BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc. Complainants, v. QWEST CORPORATION, Defendant.	DOCKET NO. DR 26/UC 600

MEMORANDUM OF LAW IN
OPPOSITION TO QWEST'S MOTION
FOR SUMMARY JUDGMENT

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This memorandum of law is submitted on behalf of the Northwest Public Communications Council (NPCC), representative of those unidentified Payphone Service Providers A to Z, and the payphone service providers (PSPs) members of NPCC formerly appearing by the NPCC and now appearing as the real parties in interest individually (NPCC and the individual PSPs are hereinafter collectively referred to as the Complainants) in opposition to the motion for summary judgment of Qwest Corporation ("Qwest"). This filing is without prejudice to Complainants right to file a motion for summary judgment.

It is beyond dispute that it has already been judicially determined that Qwest had grossly overcharged Complainants from 3 to 20 times the NST compliant rate during the period (i) April 15, 1997 to August 28, 2003 in violation of federal law, and (ii) May 1, 1996 to August 28, 2003 in violation of Oregon State law. The entire purpose of Qwest's defense is to find a legal technicality to keep the illegally received overcharges from its much smaller competitors in violation of Section 276 and the Waiver Order. It is an effort to obtain an unjust result under cover of the law.

I. STATUS OF THE CASE AND RELATED PROCEEDINGS IN THE U.S. DISTRICT COURT

The status of the current case is as follows. Complainants' second amended complaint was stricken by the PUC and the only remaining claim in the case is the claim for refund under the Waiver Order (as defined below). Complainants moved to reconsider the striking of the second amended complaint and to stay proceedings pending the decision of the U.S. District Court, District of Oregon in a pending case between Complainants and Qwest under Docket No. CV'09 1351 BR (the "Federal Action") on Complainants' application for declaratory relief on the PUC's subject matter jurisdiction to hear the remaining claim in this case. These motions

were denied and Complainants have appealed the decision to the Oregon Court of Appeals. That appeal is presently pending. With respect to the issue of the denial of Complainants' claim for refund of CustomNet overcharges on the basis of statute of limitations, Complainants have effectively appealed that decision by filing a second action U.S. District Court, District of Oregon against the PUC and Qwest under Docket No. 03-658HA (the "Second Federal Action").

In the Federal Action filed November 13, 2009, there is presently pending both a motion to dismiss filed by Qwest and a motion for summary judgment filed by Complainants. The Court is addressing the motion to dismiss first and has bifurcated the motion into separate segments. The court will be addressing the statute of limitations first followed by jurisdictional issues related to the PUC, including its subject matter jurisdiction. The statute of limitations issues are presently under advisement.

II. SUMMARY OF QWEST'S ARGUMENTS

Qwest's argument can basically be distilled down to the following points. First, it did not rely on the Waiver Order (as defined below) to collect Dial Around Compensation (as defined below). Second, Qwest contends that the Waiver Order only required refunds for a period of 45 days. Third, the claim is barred by the two year statute of limitations. None of these arguments have merit and fly in the face of common sense and any rational reading of the applicable statutes, regulations and the Waiver Order. However, before the merits of the motion can be addressed, as a threshold matter the subject matter of this tribunal to adjudicate the claim before it must be determined.

III. STATEMENT OF FACTS

Plaintiff Northwest Public Communications Council ("NPCC") is a regional trade association representing companies and individuals that provide payphone services (as defined in

47 U.S.C. §276(d)) to the general public in Oregon and other states[1] (payphone services are referred to herein as "Payphone Services"). Payphone Service providers ("PSPs" and individually a "PSP") provide Payphone Services that compete with the Payphone Services provided by local exchange carriers, including Qwest (collectively "LECs" and individually a "LEC"), in the areas in which the Complainants operate. Jones ¶5[2]

PSPs purchase public access lines ("PAL") (the dial tone) and related telephone exchange services and exchange access services[3] from LECs to provide the PSPs' own Payphone Services to the public. NPCC's PSP members purchase "smart" and "basic" PAL service directly or indirectly from Qwest to connect their payphones to the local, national and international telephone networks. Jones ¶¶6-7.

Qwest is a successor of U.S. WEST Communications, Inc. (a/k/a U.S. WEST Communications Company) and is a "Bell operating company" ("BOC") as that term is defined in 47 U.S.C. §153(4). The BOCs (which are LECs) along with non BOC incumbent LECs had regulated geographic monopolies in the provision of telephone exchange services and exchange access prior to deregulation of the telecommunications industry in 1984 and the later Telecommunications Act of 1996 (the "1996 Act"). The BOCs and independent LECs in existence prior to deregulation are referred to herein as "Incumbent LECs" and individually as an "Incumbent LEC". With the break up of AT & T in 1984, regional Bell operating companies, themselves either BOCs or the parent company of BOCs (collectively "RBOCs" and each

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1 NPCC was formerly known as the Northwest Payphone Association.

