BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, Complainant, v. QWEST CORPORATION, Respondent.	QWEST'S REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

CONTENTS

I. INTRODUCTION

In its response to Qwest's cross-motion for summary judgment ("NPCC's Response"), NPCC further reveals that its claim for refunds is based on a fundamental error regarding the scope and nature of the FCC's Waiver Order[1] upon which it relies. Based upon the undisputed facts and a clear understanding of the very limited operation of the Waiver Order, Qwest did not rely on that order and cannot be required to make a refund.

NPCC's claim is also barred by the broad application of the two-year federal statute of limitations. There is no room for debate that this statute applies to NPCC's claim, that any such claim accrued in 1997, and that NPCC's claim filed in 2001 is time-barred. Finally, NPCC clearly lacks standing to recover refunds for its members, and this issue has not been addressed before. For all of these reasons, the Commission should grant Qwest's cross-motion for summary judgment and dismiss NPCC's Complaint.

II. QWEST DID NOT RELY ON THE WAIVER ORDER

A. NPCC Misrepresents the Requirements and Significance of the Payphone Orders

NPCC's Response is premised first upon a gross mischaracterization of the requirements imposed by the FCC's payphone orders that preceded the Waiver Order – that it was *unlawful* for a LEC to receive dial-around compensation ("DAC") for its payphones unless it had in effect rates that had been determined to be in compliance with the new services test. After it sets up that straw man, NPCC then imparts to the waiver granted by the Waiver Order a much greater significance than it really had – that it allowed LECs to receive DAC even though their payphone service rates had not yet been determined to be in compliance with the new services test. NPCC concludes its syllogism by arguing that reliance upon the Waiver Order must be measured with

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[1] In fact, whereas NPCC referred to the Waiver Order as the "April 15th Waiver Order" in its opening brief, it now refers to it as the "Refund Order," to de-emphasize the true nature of the limited waiver it granted.

reference to NPCC's erroneous characterizations, so that any LEC that collected DAC after April 15, 1997 and had payphone service rates that were later determined not to comply with the new services test must have "relied upon" the Waiver Order and must make refunds to its PSP customers. This reply will expose the fallacy of NPCC's argument.

1. The payphone orders preceding the Waiver Order required LECs only to be able to certify compliance with the new services test, not to obtain commission orders, in order to collect DAC.

NPPC repeatedly mischaracterizes the requirements imposed by the FCC's payphone orders, stating that they required a LEC to have rates that were determined to be in compliance with the new services test before the LEC could collect dial-around compensation for use of the LEC's own payphones:

- "As a matter of law, Qwest was not permitted to collect DAC on April 15, 1997, because Qwest's PAL tariffs on file on and after that date did not comply with the NST." NPCC's Response at 1.
- "[T]he FCC prohibited Qwest from collecting dial around compensation unless Qwest had NST-compliant rates effective by April 15, 1997." NPCC's Response at 6 (emphasis in original).
- Collection of DAC without complying with the new services test "would violate the FCC's regulations as well as" Section 276 of the Act. NPCC's Response at 11.

In fact, all the FCC required was that LECs "be able to certify" that they met the federal requirements in order to be eligible to collect DAC, *regardless* of whether their rates actually complied with the new services test.

Starting with the November 8, 1996 Reconsideration Order, the FCC required LECs to file intrastate tariffs for basic payphone services that complied with the new services test. These tariffs were to be filed no later than January 15, 1997 and effective by April 15, 1997. This order also provided that in order for LECs to be eligible to receive per-call compensation for long-

distance calls from their own payphones (DAC), they had to "be able to certify" that they had complied with these requirements. Reconsideration Order, ¶ 131.

The nature of the certification required by the payphone orders for a LEC to receive DAC is apparent from both the FCC Bureau order that Qwest cited in its Opening Brief at 13, and the FCC Bureau Order that NPCC cites, *Bell Atlantic-Delaware v. Frontier Communications Services*, DA 99-1971 at ¶ 28 (FCC Com. Car. Bur., rel. September 24, 1999). The LEC in that case, Bell Atlantic, brought a complaint against two IXCs who had refused to pay DAC to Bell Atlantic. The IXCs claimed that Bell Atlantic's certification of compliance with the payphone orders was inadequate because Bell Atlantic had not proven to the IXCs' satisfaction that it had met all of the federal requirements. The FCC rejected this argument and ordered the IXCs to pay DAC, finding that a LEC meets the certification requirement of the payphone orders by "attesting authoritatively to an IXC payor that such LEC payphone service provider has satisfied each prerequisite to the receipt of payphone compensation." *Id.*, ¶ 1.3. The FCC specifically held that a LEC is "not required to file such a certification with any state or federal regulatory agency or to obtain a formal certification of compliance from either the Commission or the states to be eligible to receive per-call compensation pursuant to the *Payphone Orders.*" *Id.*, ¶ 1.6. Nor was there any requirement that a LEC "prove in advance to the Commission, IXC, or any other entity that the prerequisites have been met." *Id.*, ¶ 1.18. Finally, the FCC re-emphasized that "IXCs challenging the veracity of a LEC's certification are obligated to challenge the LEC's compliance may initiate [*sic*] a proceeding at the Commission." *Id.*, ¶ 1.27.

These FCC decisions put to rest NPCC's argument that it was somehow unlawful for a LEC to collect DAC before it had effective rates that were determined to comply with the new services test. In fact, the FCC allowed LECs to collect DAC based upon their own certifications of compliance with the federal requirements. LECs were not required first to prove to state commissions that they met these requirements in order to collect DAC.

2. NPCC misstates the operation of the Waiver Order

NPCC next attempts to parlay its overstatement of the requirements of the payphone orders into a much broader and far-reaching impact of the waiver granted in the Waiver Order:

- "[Qwest] asked the FCC for a temporary waiver of the prerequisite to file NST-compliant rates before it could collect dial around compensation." NPCC's Response at 3.[2]
- "Qwest, as a member of the RBOC Coalition, sent the RBOC Coalition letter to the FCC requesting a 45-day waiver of the requirement to meet the NST before collecting DAC." NPCC's Response at 8.

As discussed at length in Qwest's Memorandum in Opposition To NPCC's Motion for Partial Summary Judgment and in Support of Qwest's Cross-Motion for Summary Judgment (Qwest's "Opening Brief"), the Waiver Order did not provide such broad relief. Indeed, the Waiver Order did not change the basic requirements that were in effect from the previous payphone orders, the same requirements that NPCC asserts Qwest did not meet. The Waiver Order simply gave the RBOCs an additional 45 days to review their existing tariffs to decide whether they could base their certifications of compliance upon them or whether they should file new tariffs to make their certifications. The only aspect of these requirements that the Waiver Order modified was the January 15, 1997 filing date; it gave LECs until May 19, 1997 to file tariffs they believed complied with the new services test, *if* the LECs did not think that their previously filed tariffs complied.

NPCC attempts to find a refund remedy in the Waiver Order where none exists by misstating the obligations imposed by the prior FCC payphone orders. The FCC clearly required only that a LEC "be able to certify" its compliance with the federal requirements to be eligible to

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[2] NPCC cites no support in the Waiver Order for such a broad statement, because there is none. NPCC cites to the Waiver Order, ¶ 3, n.7 for this statement. NPCC's Response at 3. That note, however, merely identifies the members of the RBOC Coalition.

receive DAC. NPCC asserts that these orders created an obligation that LECs actually be determined to comply with the new services test to receive DAC, and thus argues that the Waiver Order waived that requirement.[3] The FCC's prior payphone orders, however, did not actually impose such a requirement. Hence, the Waiver Order could not have had such a broad effect.

While NPCC argues that the Waiver Order waived the requirement that a LEC actually have new services test-compliant rates in effect by April 15, 1997 in order to receive DAC, the FCC decisions discussed above show that the Waiver Order did no such thing. Under the FCC decisions, a LEC was absolutely entitled to collect DAC once it certified its belief that it was in compliance with the requirements of the payphone orders, including having effective PAL rates that complied with the new services test. The fact that a state had not approved such rates or that they may not actually comply with the new services test was, according to the FCC, no basis to deny a LEC receipt of DAC. According to the FCC, the remedy in such a case was not to withhold DAC, but to file a complaint with the FCC. Since the payphone orders did not require that a LEC prove to a state commission or anyone else that its rates satisfied the new services test, the Waiver Order could not have waived any such requirement.

3. NPCC misstates what it means to rely on the Waiver Order

Having set up a more far-reaching waiver than the Waiver Order supports, NPCC concludes its argument by stating that any LEC that began to collect DAC on April 15, 1997, but did not have in effect rates that were ultimately determined to comply with the new services test must have relied upon the Waiver Order:

- "The only fact relevant to whether Qwest relied on the *Refund Order* is whether Qwest began to collect DAC on April 15, 1997 before complying with the NST.

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[3] In fact, NPCC goes so far as to suggest that Qwest should be required either to "disgorge the DAC it collected or refund its PAL overcharges" because its PAL rates did not comply with the new services test. NPCC's Response at 1. NPCC cites no authority for its bold assertion. Of course, the disgorgement of DAC is not before the Commission, both because it is not pled in the Complaint and because neither NPCC nor its members paid DAC to Qwest.

Qwest could not lawfully have done so without the waiver." NPCC's Response at 5-6.

- "In sum, any RBOC that accepted dial around compensation without complying with the NST by April 15, 1997 did so in reliance upon the waiver granted in the *Refund Order*." NPCC's Response at 11.
- "It is undisputed that Qwest relied on the waiver by collecting dial around compensation before complying with the NST." NPCC's Response at 3.

