation of Sections 276, 201 and 202 of the Act." Complainants' Memo at 23. Once again, Complainants are wrong. The requirement that payphone service rates comply with the new services test was imposed by the FCC in implementing Section 276, not by Congress. 460 F.3d at 1081. Thus, the FCC was acting fully

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within its power when it issued the Waiver Order. If the FCC was not acting within its authority, then the refund provisions of the Waiver Order would also be unenforceable and Complainants would have no claim to bring.

Because the refund period was limited to 45 days and was based on the difference between the newly-effective and existing tariffs, Qwest would have been obligated to make a refund (if at all) as of May 19, 1997, and the amount of the refund could have been calculated at that time. In these circumstances, any refund claim accrued in 1997 and had to be brought by 1999. This claim, brought in 2001, is time-barred.

2. Complainants' claim did not accrue for the first time in 2007.

Complainants argue that their claim did not accrue until November 2007, when the Commission approved Qwest's rates filed in 2003. According to Complainants, "under the Waiver Order no refund is due until the final rate has been established and is shown to be lower than the interim rate." Complainants' Memo at 23. This is not what the Waiver Order provides. Moreover, this argument is based on an incorrect reading of the Waiver Order. The only refund authorized by the Waiver Order – which is the only Payphone Order authorizing a refund of any sort – is for the difference between the effective rates as of April 15, 1997 and the effective rates as of May 19, 1997 for a LEC who chose to file new rates during that period. Both Qwest's liability to make a refund and the amount of any refund could have been claimed as of May 19, 1997. The refund was ***not*** to be based on the difference between the rate a LEC charged as of April 15, 1997 and the rate that the Commission finally approved at some later date, even as late as 2007. Thus, there is no significance to the fact that the Commission approved Qwest's PAL tariffs in November 2007 in determining when Complainants' refund claim accrued.

In *Davel*, the Ninth Circuit decided that the refund claim at issue accrued in 1997. *See* Qwest's Opening Brief at 22-25. Complainants grossly misrepresent the holding of *Davel* when they state:

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> Until a final rate is determined, you cannot have a claim for the overcharge because the standard for comparison is not known. This is precisely what the court in *Davel, supra,* ruled when it found that the claim for refund under the Waiver Order with respect to PAL rates was not time barred because the claim did not arise until the NST compliant tariffs were in place. *Davel, supra.*

Complainants' Memo at 25. The *Davel* court was asked to dismiss only the plaintiffs' claim for refunds for CustomNet service as time-barred (which it did, deciding that the claim first accrued in 1997); it was not asked to dismiss the claim for refund of PAL rates as time-barred. Thus, the Ninth Circuit did not decide "that the claim for refund under the Waiver Order with respect to PAL rates was not time barred" as Complainants assert, nor did it make any decision as to when such a claim accrued. What Complainants are referring to is what the Ninth Circuit described as "Davel's construction of the Waiver Order," not the Ninth Circuit's holding. 460 F.3d at 1092.

Moreover, Complainants' argument that their claim did not accrue until 2007 is completely belied by the fact that Complainants filed this claim in May 2001, armed with what Complainants described as "powerful evidence that Qwest's past and current PAL rates have never been set in accordance with the new services test as required by the *Waiver Order.*" Complaint ¶ 13. Even though they filed the Complaint in 2001, Complainants now assert that they needed to wait until the Commission finally established new services test-compliant rates in 2007 before they could *know* whether or not Qwest's rates complied with the new services test. Accrual of a claim does not wait until every item of a claim has been finally established in some other proceeding. Rather, it depends upon a party's being on notice that it may have been injured. For purposes of applying the two-year statute of limitations in 47 U.S.C. § 415, a claim accrues "when the injured party discovers – or in the exercise of due diligence should have discovered – that it has been injured." *Sprint Communications v. F.C.C.*, 76 F.3d 1221, 1227-31 (D.C. Cir. 1996). "Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. . . . Nor is accrual deferred until the injured party has enough information to calculate its damages." *Id.* at 1228. Complainants did

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not have to wait until 2007 to assert their claim, ***nor did they.*** Complainants' claim accrued in 1997, not in 2007.