2 References to the declaration of Charles Jones dated March 10, 2010 filed in the Federal Action are denominated as "Jones ¶__" or "Jones Exhibit ___".

3 Such terms are defined in 47 U.S.C. §153(47) and 47 U.S.C. §153(16), respectively.

individually a "RBOC") were formed. Qwest at all relevant times has also been a RBOC. Qwest, at relevant times, was the largest provider of jail and public Payphone Services in the areas in which it operated as a LEC. Jones ¶8.

In 1996, Congress adopted the 1996 Act that significantly modified the Telecommunications Act of 1934, 47 U.S.C. §§1 et seq. (as amended by the 1996 Act, the "Act"). Among the modifications, was the adoption of 47 U.S.C. §276 which deregulated payphone telephone services. Under deregulation, for the first time, owners of payphones were to be compensated for all calls from their payphones. Prior to the adoption of Section 276 payphone owners only received compensation from coins deposited in the phone box and had not been compensated for Toll Free calls (10xxx, 1-800, etc), credit card calls, and other similar calls made from their payphones from which the long distance carriers derived the revenues (compensation for such calls is referred to as "Dial Around Compensation" or "DAC"). Jones ¶15

To foster competition and protect the PSPs from the BOC entrenched positions and control of the pricing of the PALs, Section 276 of the Act prohibited the BOCs from subsidizing their payphone operations from their non payphone revenues and prohibited them from preferring or discriminating in favor of their Payphone Services as against those of competing independent PSPs such as the Complainants. To equalize competition and foster the deployment of independently owned payphones, Section 276 of the Act also required that BOCs provide independent PSPs access to their telephone network at cost plus a reasonable amount of overhead (based on forward looking methodologies without taking into account the historical cost of building their telephone networks), but not profit. Section 276 applied to both interstate and intrastate Payphone Service tariffs. 47 U.S.C. §276(b).

Section 276 required the Federal Communications Commission (the "FCC") to develop implementing regulations and Section 276 became effective upon adoption of such regulations. 47 U.S.C. §276(a) and (b). Under 47 U.S.C. §276, any state regulations affecting payphones that conflicted with the regulations the FCC issued were preempted. 47 U.S.C. §276(c). The regulations implementing 47 U.S.C. §276 as required by 47 U.S.C. §276(b) were issued in a series of orders over time beginning with the FCC proceeding conducted by the Common Carrier Bureau (now the Wire Competition Bureau) captioned In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128 (the "Implementation Proceeding"). During the Implementation Proceeding, the FCC issued a series of Orders which constituted the regulations implementing Section 276.

On September 20, 1996, the FCC issued the first order implementing Section 276 (the "First Payphone Order")[4]. The First Payphone Order determined that "Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, we conclude that the new services test is necessary to ensure that central office coin services are priced reasonably." First Payphone Order ¶146. Thus, for a payphone tariff to comply with 47 U.S.C. §§201, 202 and 276, it had to satisfy the new services test and other federal tariffing requirements (collectively referred to as "NST compliant"). 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.

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4 *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996* CC Docket No. 96-128, First Report and Order, 11 F.C.C. R. 20541 (Sept. 20, 1996)

On November 8, 1996, the FCC issued an order reconsidering the First Payphone Order (the "Reconsideration Order")[5]. Under this order, it modified the First Payphone Order by delegating rate making of intrastate payphones tariffs to State Commissions to develop intrastate payphone tariffs that were NST compliant. It 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. First Payphone Order ¶127, Reconsideration Order ¶¶131 and 163.

In December 1995, Qwest initiated a general rate case in PUC Docket UT 125 (the "Rate Case") in which the PUC was reviewing all of Qwest's telecommunications tariffs, including its payphone tariffs for justness and reasonableness. The PUC informed NPCC that any issues concerning NST compliance of such intrastate payphone tariffs would be taken up in the Rate Case. Accordingly, NPCC intervened in the Rate Case. The Rate Case was bifurcated into two phases, the revenue requirement phase which would determine Qwest's revenue requirements and the design phase. The design phase was where the final rates would be determined. NPCC was particularly concerned with the design phase of the case as that would determine NST compliant payphone tariffs. Coincidentally, since refunds under Oregon law would be allocated based on difference between higher interim rates and lower final rates, the determination of refunds due PSPs under Oregon law would be calculated in the same manner as any refunds would be calculated under the Waiver Order if excessive rates were charged prior to finalization of the rate making process.

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5 *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996* CC Docket No. 96-128, 11 F.C.C.R. 21233 (Nov. 8, 1996).