Again, NPCC grossly mischaracterizes what it means to "rely upon" the Waiver Order. As is clear from the discussion in Qwest's Opening Brief, the Waiver Order provided only a short period of additional time for LECs to review their filed tariffs to decide whether they could make the required certifications based upon those tariffs, or if they needed to make new or revised filings upon which to base their certifications. Only those LECs that made new or revised tariff filings in the 45-day extension period "relied" upon the Waiver Order.

This is precisely the conclusion that the New York appellate court reached in the one reported case that is on point, the Verizon-New York case that Qwest discussed in its Opening Brief, at 16-18. There, the court found that Verizon did not rely on the Waiver Order since it did not file any new tariffs in the 45 days following April 4, 1997, and thus was not required to make a refund under the Waiver Order. The court reached this conclusion notwithstanding the fact that the payphone service rates Verizon had in effect in 1997 may not have complied with the new services test. Recognizing that it has no basis whatsoever to distinguish this case, NPCC simply dismisses it as wrong and attempts to bolster the six cases it cited, which are plainly inapposite. The Verizon-New York case is factually indistinguishable from the instant case, and NPCC does not argue otherwise. NPCC petulantly asserts that the New York case is "an outlier" and requests that the Commission "disregard the New York case." NPCC's Response at 24-25. To the contrary, the Verizon-New York case is the *only* reported case precisely on point, it is clearly

reasoned, and the Commission should follow it, particularly since none of NPCC's authorities supports its position.[4]

B. NPCC Actually Seeks To Create a New Refund Remedy That Is Not Based on the Waiver Order

NPCC is attempting to forge a new refund remedy available from any LEC that did not have new services test-compliant rates in effect on April 15, 1997. As early as the November 8, 1996 Reconsideration Order, the FCC had put into place the requirement that, in order to receive DAC, LECs had to be able to certify that they had new services test-compliant rates in effect by April 15, 1997. The FCC did not, in any of the payphone orders preceding the Waiver Order, impose any sort of refund obligation in the event that it was later determined that a LEC that collected DAC on the basis of its certification did not, in fact, have new services test-compliant rates in effect. Yet that is precisely the situation in which NPCC asserts a refund obligation arises.

Indeed, NPCC's reliance upon the general obligations imposed by all the payphone orders – and not just the Waiver Order – is plain from its brief: "The NPCC's claim for PAL refunds is based on the FCC's orders entered in late 1996 and early 1997." NPCC's Response at 27. NPCC is attempting to graft a refund remedy upon obligations created by the FCC in all of the payphone orders. The FCC, however, did not impose any refund obligation, except in the narrow circumstance where a LEC relied upon the Waiver Order by filing new or revised tariffs between April 4 and May 19, 1997.

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[4] The U.S. District Court for the Western District of Washington recently characterized the effect of the Waiver Order in a similar manner as did the New York court: "In the April 10, 1997 letter that Qwest and the other RBOCs signed, they requested a 45-day extension to file new NST-compliant rates and in exchange promised to reimburse or provide credit to customers *if the 45-day late rates were lower than the rates that had been charged over those 45 days*." *Davel Communications, Inc. v. Qwest Corp.*, No. C03-3680P (slip op. July 28, 2004) at 7 (copy attached as Exhibit 1) (emphasis added).

C. None of NPCC's Six State Commission Cases Is on Point

In five of the six state commission cases NPCC relies upon, including the four involving BellSouth, the LEC never disputed its obligation to make a refund. *See* Qwest's Opening Brief at 18-19. That fact alone negates any precedential value of these cases. Moreover, in two of these cases, Tennessee and Louisiana, it is undisputed that BellSouth filed payphone tariffs on May 19, 1997, clearly in reliance upon the Waiver Order. NPCC's quote from the Tennessee case, NPCC's Response at 21, misleadingly omits the bolded language in the following sentence: "BellSouth requested certification of its existing tariff as compliant **by filing a tariff** on May 19, 1997."[5] Likewise in Louisiana, "on May 19, 1997," BellSouth filed a "new payphone tariff and cost studies." The South Carolina decision also recites that BellSouth filed tariffs "by May 19, 1997." NPCC asserts that BellSouth filed those tariffs on March 14, 1997. Even so, BellSouth did not file these tariffs by January 15, 1997, as required by the FCC's payphone orders prior to the Waiver Order, and, therefore, did not comply with the previous payphone orders. Thus, it may rightly be said that BellSouth relied on the Waiver Order since it did not comply with the timing requirements of the previous payphone orders. Regardless of when BellSouth filed its tariffs, the point remains that BellSouth did not dispute its obligation to make a refund in any of these cases, for whatever reason, and none of these cases, therefore, has any precedential value.[6]

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[5] *See* Qwest's Opening Brief at 19 for citations in this paragraph.

[6] NPCC also criticizes the alleged "absurdity" of Qwest's alleged theory that it is material to the obligation to make a refund whether a LEC "files its certificates of compliance with the states" on May 19, 1997, as BellSouth did, or May 20, 1997, as Qwest allegedly did. NPCC's Response at 15. NPCC attempts to obfuscate Qwest's argument. Qwest's argument is that only LECs that filed new or revised tariffs with the states within 45 days after April 4, 1997, in order to make their certificates of compliance to the IXCs, relied on the Waiver Order. Qwest does not argue that the date of a certificate of compliance – which is served upon IXCs, not filed with the states as NPCC claims – is relevant to that inquiry.

NPCC also criticizes Qwest's alleged "twisted logic," which NPCC describes as follows:

> Under Qwest's reasoning, an RBOC that ***refused*** to file at all under the NST ***should not be liable*** for refunds whereas an RBOC that timely ***complied*** with its filing obligations but did not meet the NST standards ***would be liable*** for refunds.

NPCC's treatment of the Michigan decision is almost as astonishing as its dismissal of the New York case. NPCC shamelessly asserts that the Michigan commission's "reference to state law was merely an observation that it had authority to issue federally-mandated refunds under state law as well as federal law." NPCC's Response at 24. To the contrary, it is quite plain that the *only* basis for the commission's ordering a refund in that case was state law; the commission did not cite the Waiver Order as authority for the refund. *See* Qwest's Opening Brief at 19-20.

III. NPCC'S CLAIM IS UNTIMELY

One of the grounds Qwest asserted in its cross-motion for summary judgment is that NPCC failed to commence this action within the time prescribed by the applicable statute of limitations, 47 U.S.C. § 415(b). In response, NPCC argues that (1) the two-year federal statute of limitations does not apply; (2) the Commission should apply a six-year statute of limitations under Oregon law; and (3) if the federal statute of limitations applies, NPCC's claim has not yet accrued. It is clear that the federal statute applies and that NPCC's claim accrued in 1997. For this reason alone, the Commission should dismiss NPCC's Complaint.

A. The Two-Year Federal Statute of Limitations Applies to NPCC's Claim

47 U.S.C. § 415(b) provides:

> All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

> Qwest's theory of the *Refund Order* would reward scofflaws and punish those RBOCs who obey the law.

Id. (emphasis in original). This does not represent Qwest's position. Qwest believes that an RBOC that refused to file rates that it believed complied with the new services test would not be entitled to recover DAC; thus, there would be no issue about refunds. Qwest also believes that an RBOC that timely (under the orders preceding the Waiver Order) filed tariffs it believed complied with the new services test would not be obligated to make refunds, even if the rates were later determined not to comply. These are additional examples of NPCC's reliance upon inaccurate straw men to support its ill-conceived arguments. In fact, it is *NPCC*, not Qwest, who urges that "RBOCs who obey the law" because they "timely complied with its filing obligations but did not meet the NST standards" be "punished" by having to make refunds.

NPCC does not dispute the operative provisions of this statute, nor could it. That is, there is no dispute that NPCC has filed a complaint against a carrier for the recovery of damages. There is also no dispute that NPCC's claim is not based on overcharges as that term is used in section 415(b), which is defined as charges in excess of FCC tariffed rates.[7] 47 U.S.C. § 415(g). Thus, the federal statute of limitations applies to NPCC's claim.

NPCC argues first that this statute applies only to actions brought before the FCC or in federal court, and does not apply to actions before the Oregon Commission. NPCC is wrong. In the case NPCC cites for this proposition, *Ward v. Northern Ohio Tel. Co.*, 251 F. Supp. 606 (N.D. Ohio 1966), *aff'd*, 311 F.2d 16 (6th Cir. 1967), the plaintiff actually argued that section 415(b) applies only to actions before the FCC and *not* to actions in court, relying upon the language in the statute "shall be filed with the Commission within two years." Citing Supreme Court precedent, the *Ward* court rejected this argument, ruling that running of the statute of limitations not only bars the remedy, but also "destroys the liability" of the carrier. *Id.* at 609. For this reason, the *Ward* court applied the statute to the claim brought in federal court.

Based on this reasoning, there is no logical reason why section 415(b) would not apply in an action brought before a state PUC. For example, relying on *Ward*, a Texas appellate court applied section 415(b) to dismiss an action brought in Texas state court. *Southwestern Bell Telephone Co. v. Rucker*, 537 S.W.2d 326, 333-34, *writ refused n.r.e.* (1976). Indeed, all courts facing this issue have applied the "broad language"[8] of section 415(b) to claims falling within its ambit, "against carriers for the recovery of damages," even if the claim is based upon state law[9]

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[7] NPCC also agrees with this point: "Moreover, as Qwest notes, the term 'overcharges' as defined in Section 415 does not apply to NPCC's claim because the claim is not based on federal tariffs." NPCC's Response at 33, n.39.