Complainants also argue somewhat elliptically that the statute of limitations was tolled because "[i]n September 2000, Qwest admitted the PAL rates were illegally high and agreed to temporary bill credits to effectively reduce those rates going forward." Complainants' Memo at 28. Not surprisingly, Complainants cite nothing to support that assertion, because it is false. Qwest never admitted that its PAL rates were "illegally high." The orders in Docket UT 125 make clear the basis for the temporary bill credits Complainants refer to and they had nothing to do with any admission or even suggestion that PAL rates were too high. In any event, tolling the two-year statute of limitations starting in September 2000 for a claim that accrued by May 1997 does nothing to preserve Complainants' claim, which expired in 1999.

3. Even if the refund period were open-ended, any claim prior to May 21, 1999 is time-barred.

Qwest argued in the alternative that, at the minimum, Complainants may not recover refunds for any period before May 21, 1999 (two years before they filed the Complaint). Opening Brief at 26-27. Complainants do not respond to this argument. While Qwest thinks that the Commission should dismiss the Complaint in its entirety, at the minimum the Commission should decide that Complainants may not recover refunds for any period prior to May 21, 1999, based on application of the two-year statute of limitations.

D. The Commission Has Jurisdiction Over Complainants' Claim.

Finally, Complainants respond to Qwest's motion for summary judgment by arguing that the Commission does not have subject-matter jurisdiction to decide Complainants' claim. Complainants' Memo at 15-17. Complainants assert that the Commission's jurisdiction to address the claim is a "threshold matter" that "must be determined." *Id.* at 2. While it is the case that a court (and presumably the Commission) may always consider whether it has jurisdiction to resolve a particular matter, such issues are typically raised by a motion. *See* ORCP 21 G(4).

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Qwest has not challenged the Commission's jurisdiction to decide this case. Complainants invoked the Commission's jurisdiction when they filed the Complaint, and they have not voluntarily dismissed the Complaint or filed any motion asking the Commission to decide whether it has jurisdiction. Thus, it does not appear that this matter is properly before the Commission. Nevertheless, Qwest will respond and explain why the Commission does have jurisdiction over the case.

Complainants argue that 47 U.S.C. § 207 vests exclusive jurisdiction in the federal courts and the FCC to decide claims under the federal telecommunications statutes, and imply that this is such a claim. Complainants' Memo at 15. Complainants cite *AT&T Corp. v. Couer d'Alene Tribe*, 295 F.3d 899 (9th Cir. 2002), for the proposition that no other tribunal has jurisdiction to decide a claim under the Act. The flaw in Complainants' argument is that their claim is not made under the Act, but is made to an enforce an FCC order, and Section 207 does not vest exclusive jurisdiction in the federal courts and the FCC to decide such claims.

The Ninth Circuit rejected arguments identical to Complainants' in *Greene v. Sprint Communications Company*, 340 F.3d 1047 (9th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004). The plaintiffs in *Greene* were payphone service providers ("PSPs"), like Complainants, who brought a claim in District Court against Sprint seeking DAC. The court first decided that Section 276 does not create either a private right of action or a right to compensation that PSPs can enforce. 340 F.3d at 1050. Instead, as in this case, the PSPs' right to compensation (if any) was based on orders and rules of the FCC, not on Section 276 directly. *Id.* at 1050-51. The court held that Sections 206 and 207 provide a remedy and procedure for enforcing only claims made directly under the statutes, but not claims based on rules or orders of the FCC. *Id.* Thus, the Ninth Circuit concluded that the federal courts did not have subject-matter jurisdiction over the plaintiffs' claims. *Id.* at 1053. Similarly, in this case, Complainants' claims are based on the FCC's Waiver Order, not on Section 276, which does not create a private right of action in any

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event. For these reasons, Complainants do not have a claim under Section 206 and the Commission is not ousted of its jurisdiction by Section 207.