On January 15, 1997, purportedly in compliance with the requirements of the First Payphone Order and the Reconsideration Order, Qwest submitted Advice 1668 in which it introduced "smart PAL" rates and reiterated its other PAL rates. The rates contained in Advice No. 1668 were approved by the PUC at a public meeting of the PUC on April 1, 1997 and made effective April 15, 1997. See Harris Ex. 2 at Patrick Ex. 14[6] at p. 12.

However, in reviewing these proposed rates, the PUC never considered whether they were NST compliant as required by the First Payphone Order and the Reconsideration Order. See excerpts of the transcript of the April 1, 1997 public meeting at which Advice No. 1668 was approved along with the Staff report both attached to Reichman as Ex.s 3 and 4, respectively at Patrick Ex. 17 at pp. 9-15. Further, as is shown below, Qwest admitted it did not know that tariffs such as those in Advice No. 1668 had to be NST compliant. Consequently, the rates submitted in Advice No. 1668 were not reviewed or approved as NST compliant by the PUC as required by the Reconsideration Order ¶¶131 and 163 because, at the time they were submitted and reviewed, Qwest did not know they had to be NST compliant.

On April 4, 1997, the FCC issued an order clarifying BOC obligations under the First Payphone and Reconsideration Orders (the "Clarification Order")[7]. Of particular importance, it rejected the RBOCs narrow interpretation of NST compliance and held that NST compliance applied to *all* Payphone Service tariffs and was not limited to only those services provided to the BOC's own payphones. Clarification Order at ¶15 attached as Patrick Ex. 22 at p.5.

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6 References to the Exhibits attached to the Declaration of Franklin G. Patrick dated March 10, 2010 filed in the Federal Action are denominated as ""Patrick Ex. ____".

7 *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996* CC Docket No. 96-128, DA 97-678, 13 F.C.C. R. 1778 (April 4, 1997).

The Clarification Order also granted a limited waiver with respect to the filing of federal tariffs for certain unbundled interstate Payphone Services. Those federal tariffs were to be filed within 45 days of the release date of the Clarification Order and were to be reviewed and made effective by the FCC 15 days thereafter. So long as the such tariffs were filed within 45 days of the April 4, 1997 release date of the Clarification Order, were effective within 15 days thereafter *and*, the BOC met all the other requirements of NST compliance, the BOC was eligible to receive DAC effective April 15, 1997. Other than this exception, 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. Reconsideration Order ¶¶131-132 at Patrick Ex. 4 at p. 60; Clarification Order ¶21 at Patrick Ex. 22 at p. 7

In a letter dated April 10, 1997 (the "Waiver Request Letter"), the RBOCs, including Qwest, requested a waiver of the requirement that previously filed intrastate tariffs (including those in Advice No. 1668) be found by State Commissions to be NST compliant by April 15, 1997. The RBOCs claimed that until the issuance of the Clarification Order, they thought the new services test only applied to new services tariffed at the federal level and *not previously filed intrastate tariffs*. Waiver Request Letter at Patrick Ex. 20 at p. 1.

The RBOCs stated that while it would be "onerous to do so", they would undertake to review the previously filed intrastate tariffs for compliance with the new services test and, *where they were not compliant, file new replacement tariffs*[8]. This review and certification of

8 The Reconsideration Order did not require previously filed intrastate tariffs that were determined to be NST compliant to be re-filed. Only where new replacement tariffs were required would such new tariffs have to be filed with the FCC and the State Commission. Reconsideration Order ¶163 at Patrick Ex. 4 at pp. 74-75.

compliance would be completed by the same deadline the Clarification Order provided for filing tariffs for unbundled interstate services. The RBOCs acknowledged that, because of the variety of the State regulatory processes, the state review and approval required before any previously filed intrastate payphone tariffs, including any replacement intrastate tariffs, could be certified as NST compliant and made effective could not be assured to be completed within the 15 days of filing of replacement tariffs provided in the Clarification Order. Waiver Request Letter at Patrick Ex. 20 at p. 2; Reichman as Ex. 2 at Patrick Ex. 17 at p. 7-8.

The RBOCs went on to say that they would make sure that the previously filed intrastate tariffs were compliant and if they were not, they would file new tariffs. They undertook that

> Once the new state tariffs go into effect, to the extent the new tariff rates are lower than the existing ones, we will undertake to reimburse or provide a credit to those purchasing the services back to April 15, 1997. (I should note that the filed-rate doctrine precludes either the state or federal government from ordering such a retroactive rate adjustment. However we can and do voluntarily undertake to provide one, consistent with state regulatory requirements, in this unique circumstance.. . . .)" [parenthetical in the original] Waiver Letter at Patrick Ex. 20 at p. 2.