[8] *MFS Intern. v. International Telecom Ltd.*, 50 F.Supp.2d 517, 520 (E.D. Va. 1999).

[9] *Id.; Hofler v. AT&T*, 328 F.Supp. 893 (E.D. Va. 1971).

or involves purely intrastate telecommunications.[10] This is so because of the important federal policy to have national uniformity in the limitations period applicable to claims against carriers.[11] Section 415(b) applies to claims within its broad ambit regardless of the forum in which the claim is brought.

Section 415(b) clearly applies to NPCC's claim in this case, in which NPCC's claim is based solely upon an order of the FCC. Given the broad language of section 415(b) and the uniformity of the cases applying that limitations period to claims brought in a number of different forums, application of section 415(b) to NPCC's claim is beyond dispute.

B. Oregon's Six-Year Statute for Breach of Contract Does Not Apply

NPCC correctly cites controlling federal law that "absent a clearly applicable federal statute of limitations, federal courts should determine the most analogous state statute of limitations and incorporate its time limits." NPCC's Response at 33. NPCC, however, fails to apply this rule correctly when it argues that the Commission should apply Oregon's six-year statute of limitations applicable to actions for breach of contract.

In this case, there *is* a clearly applicable federal statute of limitations, section 415(b). Application of a state statute of limitations in this case is, therefore, not called for. *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984).

C. NPCC's Claim Accrued in 1997

NPCC's final effort to avoid application of the two-year limitations period provided by section 415(b) is to argue that its claim did not accrue in 1997, as Qwest asserts. NPCC attempts to do this by describing the elements of its claim in an illogical manner. Specifically, NPCC identifies the first fact that would need to exist for its claim to exist and have accrued as follows: "Qwest must have effective newly-tariffed NST-compliant PAL rates." NPCC's Response at 32.

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[10] *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984).

[11] *Swarthout v. Michigan Bell Tel. Co.*, 504 F.2d 748, 749 (6th Cir. 1974).

Indeed, in its gyrations to avoid application of the statute of limitations, NPCC even asserts that its claim has not yet accrued! *Id.* ("The first prerequisite is arguably still lacking, meaning the cause may not have accrued even today").[12] If that were the case, the Commission would be required to dismiss NPCC's complaint for failure to state a claim upon which relief could be granted, or as non-justiciable because it is unripe. *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry,* 192 Or. App. 126, 129, 83 P.3d 966, *rev. allowed,* 337 Or. 476 (2004); *Mantia v. Hanson,* 190 Or. App. 412, 414, 79 P.3d 404 (2003), *rev. denied,* 336 Or. 615 (2004). Instead, the Commission should dismiss NPCC's complaint as untimely, because its claim undoubtedly accrued in 1997.

NPCC correctly recites the rule that a federal cause of action accrues "when a plaintiff knows or has reason to know of the injury that is the basis of the action." NPCC's Response at 31. Once again, however, NPCC applies this rule in a tortured manner that contradicts the allegations of its Complaint. NPCC's claim is based upon its allegation that Qwest's rates for payphone service that were effective as of April 15, 1997 did not meet the requirements of the new services test. For that reason, NPCC claims that Qwest should be required to make a refund of charges it collected from PSPs to the extent the payphone service rates they paid since 1997 exceeded the rates that would meet that test, because Qwest relied upon the FCC's Waiver Order. Thus, NPCC asserts that its members paid rates that exceeded the federal standard starting on April 15, 1997. Their alleged injury, therefore, began in 1997, and they certainly knew or had reason to know then of the federal requirements that they are seeking to enforce in this case. For these reasons, it is beyond dispute that any claim accrued as of April 15, 1997. The U.S. District Court for the Western District of Washington recently reached the same conclusion in *Davel Communications, Inc. v. Qwest Corp., supra,* at 7-8 (Exhibit 1) (holding that the plaintiff's claim

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[12] NPCC is more forthright elsewhere in its Response regarding its belief that its claim has not, in fact, accrued: "There presently is no valid order holding that Qwest's Oregon rates meet the NST." NPCC's Response at 12 (emphasis in original).

that Qwest refused to file new services test-compliant rates with the FCC in 1997 accrued in 1997 and was barred by section 415(b) since it was brought after 1999).

NPCC argues that "Qwest's statute of limitations argument is based on a misstatement of NPCC's claim. Qwest describes the claim as being one to establish that Qwest's PAL rates effective in April 1997 violated the NST." NPCC's Response at 31. NPCC then denies that characterization. *Id.* NPCC's Complaint in this action, however, states:

> Based on the foregoing, this Commission should determine whether Qwest's 1997 PAL tariffs and the supporting cost data met the new services test. If not, Qwest must refund any overcharges to its customers, including NPCC.

Complaint, ¶ 11. It is both logical and undisputed that NPCC asked the Commission in its Complaint to determine whether Qwest's 1997 PAL rates met the new services test, and to order a refund of amounts its members paid since that time if such rates did not meet the test. NPCC should have filed this claim promptly in 1997, as many other PSPs and associations did. *See* Qwest's Opening Brief at 22-23.

NPCC's primary excuse for not filing a timely complaint seeking a refund is that it chose to challenge Qwest's payphone rates in the general rate case, Docket UT 125, rather than to institute a special challenge to the payphone rates. NPCC's choice to challenge Qwest's payphone rates in a particular docket, however, does not relieve it of its obligation to timely file a claim for refund. Section 415(b) provides a limitation period for the recovery of damages. This period does not affect the time within which a party must challenge rates on a prospective basis, and NPCC was entitled to choose – for the purpose of economy, efficiency, or whatever other reasons – to address payphone service rates in a pending rate case docket rather than undertaking the burden to ask this Commission or the FCC to open a separate docket. If NPCC wanted to pursue a claim for *refunds*, however, it was required to commence such a proceeding within the time prescribed by the governing statute.

Finally, NPCC argues that, if its claim has accrued already, which it denies, that did not occur until 2000, so its claim filed in 2001 is timely. NPCC picks 2000 because that is when Qwest implemented a temporary bill credit pursuant to Commission Order No. 00-190 in Docket Nos. UT 125/UT 80, which approved the settlement of the revenue requirement phase of the rate case. The Commission ordered Qwest to issue a temporary monthly bill credit in the amount of $5.93 per business access line (including PALs) until rates to be established in the rate design phase of the case became effective. *Id.* at 4. NPCC asserts that this was the "first rate reduction that arguably had anything even remotely to do with the NST." NPCC's Response at 32. This is hardly a strong endorsement of the existence of the first fact that NPCC alleges is necessary to the accrual of its claim ("effective newly tariffed NST-compliant PAL rates").

Even NPCC's meager suggestion that the 2000 temporary bill credit had something remotely to do with the new services test is an overstatement. The 2000 temporary credit simply implemented on an interim basis the overall revenue reduction agreed to in the settlement of the first phase of UT 125. PAL customers received the same level of credit as all other business customers subscribing to an access line. The Commission undertook no effort at that time to implement the new services test, leaving that exercise for the second, rate design phase of UT 125. Order No. 00-190 at 4; *see also* NPCC's Response at 32 ("there was no discussion of the NST in the Commission's 2000 orders"). Nor did NPCC offer any evidence in the 2000 proceedings about what it would take for Qwest's PAL rates to comply with the new services test. Order No. 00-190 at 15. Moreover, NPCC argues that its claim will not accrue until Qwest has "effective newly tariffed NST-compliant PAL rates." NPCC's Response at 32. NPCC does not argue that Qwest's rates in 2000, after it implemented the temporary bill credit, complied with the new services test. Thus, there is no basis for NPCC's argument that its claim accrued in 2000.

NPCC's claim accrued on or about April 15, 1997, and NPCC should have brought its refund claim at that time, and certainly within two years of that date. Since it failed to bring its

claim for more than four years after it accrued, NPCC's claim is untimely under the applicable federal statute of limitations, and the Commission should dismiss its Complaint.

IV. NPCC LACKS STANDING TO SEEK REFUNDS

Finally, NPCC asserts that Qwest has already challenged NPCC's standing in this case, so the Commission should not consider Qwest's argument that NPCC lacks standing to seek refunds for its members. It is true that when this case was before the Marion County Circuit Court on NPCC's suit for judicial review, Qwest moved to dismiss arguing that NPCC did not have standing as an association to seek judicial review under ORS 756.580 because it was not "aggrieved" by the Commission's order dismissing its Complaint. That is the motion that the Court denied, and Qwest does not repeat that argument now. Rather, Qwest argues that NPCC does not have standing to seek refunds for its members under ORS 756.500(2), so the Commission should dismiss its Complaint for this additional reason.

NPCC cites some cases in which the Citizens' Utility Board ("CUB") has successfully obtained refunds for customers. CUB, however, is a very different entity from NPCC, and has special rights under Oregon law. CUB was created by the legislature. Among its specific powers are the right to represent utility consumers before the Commission.[13] NPCC, on the other, has no such statutory authority. Thus, the relief it seeks in this case, refunds for its members, is barred by ORS 756.500(2), which provides that "the commission shall not grant any order of reparation to any person not a party to the proceedings . . .."

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[13] ORS 774.030(3) provides, in pertinent part:

> (3) The Citizens' Utility Board shall have all rights and powers necessary to represent and protect the interests of utility consumers, including but not limited to the following powers:
>
> * * * * *
>
> (b) To represent the interests of utility consumers before legislative, administrative and judicial bodies.

NPCC also argues that the refunds it seeks are not "reparations" as that term is used in ORS 756.500(2). NPCC states the following regarding reparations under Oregon law:

> Reparations actions involved investigation into the reasonableness of rates previously charged and paid. If the rates paid were found to be unjust and unreasonable, then retroactive reparations could be ordered. In other words, reparations were an adjunct to the ratemaking function.