Complainants' citation of *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S. 45 (2007), does not support their position that this case is governed by Section 207. The FCC rules at issue in *Global Crossing* established a compensation system and specifically provided that an IXC's refusal to pay compensation is a practice that is unjust or unreasonable under 47 U.S.C. § 201(b). Because of that specific regulation, the Supreme Court found that the claim was a suit to enforce Section 201(b), and that the plaintiff had filed a claim under the Act that was governed by Sections 206 and 207. The Court noted that the FCC was not required to find that every failure to pay is a violation of Section 201(b) and that not every violation of an FCC regulation is an unjust or unreasonable practice under Section 201(b). 550 U.S. at 56. The Court was aware of *Greene* and distinguished it on the basis that *Greene* did not involve either the FCC's application or interpretation of Section 201(b), or a regulation promulgated pursuant to the authority of Section 201(b). *Id.* at 61.

Complainants' claim is not made under Section 276, which does not authorize a private cause of action, nor is it made under any other section of the Telecommunications Act. Thus, it is not governed by Section 207 and the Commission is not deprived of jurisdiction to decide it. Instead, it is a claim to enforce an FCC order, seeking a refund of rates filed with this Commission pursuant to an FCC delegation, which this Commission has authority to decide. It is also worth noting that public utility commissions in no fewer than seven states have considered and denied claims for refunds under the Waiver Order, confirming that state commissions have jurisdiction to decide such claims.[8]

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[8] *See, e.g.,* Alabama: *Southern Public Communication Association v. Bellsouth Telecommunications, Inc.*, Docket 29172 (Alabama Public Service Commission, April 13, 2004) (dismissing claim for refunds); Florida: *Re: Bellsouth Telecommunications, Inc.*, 2004 WL 2359261 (Florida Public Service Commission, Oct. 7, 2004) (denying claim for refunds); Illinois: *Investigation Into Certain Payphone Issues as Directed in Docket 97-0255*, ICC Docket No. 98-0195, Interim Order (Illinois Commerce Commission, Nov. 12, 2003) (denying claim for refunds); Kansas: *In the Matter of the Application of the Kansas Payphone Association etc.*, Docket No. 02-KAPT-651-GIT (Kansas State

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Complainants have not challenged the Commission's organic authority to order refunds under state law; however, the Commission has already decided that it has that authority. Order No. 08-487 at 41. The FCC delegated authority to the Commission to set PAL rates in the exercise of the Commission's statutory authority to establish rates for intrastate telecommunications services. That carries with it the authority to order refunds of rates it has set, if required (and it most certainly is **not** required in this case).

III. CONCLUSION

For the foregoing reasons, as well as those asserted in Qwest's Opening Brief, the Commission should grant Qwest's motion for summary judgment and dismiss Complainants' Complaint.

DATED: August 27, 2010

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Corporation Commission, Dec. 10, 2002) (denying claim for refunds); Mississippi: *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions etc.*, Docket No. 2003-AD-927 (Mississippi Public Service Commission, Sept. 1, 2004) (dismissing claim for refunds); Missouri: *Christ v. Southwestern Bell Telephone Company, L.P., et al*, Case No. TC-2003-0066 (Missouri Public Service Commission, Jan. 9, 2003) (dismissing claim for refunds); Ohio: *Payphone Association of Ohio v. Public Utilities Commission of Ohio et al.*, 109 Ohio St.3d 453, 849 N.E.2d 4 (2006) (affirming order of Ohio PUC denying refund claim).

CERTIFICATE OF SERVICE

I hereby certify that I have this 27th day of August, 2010, served the foregoing **QWEST CORPORATION'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT** upon all parties of record in this proceeding by causing a copy to be sent by electronic mail and U.S. mail to the following addresses:

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