In making this undertaking to reimburse PSPs who paid the higher than allowed tariffs, the RBOCs specifically offered to waive their right to the protection of the filed-rate doctrine[9]. The RBOCs urged acceptance of their limited waiver request because

> . . . granting the waiver in this limited circumstance will not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated from payphones. And competing PSPs will suffer *no disadvantage*. Indeed the voluntary reimbursement

9 Complainants, consistent with the decision in *Davel Communications v. Qwest*, 460 F.3d 1075 (9th Cir. 2006), assert the filed rate doctrine is applicable.

> mechanism discussed above - - - which ensure that PSPs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up - - will ensure that *no purchaser of payphone services is placed at a disadvantage due to the limited waiver*. [emphasis added] Waiver Letter at Patrick Ex. 20 at p. 3.

The offer to reimburse competing PSPs any overcharges arising from collecting non NST compliant rates was designed to put the payphones of all PSPs, both those owned by independent PSPs and those owned by RBOCs, on a level playing field consistent with the Federal mandate. It also was an inducement, the quid pro quo, to the FCC and the PSPs who were participating in the Implementation Proceeding to grant the waiver the RBOCs were requesting so as to permit the RBOCs to commence collecting DAC on April 15, 1997 even though their intrastate payphone rates were not then NST compliant and had not been reviewed and approved as NST compliant and made effective as required by Section 276 and the FCC's First Payphone Order, Reconsideration Order and Clarification Order. Waiver Request Letter at Patrick Ex. 20 at pp. 2-3.

On April 15, 1997, the FCC issued the Waiver Order[10] granting a waiver to the RBOCs in response to the Waiver Request Letter. Waiver Order ¶3 at Patrick Ex. 12 pp. 2. 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. Waiver Order ¶12. Any BOC relying on the Waiver Order had to reimburse its customer for any overcharges if the NST Compliant Payphone Tariff were lower than the tariffs previously in effect. Importantly, the FCC made clear that the waiver granted

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10 *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provision of the Telecommunications Act of 1996*, DA 97-805 12 F.C.C. R. 21370 (1997)

only related to the LECs' ability to collect DAC and did not waive the requirement that the LEC have NST compliant tariffs that were in effect by April 15, 1997 to comply with Section 276. The FCC stated the following on the issue of compliance with the statute. "Under the terms of this limited waiver, a BOC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997." Waiver Order ¶2 at Patrick Ex. 12 at p. 2. No appeal or application for reconsideration of the Waiver Order was taken by any participant in the Implementation Proceeding. Waiver Order ¶¶2, 11, 12 and 20 at Patrick Ex. 12 at pp. 2, 6 and 11

Thus, as a result of the Act and the Payphone Orders, BOCs, such as Qwest, that relied on the Waiver Order to collect DAC as of April 15, 1997 were given until May 19, 1996 to be charging Payphone Service rates based upon intrastate NST Compliant Payphone Tariffs. However, this extension, while allowing them to collect DAC, did not absolve them of their obligation to have intrastate NST Compliant Payphone Service Tariffs reviewed by a State Commission for NST compliance, approved as NST compliant and made effective by April 15, 1997. If this deadline was not met and higher, non NST compliant rates were charged on and after April 15, 1997, the BOC was in violation of Section 276 and liable for damages, including the Waiver Order refund.

On or about May 20, 1997, Qwest sent to all interexchange carriers a form letter certifying to Qwest's compliance with the Payphone Orders and its entitlement to receive DAC specifying compliance by state, including Oregon. In that letter Qwest admitted relying on the Waiver Order. Reichman Ex. 5 at Patrick Ex. 17 at p. 16-17.

All the RBOCs, including Qwest, are believed to have begun to collect millions of dollars, if not billions of dollars, annually, in DAC commencing April 15, 1997, even though intrastate NST compliant payphone tariffs were not reviewed for NST compliance, approved as NST compliant and made effective on that date. In fact, in Oregon such intrastate NST compliant tariffs did not go into effect until November 15, 2007, some ten and a half years after Qwest began collecting DAC with respect to Oregon.

In the Rate Case, the revenue requirements phase of the Rate Case was resolved by a settlement stipulation between PUC Staff (the "Staff") and Qwest, which settlement, as modified, was approved by the PUC in Order Nos. 00-190 and 00-191and accepted by Qwest. Under the terms of the settlement, Qwest agreed to, and was ordered to, refund approximately $250 million to rate payers, including PSPs, for the period May 1, 1996 to September 2000. As part of that settlement, PAL rates were effectively reduced prospectively by temporary bill credits that went into effect in September 2000 but were not in fact NST compliant.

This case was filed in May 2001 as a precautionary matter to avoid any potential statute of limitations issue. However, since Qwest's liability for refunds could not be determined until final rates in the design phase of the Rate Case were established, by consent of Qwest and NPCC the case was held in abeyance awaiting federal clarification of the Waiver Order. See PUC Order No. 05-208 in this case.