NPCC's Response at 38. It appears that this is precisely the relief NPCC is seeking for its members in this case. NPCC claims that the PAL rates its members paid in the past were excessive, and that its members are entitled to retroactive adjustments. The fact that NPCC bases this claim upon federal law rather than state law does not change the nature of the relief requested, which is "reparations" under any common usage of that term.

Finally, NPCC argues that dismissal is not an appropriate remedy under ORS 756.500(2) and that if the Commission agrees that ORS 756.500(2) bars the Commission from awarding the relief NPCC seeks, then the better solution would be to grant NPCC leave to amend its Complaint to add its members as parties. Qwest respectfully submits that dismissal is a perfectly appropriate remedy where the Commission simply cannot grant the relief a complainant requests; indeed, the Commission has done this on numerous occasions. *See, e.g.*, Order No. 85-196 (complaint dismissed because Commission cannot award monetary damages). Moreover, there is no basis to grant NPCC leave to substitute parties. NPCC has made no motion to that effect, and has not even attempted to address the legal standard that the Commission should apply in considering such a motion. Its failure to do these things is particularly significant given the serious statute of limitations issues present, as NPPC itself acknowledges. NPCC's Response at 39. Given the procedural posture of this case, the Commission should simply dismiss NPCC's Complaint because the Commission cannot grant the relief NPCC requests.

V. CONCLUSION

For the foregoing reasons, the Commission should grant Qwest's cross-motion for summary judgment and dismiss NPCC's Complaint.

DATED: February 17, 2005.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM on:

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by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by fax), to be sent by the following indicated method or methods, on the date set forth below:

[x] by **mailing** in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service at Portland, Oregon.

DATED: February 17, 2005.

PERKINS COIE LLP

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BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

DR 26/ UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, Complainant, v. QWEST CORPORATION, Respondent.	QWEST'S REPLY MEMORANDUM IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

CONTENTS

I. INTRODUCTION

In its response to Qwest's cross-motion for summary judgment ("NPCC's Response"), NPCC further reveals that its claim for refunds is based on a fundamental error regarding the scope and nature of the FCC's Waiver Order[1] upon which it relies. Based upon the undisputed facts and a clear understanding of the very limited operation of the Waiver Order, Qwest did not rely on that order and cannot be required to make a refund.

NPCC's claim is also barred by the broad application of the two-year federal statute of limitations. There is no room for debate that this statute applies to NPCC's claim, that any such claim accrued in 1997, and that NPCC's claim filed in 2001 is time-barred. Finally, NPCC clearly lacks standing to recover refunds for its members, and this issue has not been addressed before. For all of these reasons, the Commission should grant Qwest's cross-motion for summary judgment and dismiss NPCC's Complaint.

II. QWEST DID NOT RELY ON THE WAIVER ORDER

A. NPCC Misrepresents the Requirements and Significance of the Payphone Orders

NPCC's Response is premised first upon a gross mischaracterization of the requirements imposed by the FCC's payphone orders that preceded the Waiver Order – that it was *unlawful* for a LEC to receive dial-around compensation ("DAC") for its payphones unless it had in effect rates that had been determined to be in compliance with the new services test. After it sets up that straw man, NPCC then imparts to the waiver granted by the Waiver Order a much greater significance than it really had – that it allowed LECs to receive DAC even though their payphone service rates had not yet been determined to be in compliance with the new services test. NPCC concludes its syllogism by arguing that reliance upon the Waiver Order must be measured with

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[1] In fact, whereas NPCC referred to the Waiver Order as the "April 15th Waiver Order" in its opening brief, it now refers to it as the "Refund Order," to de-emphasize the true nature of the limited waiver it granted.

reference to NPCC's erroneous characterizations, so that any LEC that collected DAC after April 15, 1997 and had payphone service rates that were later determined not to comply with the new services test must have "relied upon" the Waiver Order and must make refunds to its PSP customers. This reply will expose the fallacy of NPCC's argument.

1. The payphone orders preceding the Waiver Order required LECs only to be able to certify compliance with the new services test, not to obtain commission orders, in order to collect DAC.

NPPC repeatedly mischaracterizes the requirements imposed by the FCC's payphone orders, stating that they required a LEC to have rates that were determined to be in compliance with the new services test before the LEC could collect dial-around compensation for use of the LEC's own payphones:

- "As a matter of law, Qwest was not permitted to collect DAC on April 15, 1997, because Qwest's PAL tariffs on file on and after that date did not comply with the NST." NPCC's Response at 1.
- "[T]he FCC prohibited Qwest from collecting dial around compensation unless Qwest had NST-compliant rates effective by April 15, 1997." NPCC's Response at 6 (emphasis in original).
- Collection of DAC without complying with the new services test "would violate the FCC's regulations as well as" Section 276 of the Act. NPCC's Response at 11.

In fact, all the FCC required was that LECs "be able to certify" that they met the federal requirements in order to be eligible to collect DAC, *regardless* of whether their rates actually complied with the new services test.

Starting with the November 8, 1996 Reconsideration Order, the FCC required LECs to file intrastate tariffs for basic payphone services that complied with the new services test. These tariffs were to be filed no later than January 15, 1997 and effective by April 15, 1997. This order also provided that in order for LECs to be eligible to receive per-call compensation for long-

distance calls from their own payphones (DAC), they had to "be able to certify" that they had complied with these requirements. Reconsideration Order, ¶ 131.

The nature of the certification required by the payphone orders for a LEC to receive DAC is apparent from both the FCC Bureau order that Qwest cited in its Opening Brief at 13, and the FCC Bureau Order that NPCC cites, *Bell Atlantic-Delaware v. Frontier Communications Services*, DA 99-1971 at ¶ 28 (FCC Com. Car. Bur., rel. September 24, 1999). The LEC in that case, Bell Atlantic, brought a complaint against two IXCs who had refused to pay DAC to Bell Atlantic. The IXCs claimed that Bell Atlantic's certification of compliance with the payphone orders was inadequate because Bell Atlantic had not proven to the IXCs' satisfaction that it had met all of the federal requirements. The FCC rejected this argument and ordered the IXCs to pay DAC, finding that a LEC meets the certification requirement of the payphone orders by "attesting authoritatively to an IXC payor that such LEC payphone service provider has satisfied each prerequisite to the receipt of payphone compensation." *Id.*, ¶ 1.3. The FCC specifically held that a LEC is "not required to file such a certification with any state or federal regulatory agency or to obtain a formal certification of compliance from either the Commission or the states to be eligible to receive per-call compensation pursuant to the *Payphone Orders*." *Id.*, ¶ 1.6. Nor was there any requirement that a LEC "prove in advance to the Commission, IXC, or any other entity that the prerequisites have been met." *Id.*, ¶ 1.18. Finally, the FCC re-emphasized that "IXCs challenging the veracity of a LEC's certification are obligated to challenge the LEC's compliance may initiate [*sic*] a proceeding at the Commission." *Id.*, ¶ 1.27.

These FCC decisions put to rest NPCC's argument that it was somehow unlawful for a LEC to collect DAC before it had effective rates that were determined to comply with the new services test. In fact, the FCC allowed LECs to collect DAC based upon their own certifications of compliance with the federal requirements. LECs were not required first to prove to state commissions that they met these requirements in order to collect DAC.

2. NPCC misstates the operation of the Waiver Order

NPCC next attempts to parlay its overstatement of the requirements of the payphone orders into a much broader and far-reaching impact of the waiver granted in the Waiver Order:

- "[Qwest] asked the FCC for a temporary waiver of the prerequisite to file NST-compliant rates before it could collect dial around compensation." NPCC's Response at 3.[2]
- "Qwest, as a member of the RBOC Coalition, sent the RBOC Coalition letter to the FCC requesting a 45-day waiver of the requirement to meet the NST before collecting DAC." NPCC's Response at 8.

As discussed at length in Qwest's Memorandum in Opposition To NPCC's Motion for Partial Summary Judgment and in Support of Qwest's Cross-Motion for Summary Judgment (Qwest's "Opening Brief"), the Waiver Order did not provide such broad relief. Indeed, the Waiver Order did not change the basic requirements that were in effect from the previous payphone orders, the same requirements that NPCC asserts Qwest did not meet. The Waiver Order simply gave the RBOCs an additional 45 days to review their existing tariffs to decide whether they could base their certifications of compliance upon them or whether they should file new tariffs to make their certifications. The only aspect of these requirements that the Waiver Order modified was the January 15, 1997 filing date; it gave LECs until May 19, 1997 to file tariffs they believed complied with the new services test, *if* the LECs did not think that their previously filed tariffs complied.

NPCC attempts to find a refund remedy in the Waiver Order where none exists by misstating the obligations imposed by the prior FCC payphone orders. The FCC clearly required only that a LEC "be able to certify" its compliance with the federal requirements to be eligible to

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[2] NPCC cites no support in the Waiver Order for such a broad statement, because there is none. NPCC cites to the Waiver Order, ¶ 3, n.7 for this statement. NPCC's Response at 3. That note, however, merely identifies the members of the RBOC Coalition.

receive DAC. NPCC asserts that these orders created an obligation that LECs actually be determined to comply with the new services test to receive DAC, and thus argues that the Waiver Order waived that requirement.[3] The FCC's prior payphone orders, however, did not actually impose such a requirement. Hence, the Waiver Order could not have had such a broad effect.

While NPCC argues that the Waiver Order waived the requirement that a LEC actually have new services test-compliant rates in effect by April 15, 1997 in order to receive DAC, the FCC decisions discussed above show that the Waiver Order did no such thing. Under the FCC decisions, a LEC was absolutely entitled to collect DAC once it certified its belief that it was in compliance with the requirements of the payphone orders, including having effective PAL rates that complied with the new services test. The fact that a state had not approved such rates or that they may not actually comply with the new services test was, according to the FCC, no basis to deny a LEC receipt of DAC. According to the FCC, the remedy in such a case was not to withhold DAC, but to file a complaint with the FCC. Since the payphone orders did not require that a LEC prove to a state commission or anyone else that its rates satisfied the new services test, the Waiver Order could not have waived any such requirement.

3. NPCC misstates what it means to rely on the Waiver Order

Having set up a more far-reaching waiver than the Waiver Order supports, NPCC concludes its argument by stating that any LEC that began to collect DAC on April 15, 1997, but did not have in effect rates that were ultimately determined to comply with the new services test must have relied upon the Waiver Order:

- "The only fact relevant to whether Qwest relied on the *Refund Order* is whether Qwest began to collect DAC on April 15, 1997 before complying with the NST.

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[3] In fact, NPCC goes so far as to suggest that Qwest should be required either to "disgorge the DAC it collected or refund its PAL overcharges" because its PAL rates did not comply with the new services test. NPCC's Response at 1. NPCC cites no authority for its bold assertion. Of course, the disgorgement of DAC is not before the Commission, both because it is not pled in the Complaint and because neither NPCC nor its members paid DAC to Qwest.

Qwest could not lawfully have done so without the waiver." NPCC's Response at 5-6.

- "In sum, any RBOC that accepted dial around compensation without complying with the NST by April 15, 1997 did so in reliance upon the waiver granted in the *Refund Order.*" NPCC's Response at 11.
- "It is undisputed that Qwest relied on the waiver by collecting dial around compensation before complying with the NST." NPCC's Response at 3.

Again, NPCC grossly mischaracterizes what it means to "rely upon" the Waiver Order. As is clear from the discussion in Qwest's Opening Brief, the Waiver Order provided only a short period of additional time for LECs to review their filed tariffs to decide whether they could make the required certifications based upon those tariffs, or if they needed to make new or revised filings upon which to base their certifications. Only those LECs that made new or revised tariff filings in the 45-day extension period "relied" upon the Waiver Order.

This is precisely the conclusion that the New York appellate court reached in the one reported case that is on point, the Verizon-New York case that Qwest discussed in its Opening Brief, at 16-18. There, the court found that Verizon did not rely on the Waiver Order since it did not file any new tariffs in the 45 days following April 4, 1997, and thus was not required to make a refund under the Waiver Order. The court reached this conclusion notwithstanding the fact that the payphone service rates Verizon had in effect in 1997 may not have complied with the new services test. Recognizing that it has no basis whatsoever to distinguish this case, NPCC simply dismisses it as wrong and attempts to bolster the six cases it cited, which are plainly inapposite. The Verizon-New York case is factually indistinguishable from the instant case, and NPCC does not argue otherwise. NPCC petulantly asserts that the New York case is "an outlier" and requests that the Commission "disregard the New York case." NPCC's Response at 24-25. To the contrary, the Verizon-New York case is the *only* reported case precisely on point, it is clearly

reasoned, and the Commission should follow it, particularly since none of NPCC's authorities supports its position.[4]

B. NPCC Actually Seeks To Create a New Refund Remedy That Is Not Based on the Waiver Order

NPCC is attempting to forge a new refund remedy available from any LEC that did not have new services test-compliant rates in effect on April 15, 1997. As early as the November 8, 1996 Reconsideration Order, the FCC had put into place the requirement that, in order to receive DAC, LECs had to be able to certify that they had new services test-compliant rates in effect by April 15, 1997. The FCC did not, in any of the payphone orders preceding the Waiver Order, impose any sort of refund obligation in the event that it was later determined that a LEC that collected DAC on the basis of its certification did not, in fact, have new services test-compliant rates in effect. Yet that is precisely the situation in which NPCC asserts a refund obligation arises.

Indeed, NPCC's reliance upon the general obligations imposed by all the payphone orders – and not just the Waiver Order – is plain from its brief: "The NPCC's claim for PAL refunds is based on the FCC's orders entered in late 1996 and early 1997." NPCC's Response at 27. NPCC is attempting to graft a refund remedy upon obligations created by the FCC in all of the payphone orders. The FCC, however, did not impose any refund obligation, except in the narrow circumstance where a LEC relied upon the Waiver Order by filing new or revised tariffs between April 4 and May 19, 1997.

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[4] The U.S. District Court for the Western District of Washington recently characterized the effect of the Waiver Order in a similar manner as did the New York court: "In the April 10, 1997 letter that Qwest and the other RBOCs signed, they requested a 45-day extension to file new NST-compliant rates and in exchange promised to reimburse or provide credit to customers *if the 45-day late rates were lower than the rates that had been charged over those 45 days*." *Davel Communications, Inc. v. Qwest Corp.*, No. C03-3680P (slip op. July 28, 2004) at 7 (copy attached as Exhibit 1) (emphasis added).

C. None of NPCC's Six State Commission Cases Is on Point

In five of the six state commission cases NPCC relies upon, including the four involving BellSouth, the LEC never disputed its obligation to make a refund. *See* Qwest's Opening Brief at 18-19. That fact alone negates any precedential value of these cases. Moreover, in two of these cases, Tennessee and Louisiana, it is undisputed that BellSouth filed payphone tariffs on May 19, 1997, clearly in reliance upon the Waiver Order. NPCC's quote from the Tennessee case, NPCC's Response at 21, misleadingly omits the bolded language in the following sentence: "BellSouth requested certification of its existing tariff as compliant **by filing a tariff** on May 19, 1997."[5] Likewise in Louisiana, "on May 19, 1997," BellSouth filed a "new payphone tariff and cost studies." The South Carolina decision also recites that BellSouth filed tariffs "by May 19, 1997." NPCC asserts that BellSouth filed those tariffs on March 14, 1997. Even so, BellSouth did not file these tariffs by January 15, 1997, as required by the FCC's payphone orders prior to the Waiver Order, and, therefore, did not comply with the previous payphone orders. Thus, it may rightly be said that BellSouth relied on the Waiver Order since it did not comply with the timing requirements of the previous payphone orders. Regardless of when BellSouth filed its tariffs, the point remains that BellSouth did not dispute its obligation to make a refund in any of these cases, for whatever reason, and none of these cases, therefore, has any precedential value.[6]

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[5] *See* Qwest's Opening Brief at 19 for citations in this paragraph.

[6] NPCC also criticizes the alleged "absurdity" of Qwest's alleged theory that it is material to the obligation to make a refund whether a LEC "files its certificates of compliance with the states" on May 19, 1997, as BellSouth did, or May 20, 1997, as Qwest allegedly did. NPCC's Response at 15. NPCC attempts to obfuscate Qwest's argument. Qwest's argument is that only LECs that filed new or revised tariffs with the states within 45 days after April 4, 1997, in order to make their certificates of compliance to the IXCs, relied on the Waiver Order. Qwest does not argue that the date of a certificate of compliance – which is served upon IXCs, not filed with the states as NPCC claims – is relevant to that inquiry.

NPCC also criticizes Qwest's alleged "twisted logic," which NPCC describes as follows:

> Under Qwest's reasoning, an RBOC that ***refused*** to file at all under the NST ***should not be liable*** for refunds whereas an RBOC that timely ***complied*** with its filing obligations but did not meet the NST standards ***would be liable*** for refunds.

NPCC's treatment of the Michigan decision is almost as astonishing as its dismissal of the New York case. NPCC shamelessly asserts that the Michigan commission's "reference to state law was merely an observation that it had authority to issue federally-mandated refunds under state law as well as federal law." NPCC's Response at 24. To the contrary, it is quite plain that the *only* basis for the commission's ordering a refund in that case was state law; the commission did not cite the Waiver Order as authority for the refund. *See* Qwest's Opening Brief at 19-20.

III. NPCC'S CLAIM IS UNTIMELY

One of the grounds Qwest asserted in its cross-motion for summary judgment is that NPCC failed to commence this action within the time prescribed by the applicable statute of limitations, 47 U.S.C. § 415(b). In response, NPCC argues that (1) the two-year federal statute of limitations does not apply; (2) the Commission should apply a six-year statute of limitations under Oregon law; and (3) if the federal statute of limitations applies, NPCC's claim has not yet accrued. It is clear that the federal statute applies and that NPCC's claim accrued in 1997. For this reason alone, the Commission should dismiss NPCC's Complaint.

A. The Two-Year Federal Statute of Limitations Applies to NPCC's Claim

47 U.S.C. § 415(b) provides:

> All complaints against carriers for the recovery of damages not based on overcharges shall be filed with the Commission within two years from the time the cause of action accrues, and not after, subject to subsection (d) of this section.

> Qwest's theory of the *Refund Order* would reward scofflaws and punish those RBOCs who obey the law.

Id. (emphasis in original). This does not represent Qwest's position. Qwest believes that an RBOC that refused to file rates that it believed complied with the new services test would not be entitled to recover DAC; thus, there would be no issue about refunds. Qwest also believes that an RBOC that timely (under the orders preceding the Waiver Order) filed tariffs it believed complied with the new services test would not be obligated to make refunds, even if the rates were later determined not to comply. These are additional examples of NPCC's reliance upon inaccurate straw men to support its ill-conceived arguments. In fact, it is *NPCC*, not Qwest, who urges that "RBOCs who obey the law" because they "timely complied with its filing obligations but did not meet the NST standards" be "punished" by having to make refunds.