In the design phase of the Rate Case, NPCC argued that the PAL rates proposed by Qwest (and effectively accepted by Staff), while substantially lower than the existing rates were still too high and not NST compliant. On that basis, PSPs were, in fact, entitled to a higher refund than would be paid based on the difference between the final lower rate and the higher

interim rates (this was the standard the PUC adopted and Qwest accepted for allocating the refund among rate payers) given the final rate made effective in PUC Order No. 07-497. They would also be entitled to lower rates going forward than was reflected in the proposed temporary bill credits. Over NPCC's objection, the PUC adopted Order No. 01-810 setting Qwest's final telecommunications tariffs, including those for payphone services.

The NPCC moved for reconsideration of Order No. 01-810, which was denied by Order No. 02-009 dated January 2, 2002. NPCC appealed Order Nos. 01-810 and 02-009 to the Marion County Circuit Court. By order dated October 1, 2002, the Marion County Circuit Court affirmed the orders of the PUC. NPCC appealed this decision to the Oregon Court of Appeals. By decision and order dated November 10, 2004, the Oregon Court of Appeals reversed the decision of the Marion County Circuit Court and the PUC and remanded the case for further proceedings in accordance with the decision of the Court of Appeals. The Court of Appeals specifically found that the PAL rates established by the PUC were not NST compliant and new NST compliant rates had to be determined. With respect to CustomNet, the Court held that insufficient cost data was available to determine whether such rates were NST compliant and directed the PUC, on remand, to take additional evidence to determine compliance.

Qwest realized that the Oregon Court of Appeals decision meant that PSPs would receive both a higher refund than previously paid and lower rates and sought to recoup the revenue shortfall from other rate payers in the Rate Case. The PUC rejected Qwest's arguments finding that under the terms of the settlement of the revenue requirement phase of the Rate Case, Qwest was obligated to pay the higher refund and **suffer the** revenue reduction required by the Oregon Court of Appeals decision without any offsetting rate increases. Order No. 06-515

Patrick Ex. 9 at p. 10. On the remand, Qwest, NPCC and Staff stipulated to the NST compliant rates which were subsequently reviewed and approved by the PUC by Order No. 07-497 dated November 15, 2007. Patrick Ex. 11. These NST compliant rates were from 3 to 20 times lower than the unlawful rates Qwest had previously charged during the period May 1, 1996 to August 28, 2003 resulting in a refund obligation under both the Waiver Order and Section 276 as well as under Oregon law. Jones ¶¶20-28

In March and August 2003, Qwest unilaterally reduced its PAL and CustomNet rates to levels it alleged were NST compliant. However, this reduction was made without providing the cost data required by the First Payphone and Reconsideration Orders and was without prejudice to Qwest's positions before the Oregon Court of Appeals that the rates approved in Order No. 01-810 were NST compliant and its position before the DC Circuit Court of Appeals challenging the FCC's determination that all payphone rates had to be NST compliant and computed in the manner the Common Carrier Bureau had determined as early as 2000.

Having reaped the DAC benefits it sought based on the representations and promises it made in its Waiver Request Letter to obtain the Waiver Order, and having reaped the benefit of the settlement of the revenue requirement phase of the Rate Case where its refund liability was reduced from $102 million per year to $52 million per year, it now seeks to avoid its obligation to pay the very refunds it promised on the basis of a variety of specious arguments. None of these arguments have merit and are addressed below.

However, before addressing these arguments, this tribunal must consider whether it has subject matter jurisdiction of the claim before it. Whether the PUC has subject matter jurisdiction of a claim under the Waiver Order is a question of federal law as the PUC

acknowledged when it originally held this case in abeyance while seeking guidance from the FCC. The U.S. District Court in the pending case before it involving the same parties to this proceeding as an integral part of its decision making process has stated that it will address the PUC's subject matter jurisdiction to hear this or any other claim under the Act.

IV. THE PUC LACKS SUBJECT MATTER JURISDICTION OF THE CLAIM

In May 2001, at the time this action was filed, no definitive decision had been rendered by a federal court in this Circuit on the jurisdiction of tribunals other than the U.S. District Court or the FCC to adjudicate claims under the Act. Exclusive jurisdiction of claims under the Act is vested concurrently in the U.S. District Court and the FCC. 47 U.S. §207. Given the delegation of rate making authority to the PUC under Reconsideration Order ¶¶162 and 163, it was conceivable that that delegation might have carried with it the power to complete the ministerial task of calculating refunds where an unlawful non NST compliant interim rate had been charged that was higher than the NST compliant rate that was finally established by the PUC in accordance with federal law. However, in *AT&T Corp. v. Coeur d'Alene Tribe,* 283 F.3d 1156 (9th Cir. 2002), *amd, reprinted as amd* 295 F.3d 899 (9th Cir. 2002) the Ninth Circuit held that by its express language, Sec. 207 establishes concurrent jurisdiction in the FCC and the federal district courts only, leaving no room for adjudication in any other forum–be it state, tribal or otherwise. Given the strong language of *Coeur d'Alene, supra*, and the fact that once Congress determines what tribunal will have subject matter jurisdiction of a claim, that mandate cannot be altered by an administrative agency, a court or the agreement of the parties, it seemed unlikely that the PUC would jurisdiction of a claim for refunds under the Waiver Order.

The Waiver Order and its interpretation arises from the authority granted to the FCC under the Act. Enforcement of the FCC's orders is clearly within the subject matter jurisdiction of the FCC and the U.S. District Court. A private right to enforce an order of the FCC exists if such order's violation would be equivalent of a violation of the Act itself. *Metrophones Communications, Inc. v. Global Crossing Telecommunications, Inc.*, 423 F.3d 1056 (9th Cir. 2005); *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*, 550 U.S.45, 127 S. Ct. 1513,167 L. Ed. 2d 422 (2007). Such claims are within the subject matter jurisdiction of the FCC and the U.S. District Court. 47 U.S.C. §207. Assuming, *arguendo*, that the FCC had the authority to delegate subject matter jurisdiction to the PUC, there is nothing in the FCC regulations indicating such a delegation. This fact coupled with the strong language of *Coeur d'Alene, supra*, leads Complainants to the conclusion that the PUC lacks the subject matter jurisdiction to adjudicate a claim for refunds under the Waiver Order. This is the reason, Complainants sought to stay this claim until declaratory relief could be obtained from the U.S. District Court on this particular issue.

The issue of subject matter jurisdiction can be addressed at any time in the proceeding and cannot be waived. *Embassy of the Arab Republic of Egypt,* 603 F.3d 1166 (9th Circuit 2010) *citing Am. Fire & Cas. Co. v. Finn*, 341 U.S. 6, 18 n.17, 71 S. Ct. 534, 95 L. Ed. 702 (1951). It is for this reason that when Complainants current counsel assumed responsibility for the case, they sought a ruling from the federal court so that these proceedings would not be a waste of the PUC's and the litigants' valuable time.

Assuming, *arguendo,* that the PUC has subject matter jurisdiction of the claim before it, Qwest's motion for summary judgment must be denied for the reasons discussed below.

V. QWEST HAS BENEFITTED FROM ITS PRIOR POSITION BEFORE THE FCC PRESENTED IN THE WAIVER REQUEST LETTER THAT IT WOULD PAY REFUNDS IF THE NST COMPLIANT RATES WERE LOWER THAN HIGHER INTERIM NON NST COMPLIANT RATES, THEREFORE , IT IS JUDICIALLY ESTOPPED NOW FROM DISPUTING ITS OBLIGATION TO PAY SUCH REFUNDS TO THE COMPLAINANTS BASED ON THE CORRECT FINAL RATES.

Judicial estoppel is a common law doctrine designed to protect the courts from litigants playing fast and loose with the court by changing their positions and causing the court to contradict its own earlier rulings. In Oregon, judicial estoppel bars a party from assuming a position in one judicial proceeding that is inconsistent with the position the party has taken in another judicial proceeding. *Hampton Tree Farms, Inc. v. Jewett*, 320 Or. 599, 609-610, 892 P.2d 683 (1995) citing *Fleck v. KDI Sylvan Pools, Inc*., 981 F.2d 107, 121-22 (3d Cir.1992). In order to establish judicial estoppel in Oregon, the following three elements must be present: (i) benefit in the earlier proceeding, (ii) different judicial proceedings, and (iii) inconsistent positions. *Glover v. Bank of New York*, 208 Or.App. 545, 147 P.3d 336 (Or.App. 2006) citing *Hampton Tree, supra*. The court in *Glover, supra*, specifically rejected the argument that the tribunal in the prior proceeding had to rely on the position taken by the person to be estopped. In the instant case, this standard would also be met if it were applicable.

Judicial estoppel is a well recognized concept in the federal courts. In the federal courts, the doctrine is imposed where a party assumes a position in a litigation and succeeds in maintaining that position. Having achieved his goal, he may not change position to the contrary, especially if it would be to the prejudice of the party who acquiesced in the position formerly taken. *Zedner v. U.S.*, 547 U.S. 489, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006); *New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001); 31 *Corpus Juris Secundum*

Estoppel and Waiver §181. The court has discretion to invoke doctrine. However, where the following factors are present, the doctrine will be imposed under federal law: (1) inconsistency of the positions, (2) whether the court accepted the earlier position so that accepting the later position would create the perception that either the first or second court was misled, and (3) whether the person taking the inconsistent position would derive an unfair advantage or impose an unfair detriment on the opposing party if not estopped. *Zedner supra*; 31 *Corpus Juris Secundum* Estoppel and Waiver §187. Judicial estoppel does not require reliance by the party urging estoppel. *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355 (3rd Cir. 1996); 31 *Corpus Juris Secundum* Estoppel and Waiver §189.