NPCC does not dispute the operative provisions of this statute, nor could it. That is, there is no dispute that NPCC has filed a complaint against a carrier for the recovery of damages. There is also no dispute that NPCC's claim is not based on overcharges as that term is used in section 415(b), which is defined as charges in excess of FCC tariffed rates.[7] 47 U.S.C. § 415(g). Thus, the federal statute of limitations applies to NPCC's claim.

NPCC argues first that this statute applies only to actions brought before the FCC or in federal court, and does not apply to actions before the Oregon Commission. NPCC is wrong. In the case NPCC cites for this proposition, *Ward v. Northern Ohio Tel. Co.*, 251 F. Supp. 606 (N.D. Ohio 1966), *aff'd*, 311 F.2d 16 (6th Cir. 1967), the plaintiff actually argued that section 415(b) applies only to actions before the FCC and *not* to actions in court, relying upon the language in the statute "shall be filed with the Commission within two years." Citing Supreme Court precedent, the *Ward* court rejected this argument, ruling that running of the statute of limitations not only bars the remedy, but also "destroys the liability" of the carrier. *Id.* at 609. For this reason, the *Ward* court applied the statute to the claim brought in federal court.

Based on this reasoning, there is no logical reason why section 415(b) would not apply in an action brought before a state PUC. For example, relying on *Ward*, a Texas appellate court applied section 415(b) to dismiss an action brought in Texas state court. *Southwestern Bell Telephone Co. v. Rucker*, 537 S.W.2d 326, 333-34, *writ refused n.r.e.* (1976). Indeed, all courts facing this issue have applied the "broad language"[8] of section 415(b) to claims falling within its ambit, "against carriers for the recovery of damages," even if the claim is based upon state law[9]

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[7] NPCC also agrees with this point: "Moreover, as Qwest notes, the term 'overcharges' as defined in Section 415 does not apply to NPCC's claim because the claim is not based on federal tariffs." NPCC's Response at 33, n.39.

[8] *MFS Intern. v. International Telecom Ltd.*, 50 F.Supp.2d 517, 520 (E.D. Va. 1999).

[9] *Id.; Hofler v. AT&T*, 328 F.Supp. 893 (E.D. Va. 1971).

or involves purely intrastate telecommunications.[10] This is so because of the important federal policy to have national uniformity in the limitations period applicable to claims against carriers.[11] Section 415(b) applies to claims within its broad ambit regardless of the forum in which the claim is brought.

Section 415(b) clearly applies to NPCC's claim in this case, in which NPCC's claim is based solely upon an order of the FCC. Given the broad language of section 415(b) and the uniformity of the cases applying that limitations period to claims brought in a number of different forums, application of section 415(b) to NPCC's claim is beyond dispute.

B. Oregon's Six-Year Statute for Breach of Contract Does Not Apply

NPCC correctly cites controlling federal law that "absent a clearly applicable federal statute of limitations, federal courts should determine the most analogous state statute of limitations and incorporate its time limits." NPCC's Response at 33. NPCC, however, fails to apply this rule correctly when it argues that the Commission should apply Oregon's six-year statute of limitations applicable to actions for breach of contract.

In this case, there *is* a clearly applicable federal statute of limitations, section 415(b). Application of a state statute of limitations in this case is, therefore, not called for. *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984).

C. NPCC's Claim Accrued in 1997

NPCC's final effort to avoid application of the two-year limitations period provided by section 415(b) is to argue that its claim did not accrue in 1997, as Qwest asserts. NPCC attempts to do this by describing the elements of its claim in an illogical manner. Specifically, NPCC identifies the first fact that would need to exist for its claim to exist and have accrued as follows: "Qwest must have effective newly-tariffed NST-compliant PAL rates." NPCC's Response at 32.

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[10] *Pavlak v. Church*, 727 F.2d 1425 (9th Cir. 1984).

[11] *Swarthout v. Michigan Bell Tel. Co.*, 504 F.2d 748, 749 (6th Cir. 1974).

Indeed, in its gyrations to avoid application of the statute of limitations, NPCC even asserts that its claim has not yet accrued! *Id.* ("The first prerequisite is arguably still lacking, meaning the cause may not have accrued even today").[12] If that were the case, the Commission would be required to dismiss NPCC's complaint for failure to state a claim upon which relief could be granted, or as non-justiciable because it is unripe. *Coast Range Conifers, LLC v. State ex rel. Oregon State Bd. of Forestry*, 192 Or. App. 126, 129, 83 P.3d 966, *rev. allowed,* 337 Or. 476 (2004); *Mantia v. Hanson*, 190 Or. App. 412, 414, 79 P.3d 404 (2003), *rev. denied*, 336 Or. 615 (2004). Instead, the Commission should dismiss NPCC's complaint as untimely, because its claim undoubtedly accrued in 1997.

NPCC correctly recites the rule that a federal cause of action accrues "when a plaintiff knows or has reason to know of the injury that is the basis of the action." NPCC's Response at 31. Once again, however, NPCC applies this rule in a tortured manner that contradicts the allegations of its Complaint. NPCC's claim is based upon its allegation that Qwest's rates for payphone service that were effective as of April 15, 1997 did not meet the requirements of the new services test. For that reason, NPCC claims that Qwest should be required to make a refund of charges it collected from PSPs to the extent the payphone service rates they paid since 1997 exceeded the rates that would meet that test, because Qwest relied upon the FCC's Waiver Order. Thus, NPCC asserts that its members paid rates that exceeded the federal standard starting on April 15, 1997. Their alleged injury, therefore, began in 1997, and they certainly knew or had reason to know then of the federal requirements that they are seeking to enforce in this case. For these reasons, it is beyond dispute that any claim accrued as of April 15, 1997. The U.S. District Court for the Western District of Washington recently reached the same conclusion in *Davel Communications, Inc. v. Qwest Corp.*, *supra*, at 7-8 (Exhibit 1) (holding that the plaintiff's claim

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[12] NPCC is more forthright elsewhere in its Response regarding its belief that its claim has not, in fact, accrued: "There presently is no valid order holding that Qwest's Oregon rates meet the NST." NPCC's Response at 12 (emphasis in original).

that Qwest refused to file new services test-compliant rates with the FCC in 1997 accrued in 1997 and was barred by section 415(b) since it was brought after 1999).

NPCC argues that "Qwest's statute of limitations argument is based on a misstatement of NPCC's claim. Qwest describes the claim as being one to establish that Qwest's PAL rates effective in April 1997 violated the NST." NPCC's Response at 31. NPCC then denies that characterization. *Id.* NPCC's Complaint in this action, however, states:

> Based on the foregoing, this Commission should determine whether Qwest's 1997 PAL tariffs and the supporting cost data met the new services test. If not, Qwest must refund any overcharges to its customers, including NPCC.

Complaint, ¶ 11. It is both logical and undisputed that NPCC asked the Commission in its Complaint to determine whether Qwest's 1997 PAL rates met the new services test, and to order a refund of amounts its members paid since that time if such rates did not meet the test. NPCC should have filed this claim promptly in 1997, as many other PSPs and associations did. *See* Qwest's Opening Brief at 22-23.

NPCC's primary excuse for not filing a timely complaint seeking a refund is that it chose to challenge Qwest's payphone rates in the general rate case, Docket UT 125, rather than to institute a special challenge to the payphone rates. NPCC's choice to challenge Qwest's payphone rates in a particular docket, however, does not relieve it of its obligation to timely file a claim for refund. Section 415(b) provides a limitation period for the recovery of damages. This period does not affect the time within which a party must challenge rates on a prospective basis, and NPCC was entitled to choose – for the purpose of economy, efficiency, or whatever other reasons – to address payphone service rates in a pending rate case docket rather than undertaking the burden to ask this Commission or the FCC to open a separate docket. If NPCC wanted to pursue a claim for *refunds*, however, it was required to commence such a proceeding within the time prescribed by the governing statute.

Finally, NPCC argues that, if its claim has accrued already, which it denies, that did not occur until 2000, so its claim filed in 2001 is timely. NPCC picks 2000 because that is when Qwest implemented a temporary bill credit pursuant to Commission Order No. 00-190 in Docket Nos. UT 125/UT 80, which approved the settlement of the revenue requirement phase of the rate case. The Commission ordered Qwest to issue a temporary monthly bill credit in the amount of $5.93 per business access line (including PALs) until rates to be established in the rate design phase of the case became effective. *Id.* at 4. NPCC asserts that this was the "first rate reduction that arguably had anything even remotely to do with the NST." NPCC's Response at 32. This is hardly a strong endorsement of the existence of the first fact that NPCC alleges is necessary to the accrual of its claim ("effective newly tariffed NST-compliant PAL rates").

Even NPCC's meager suggestion that the 2000 temporary bill credit had something remotely to do with the new services test is an overstatement. The 2000 temporary credit simply implemented on an interim basis the overall revenue reduction agreed to in the settlement of the first phase of UT 125. PAL customers received the same level of credit as all other business customers subscribing to an access line. The Commission undertook no effort at that time to implement the new services test, leaving that exercise for the second, rate design phase of UT 125. Order No. 00-190 at 4; *see also* NPCC's Response at 32 ("there was no discussion of the NST in the Commission's 2000 orders"). Nor did NPCC offer any evidence in the 2000 proceedings about what it would take for Qwest's PAL rates to comply with the new services test. Order No. 00-190 at 15. Moreover, NPCC argues that its claim will not accrue until Qwest has "effective newly tariffed NST-compliant PAL rates." NPCC's Response at 32. NPCC does not argue that Qwest's rates in 2000, after it implemented the temporary bill credit, complied with the new services test. Thus, there is no basis for NPCC's argument that its claim accrued in 2000.

NPCC's claim accrued on or about April 15, 1997, and NPCC should have brought its refund claim at that time, and certainly within two years of that date. Since it failed to bring its

claim for more than four years after it accrued, NPCC's claim is untimely under the applicable federal statute of limitations, and the Commission should dismiss its Complaint.

IV. NPCC LACKS STANDING TO SEEK REFUNDS

Finally, NPCC asserts that Qwest has already challenged NPCC's standing in this case, so the Commission should not consider Qwest's argument that NPCC lacks standing to seek refunds for its members. It is true that when this case was before the Marion County Circuit Court on NPCC's suit for judicial review, Qwest moved to dismiss arguing that NPCC did not have standing as an association to seek judicial review under ORS 756.580 because it was not "aggrieved" by the Commission's order dismissing its Complaint. That is the motion that the Court denied, and Qwest does not repeat that argument now. Rather, Qwest argues that NPCC does not have standing to seek refunds for its members under ORS 756.500(2), so the Commission should dismiss its Complaint for this additional reason.

NPCC cites some cases in which the Citizens' Utility Board ("CUB") has successfully obtained refunds for customers. CUB, however, is a very different entity from NPCC, and has special rights under Oregon law. CUB was created by the legislature. Among its specific powers are the right to represent utility consumers before the Commission.[13] NPCC, on the other, has no such statutory authority. Thus, the relief it seeks in this case, refunds for its members, is barred by ORS 756.500(2), which provides that "the commission shall not grant any order of reparation to any person not a party to the proceedings . . .."

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[13] ORS 774.030(3) provides, in pertinent part:

> (3) The Citizens' Utility Board shall have all rights and powers necessary to represent and protect the interests of utility consumers, including but not limited to the following powers:
>
> * * * * *
>
> (b) To represent the interests of utility consumers before legislative, administrative and judicial bodies.

NPCC also argues that the refunds it seeks are not "reparations" as that term is used in ORS 756.500(2). NPCC states the following regarding reparations under Oregon law:

> Reparations actions involved investigation into the reasonableness of rates previously charged and paid. If the rates paid were found to be unjust and unreasonable, then retroactive reparations could be ordered. In other words, reparations were an adjunct to the ratemaking function.

NPCC's Response at 38. It appears that this is precisely the relief NPCC is seeking for its members in this case. NPCC claims that the PAL rates its members paid in the past were excessive, and that its members are entitled to retroactive adjustments. The fact that NPCC bases this claim upon federal law rather than state law does not change the nature of the relief requested, which is "reparations" under any common usage of that term.

Finally, NPCC argues that dismissal is not an appropriate remedy under ORS 756.500(2) and that if the Commission agrees that ORS 756.500(2) bars the Commission from awarding the relief NPCC seeks, then the better solution would be to grant NPCC leave to amend its Complaint to add its members as parties. Qwest respectfully submits that dismissal is a perfectly appropriate remedy where the Commission simply cannot grant the relief a complainant requests; indeed, the Commission has done this on numerous occasions. *See, e.g.,* Order No. 85-196 (complaint dismissed because Commission cannot award monetary damages). Moreover, there is no basis to grant NPCC leave to substitute parties. NPCC has made no motion to that effect, and has not even attempted to address the legal standard that the Commission should apply in considering such a motion. Its failure to do these things is particularly significant given the serious statute of limitations issues present, as NPPC itself acknowledges. NPCC's Response at 39. Given the procedural posture of this case, the Commission should simply dismiss NPCC's Complaint because the Commission cannot grant the relief NPCC requests.

V. CONCLUSION

For the foregoing reasons, the Commission should grant Qwest's cross-motion for summary judgment and dismiss NPCC's Complaint.

DATED: February 17, 2005.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., et al.

Plaintiffs,

v.

QWEST CORP.,

Defendant.

No. C03-3680P

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS

This matter comes before the Court on Defendant's Motion to Dismiss or Stay. (Dkt. No. 12). Having reviewed the pleadings and supporting materials, and having heard oral argument on the motion, the Court GRANTS Defendant's motion. Plaintiffs' claims regarding payphone service rates are barred under the filed-rate doctrine. Plaintiffs' claim regarding fraud protection rates is time-barred under the applicable statute of limitations. Accordingly, the Court DISMISSES this case without prejudice.

BACKGROUND

Plaintiffs are Payphone Service Providers ("PSPs") that obtain payphone services from Defendant Qwest Corporation ("Qwest") in eleven states. Plaintiff PSPs are both customers of Qwest and competitors because Qwest operates its own payphones. The payphone services Qwest provides include providing public access lines, local usage to enable the PSPs to connect their payphones to the telephone network for placing calls, and fraud protection.

Chapter 5 of the Federal Telecommunications Act in 1996 ("the Act") regulates the telecommunications industry. 47 U.S.C. § 151 et seq. As a general matter, the Act requires carriers to file all of their rates and associated terms and practices with the FCC or in some cases state agencies. The Act requires common carriers such as Qwest to charge reasonable and just rates, and not to prefer or discriminate in favor of its own services. 47 U.S.C. § 201(b), § 276(a) (respectively).

Plaintiffs maintain that the rates Qwest charged from 1997 to 2002 did not comply with the Act, and that pursuant to an FCC order, Qwest is required to refund the difference between the non-compliant rates charged from 1997 to 2002 and the compliant rate charged beginning in 2002. All but one of their causes of action are for damages under various provisions of the Act. The one other cause of action is a state common law claim of unjust enrichment. The following facts are relevant to Plaintiffs' claims and Defendant's motion to dismiss.

Pursuant to specific new requirements mandated by the Act, the Federal Communications Commission ("FCC") adopted rules requiring Local Exchange Carriers ("LECs") such as Qwest to set payphone service rates and "unbundled features" rates according to the FCC's "new services test" ("NST"). LECs were required to submit the payphone service rates to the utility commissions in the states in the LECs' territory, which would review and "file" (i.e. approve) the rates. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order on Reconsideration, CC Dkt. No. 96-128, 11 F.C.C. 21,233 (Nov. 8 1996) ("Cost-Based Order"). The Cost-Based Order required the LECs to file new tariffs by January 15, 1997, with an effective date of April 15, 1997. The LECs were required to submit their "unbundled features" rates to the FCC for approval.

On April 10, 1997 a coalition of Regional Bell Operating Companies ("RBOCs"), which includes Qwest, sent a letter to the FCC requesting a limited waiver of certain provisions of the Cost-Based Order's requirements. (Phillips Decl., Ex. 3). Specifically, they requested that they be granted an extension of time to file their payphone service rates in compliance with the NST. These rates were

due on April 15, 1997, but the RBOC coalition wanted that deadline extended 45 days from April 4, 1007. If granted the waiver and allowed to file new rates that complied with the NST by 45 days from April 4, they agreed that if the new NST-compliant rates were lower than the previous non-compliant rates, they would reimburse or provide a credit to customers purchasing the services back to April 15, 1997.

On April 15, 1997, the FCC issued an order granting a limited waiver to the NST rate-filing requirement. In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order, CC Dkt. No. 96-128, 12 F.C.C. 21,370 (April 15, 1997) ("1997 Waiver Order"). Specifically, the order granted a waiver until May 19, 1997 to file payphone service rates that complied with the NST. Id. at ¶ 2. The 1997 Waiver Order stated that the existing rates would continue in effect until the new NST-compliant rates became effective.[1] Id. at ¶¶ 2, 18-19, 25. It required the LECs to file NST-compliant rates by May 19, 1997. Id. at ¶ 19. If an LEC relied on the waiver, it was required to reimburse its customers "from April 15, 1997 in situations where the newly [filed] rates, when effective, are lower than the existing [filed] rates." Id. at ¶¶ 2, 20, 25. The order stated that the waiver was for a limited and brief duration. Id. at ¶¶ 21, 23. The 1997 Waiver Order does not appear to refer to fraud protection rates.

Plaintiffs contend that Qwest did not file any payphone service rates in any of eleven states at issue from 1997 to 2002. At the same time however, Plaintiffs also imply that Qwest had rates "on file" from 1997 to 2002. (Resp. at 17). Qwest contends that it filed rates in all states from 1997 to 2002. Even though this is a Rule 12(b)(6) motion to dismiss, the Court may take judicial notice of filed rates because they are publicly filed documents. See Mir v. Little Co. of Mary Hospital, 844 F.2d 646, 649 (9th Cir. 1988). As examples of the rates it filed from 1997 to 2002, Qwest attached to its motion sets of rates filed between 1997 to 2002 for three of the eleven states. (Def's Mot. to Dismiss,

[1] The NST-complaint rates were to be filed with state utility commissions. The states were required to act on the filed rates "within a reasonable time." Id. at ¶ 19 n. 60.

Exs. 1-3). Plaintiffs allege in their first amended complaint that none of these payphone service rates complied with the NST, and in fact that Qwest refused to file complaint rates. (First Am. Compl., ¶¶ 13, 16). Plaintiffs assert that the first time Qwest filed NST-complaint rates was in 2002. (Id., ¶ 14). Plaintiffs maintain that the 2002 compliant rates, which were lower than the 1997-2002 rates, establish that Qwest's 1997-2002 rates were not compliant with the NST. (Id.) They further maintain that the 1997 Waiver Order requires Qwest to reimburse Plaintiffs for the difference in those rates. (Id.) Qwest's failure to issue the refund allegedly constitutes violations of various provisions of the Act. (Id.)