It has long been settled that statements made in administrative tribunals or quasi judicial proceedings may be the basis for judicial estoppel. *Rissetto v. Plumbers and Steamfitters Local 343*, 94 F.3d 597, 604 (9th Cir. 1996); *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1427 (7th Cir. 1993); *Smith v. Montgomery Ward & Co.*, 388 F.2d 291 (6th Cir. 1968); *Simon v. Safelite Glass Corp*., 128 F.3d 68 (2d Cir. 1997). In *Rissetto, supra*, the court held that federal law governs application of judicial estoppel in federal court as the integrity of the court that was at risk is the federal court. *Rissetto, supra* at 603. The court went on to say (1) that it was aware of no case in which judicial estoppel had not been applied because the prior statement was in an administrative proceeding, (2) that the inconsistent statements could be in different cases, and (3) that the 9th Circuit had not determined whether to adopt the majority view that the original position had to be adopted by the court or tribunal in the prior proceeding. For the reasons discussed below, under either the Oregon State law standard for judicial estoppel or

the federal standard as applied by the majority of the Circuit Courts of Appeal, Qwest is judicially estopped from disputing its obligation to pay the refunds at issue in this case.

In the Waiver Request Letter, Qwest and the other RBOCs specifically requested that the FCC grant them a waiver from having intrastate NST Compliant Payphone Tariffs reviewed and approved for NST compliance and made effective by each State Commission by April 15, 1997 as a condition to Qwest collecting DAC in such state. Waiver Request Letter at Patrick Ex. 20 at p. 3 . 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. Waiver Request Letter at Patrick Ex. 20 at p. 2. 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[11].

The RBOCs made clear that one of their concerns was having intrastate payphone tariffs handled within the same time frames that interstate unbundled features were being handled under the waiver granted by the Clarification Order. The RBOCs were concerned that even if they filed the intrastate NST compliant payphone tariffs by May 19, 1997, there was no

11 Any other interpretation would be nonsensical as it would mean Qwest would only be liable for refunding overcharges where it admitted the earlier tariff was not NST compliant but would not be liable for refunding overcharges where it claimed the tariffs were NST compliant, no matter how specious the claim, and the PUC or the FCC later determined that they were not NST compliant.

assurance that State Commissions could complete their review of the tariffs for NST compliance and make them effective within 15 days after filing. Waiver Request Letter at Patrick Ex. 20 at p. 2.

As an inducement to the FCC and the independent PSPs to accept their waiver proposal, they offered to refund any overcharges from non NST compliant rates. Qwest and the other RBOCs took the position that the refund they were offering could not be ordered by any federal or state government because the filed-rate doctrine precluded either the state or federal government from ordering such a retroactive rate adjustment[12]. This offer was a waiver of the filed rate doctrine defense. This refund was represented as preventing any disadvantage to the PSPs arising from any overcharges. Waiver Request Letter at Patrick Ex. 20 at p. 2-3.

The FCC issued the Waiver Order as requested by the Waiver Request Letter. Waiver Order ¶3 at Patrick Ex. 12 at p. 2. Thus, Qwest and the other RBOCs sought and obtained a waiver so they could be paid DAC as of April 15, 1997. The RBOCs offered and the FCC and the independent PSPs accepted their waiver proposal, that any overcharges during the period April 15, 1997 to the date the final NST compliant payphone tariffs became effective would be refunded. Qwest and the other RBOCs succeeded in their request and, in response, the FCC issued the Waiver Order. For Qwest to now claim that they are not obligated to pay the very refunds they agreed to pay to obtain the Waiver Order and the millions of dollars of DAC to which it gave them access would be wholly inconsistent with the position they took before the

12 Complainants reject this interpretation of the filed rate doctrine.

FCC and would allow Qwest to defraud the FCC and the PUC through its blatant reversal of position.

There is no question the FCC accepted Qwest's earlier position that it would pay the refunds. Finally, it is beyond dispute that Qwest has both derived an unfair advantage and imposed an unfair burden on the Plaintiffs and other similarly situated PSPs through the abuse of the PUC process. Qwest received DAC in Oregon for 10 and half years without complying with its obligation to charge NST Compliant Payphone Tariffs. In addition, it has overcharged the PSP Plaintiffs and other similarly situated PSPs to their detriment and pocketed those overcharges over the period. As a direct result, it has starved for cash these much smaller competitors while engorging itself with its ill gotten gains. One could not imagine a more just case for the imposition of judicial estoppel and immediately requiring Qwest to calculate and pay the long past due refunds with interest at the highest rate permitted by law.