Plaintiffs also allege that fraud protection rates are "unbundled features," which Qwest was required to file with the FCC pursuant to the 1996 Cost-Based Order. (Compl., ¶ 11). Plaintiffs further allege that Qwest failed to file NST-compliant fraud protection rates in 1997 and that this violated the Act. (Id., ¶ 16).

Qwest moved to dismiss or in the alternative to stay. Qwest argued that Plaintiffs' claims arising out of the payphone service rates are barred by the filed-rate doctrine, and that Plaintiffs' claim arising out of the fraud protection rates is time-barred. In the alternative, Qwest requests a stay and referral of the threshold legal issues to the appropriate state and federal agencies under the primary jurisdiction doctrine.

ANALYSIS

Dismissal under Federal Rule of Civil Procedure 12(b)(6) is warranted only if "it appears beyond doubt that plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Van Buskirk v. Cable News Network, Inc., 284 F.3d 977, 980 (9th Cir. 2002). All allegations of material fact are construed in a light most favorable to the non moving party. Allwaste, Inc. v. Hecht, 65 F.3d 1523, 1527 (9th Cir. 1995). Nonetheless, "[c]onclusory allegations of law and unwarranted inferences are insufficient to defeat a motion for to dismiss for failure to state a claim." Arpin v. Santa Clara Valley Transp. Agency, 261 F.3d 912, 923 (9th Cir. 2001).

I. Filed-Rate Doctrine

The filed-rate doctrine holds that in regulated industries such as telecommunications and railroads, rates filed with and approved by the governing agencies have the force of law, binding both customers and providers. AT&T v. Central Office Telephone, Inc., 524 U.S. 214, 222 (1998). The regulated entity may charge only the filed rate. Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 488 (2d Cir. 1998). The primary purpose of the doctrine is to prevent the carrier from discriminating among different customers. One important aspect of the doctrine is that a court may not conclude that the filed rate is unreasonable and impose a different rate. The agency is the only forum for challenging the reasonableness of a filed rate. Hargrave v. Freight Distrib. Serv., Inc., 53 F.3d 1019, 1021 (9th Cir. 1995), Fax Telecommunicaciones, 138 F.3d at 489. While the doctrine is often criticized, the Supreme Court has never overturned it despite repeated opportunities to do so. Cost Mgmt. Serv., Inc. v. Washington Natural Gas Co. 99 F.3d 937, 944-46 (9th Cir. 1996) (citing Square D Co. v. Niagrara Frontier Tariff Bureau, Inc., 476 U.S. 409, 417-24 (1986)).

While § 207 of the Act allows a party claiming to be damaged by a common carrier to bring suit before either the FCC or a district court, the filed-rate doctrine bars claims brought in district courts that challenge the validity of rates reviewed and filed by an agency. Brown v. MCI Worldcom Network Serv., Inc., 227 F.3d 1166, 1170 (9th Cir. 2002). This means that a party cannot bring a lawsuit that would, if successful, have the effect of changing, altering, or amending the filed rate. Id., Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000). Brown distinguished claims challenging the validity of the rate, which are prohibited, from claims that are based on the rate itself, which are not barred by the filed-rate doctrine. Brown, 227 F.3d at 1171. "The filed-rate doctrine precludes courts from deciding whether a [rate] is reasonable, reserving the evaluation of [rates] to the FCC, but it does not preclude courts from interpreting the provisions of a [rate] and enforcing that [rate]." Id. at 1171-72. In Brown, the plaintiff alleged that defendant MCI had violated the filed rate by charging for services that were not authorized by the filed rate. The Ninth Circuit held that the plaintiff merely

sought to enforce the filed rate, not challenge its validity. As such, his claim was not barred by the filed rate doctrine. Id.

As discussed above, Qwest filed rates with the eleven respective state agencies from 1997 to 2002. Plaintiffs allege that the payphone service rates Qwest filed from 1997 to 2002 did not comply with the NST requirements. Qwest maintains that by alleging that its 1997-2002 rates were not compliant with the NST, Plaintiffs are thereby challenging the reasonableness of the rates, which is barred under the filed-rate doctrine. Plaintiffs counter that they are not challenging the reasonableness of the rates because it is a fact, they maintain, that the 1997-2002 rates were not NST compliant, and as a factual allegation, it must be accepted as true in a Rule 12(b)(6) motion. (Resp. at 17). They assert that they have "no quarrel with the reasonableness of the filed rates" because all they want is for Qwest to make good on its promise to refund, as stated in the 1997 Waiver Order. (Resp. at 7).

As a threshold issue, the reasonableness of a filed rate is a question of fact, not law. Transworld Airlines, Inc. v. American Coupon Exchange, Inc., 913 F.2d 676, 682-83 (9th Cir. 1990) ("questions involving the reasonableness of a common carrier's [rates] almost always require substantial investigation of facts that are often complex. . . . a purely legal determination of the [rates'] validity [is] inappropriate." Therefore, to the extent that Plaintiffs allege that the 1997-2002 rates were not reasonable, the Court must accept this factual allegation as true in ruling on this motion.

Despite Plaintiffs' contention that they are not challenging the reasonableness of the rates, the very premise of Plaintiffs' claim is that the 1997-2002 rates did not comply with the applicable FCC rules set out in the NST. In other words, the 1997-2002 rates were not justified or reasonable because they did not comply with the applicable FCC rules in the NST. Before the Court could even reach the question of whether the 1997 Waiver Order authorized the refund Plaintiffs seek, the Court would have to conclude that, in fact, the 1997-2002 rates were not NST-complaint (i.e. not reasonable under applicable FCC rules). Unlike Brown, Plaintiffs do not seek to enforce the terms or conditions of the rates that were filed from 1997-2002. Instead, Plaintiffs seek to have the new 2002 rate be applied to

the previous five years. Effectively, Plaintiffs seek to replace the rate that was filed from 1997-2002 with a new rate that was filed in 2002. This would have the net result of altering the rates for 1997-2002. This is impermissible under the filed rate doctrine. Therefore, even if the Court must accept Plaintiffs' factual allegation as true in ruling on this motion, the filed-rate doctrine relegates that particular factual issue to the agency, not a district court.

Plaintiffs' argument that the filed-rate doctrine should not apply to them because they are Qwest's competitors is unavailing. In Cost Mgmt. Serv., the Ninth Circuit held that the filed-rate doctrine was not applicable to anti-trust challenges under the Sherman and Clayton Acts brought by competitors of the regulated entity. Id. at 945-46 (citing three other circuits that have reached similar conclusions). However, Plaintiffs have not brought anti-trust claims under the Sherman or Clayton Acts. Likewise, Plaintiffs are both customers of Qwest payphone services and competitors of Qwest in the payphone industry. Consequently, Plaintiffs cannot escape the force of the filed-rate doctrine.

Lastly, Plaintiffs contend that even if the filed-rate doctrine were applicable, Qwest waived the right to claim the doctrine as a defense in its April 10, 1997 letter to the FCC, which the FCC incorporated into the 1997 Waiver Order. This argument is unpersuasive. In the April 10, 1997 letter that Qwest and the other RBOCs signed, they requested a 45-day extension to file new NST-complaint rates and in exchange promised to reimburse or provide credit to customers if the 45-day late rates were lower than the rates that had been charged over those 45 days. Thus, to the extent that Qwest waived its right to invoke a filed-rate doctrine defense against claims for a refund, this waiver extended only to rates charged in that 45-day period.

II. Statute of Limitations

Plaintiffs' allegation regarding the fraud protection rates is barred by the statute of limitations. In their complaint, Plaintiffs allege that in the 1996 Cost-Based Order, the FCC required LECs such as Qwest to file their fraud protection rates with the FCC based on the NST because such services are "unbundled features" named in the order. (Compl., ¶ 11). Plaintiffs allege that Qwest refused to file

NST-compliant fraud protection rates with the FCC in 1997, which constituted an unjust and unreasonable practice in violation of the Act. (Id., ¶ 16). 47 U.S.C. § 415 provides that actions against carriers must be brought within two years from the time the cause of action accrues. Therefore, any claim that Qwest failed to file fraud protection rates in 1997 should have been brought by 1999. Plaintiffs filed the instant complaint in December, 2003. Consequently, this claim is dismissed as time-barred.

CONCLUSION

The Court GRANTS Qwest's Motion to Dismiss on the grounds that Plaintiffs' claims regarding payphone service rates are barred under the filed-rate doctrine and Plaintiffs' claim regarding fraud protection rates is time-barred under the applicable statute of limitations. Accordingly, Plaintiffs' complaint is DISMISSED without prejudice.

The clerk is directed to provide copies of this order to all counsel of record.

Dated: July 28, 2004

/s/ Marsha J. Pechman
Marsha J. Pechman
United States District Judge

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing QWEST'S SUMMARY JUDGMENT OPENING MEMORANDUM on:

Brooks E. Harlow
David L. Rice
Miller Nash LLP
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Seattle, WA 98101-2352

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State of Oregon Department of Justice
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Salem, OR 97301-4096

Alex Duarte
Qwest Corporation
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Portland, OR 97204

by causing a full, true, and correct copy thereof, addressed to the last-known office address of the attorney (except when served by fax), to be sent by the following indicated method or methods, on the date set forth below:

[x] by **mailing** in a sealed, first-class postage-prepaid envelope and deposited with the United States Postal Service at Portland, Oregon.

DATED: February 17, 2005.

PERKINS COIE LLP

By _____
Lawrence Reichman, OSB No. 86083

Attorneys for Respondent Qwest Corporation