VI. QWEST DID RELY ON THE WAIVER ORDER AND RECEIVED DIAL AROUND COMPENSATION BEGINNING APRIL 15, 1997 SOLELY ON THE BASIS OF THE WAIVER ORDER

Qwest's claim that the "did not rely" on the Waiver Order borders on the ludicrous. Under the First Payphone Order ¶127 and Reconsideration Order ¶¶131 and 163 and confirmed in the Waiver Order ¶12, 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. On April 15, 1997, the PUC had

clearly not gone through this process as required by the implementing regulations and the Waiver Order and it is believed no state had reviewed their intrastate payphone rates by that date. The rates contained in Advice No. 1668 filed by Qwest in January 1997 and approved by the PUC April 1, 1997 could not meet the test as Qwest admitted that it and the other RBOCs did not know such rates had to be NST compliant. As shown in the minutes of the PUC meeting at which these rates were approved, there is no discussion of whether such rates are NST compliant. Patrick Ex. 17 at p. 9.

The fact that NST compliance was not considered when Advice No. 1668 was reviewed by the PUC is further demonstrated by the lengthy discussion in Order No. 01-810 of whether the PAL tariffs as agreed to be reduced by Qwest, including those reflected in Advice No. 1668, were NST compliant when the final rates were established in Order No. 01-810. When the PUC process was finally completed those rates were determined to be non NST compliant rates that were higher than NST compliant rates. Without the Waiver Order, Qwest could not have received DAC in Oregon or any where else beginning April 15, 1997 because the PUC did not complete its rate evaluation (albeit erroneously) until the issuance Order No. 01-810 in 2001. Nonetheless, Qwest was receiving DAC from Oregon beginning April 15, 1997. Only in reliance on the Waiver Order could it legally collect DAC. A reliance it admitted in its letter to the interexchange carriers seeking payment of DAC. See Patrick Ex. 17 at p. 17

VII. REFUNDS ARE FOR THE ENTIRE PERIOD OF THE OVERCHARGE AND NOT JUST FOR 45 DAYS

The argument that refunds were only to be paid for 45 days even if Qwest relied on the Waiver Order is even more fanciful than the previous argument that it did not rely on the Waiver Order. 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 (45 days to submit compliant rates if previously filed rates were not compliant and 15 days for the FCC to act). Under this theory, Qwest could collect DAC from April 15, 1997 forward without any termination and would be entitled to keep the illegal overcharges it received for over six years and only have an obligation to refund 45 days of these illegal charges. It simply is ridiculous for Qwest to ask the PUC to take the position that the FCC would allow the passage of the 45 days to result in the nullification of a refund obligation by continued noncompliance. No party would ever comply if the noncompliance results in a limitation of liability. Besides flying in the face of the plain language of the Waiver Order, it has another fundamental problem. No FCC waiver was granted from the obligation to have NST compliant rates charged beginning April 15, 1997. Any charges in excess of those rates is a violation of Sections 276, 201 and 202 of the Act. Not only did the FCC not purport to waive such compliance, the FCC would not have the authority to effectively repeal the express provisions of Section 276 that its provisions became effective when the implementing regulations became effective, which was April 15, 1997.

VIII. THE WAIVER ORDER CLAIM IS NOT BARRED BY THE STATUTE OF LIMITATIONS

Qwest claims that the statute of limitations on the Waiver Order refund claim began to run in April 1997. However, 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. In Oregon, that did not happen until November 15, 2007. Complainants were involved in challenging these rates in the Rate Case in which they intervened in 1996, prior to the effective date of the 1996 Act. It was the efforts of Complainants that led to the overturning of the unlawful rates Qwest had been

charging since April 15, 1997 but always maintained were in compliance with federal law. Qwest maintained their compliance with federal law while consistently refusing to provide the cost data they are required to provide by federal law to support their assertion. Once that data was provided as it was ultimately by order of the Oregon Court of Appeals, the non compliant nature of the prior higher rates became readily apparent. This data was not provided until well after the Oregon Court of Appeals decision in 2004 sometime in 2006. The concealing of this data that was in the exclusive possession of Qwest alone would require tolling of the statute of limitations. As this is a fact intense issue, summary judgment in favor of Qwest is precluded.

In order for a claim to accrue, you must be able to enforce the claim. *United States v. One 1961 Red Chevrolet Impala Sedan*, 457 F.2d 1353 (5th Cir. 1972) and particularly *Hartford Life Insurance Co., v. Title Guarantee*, 520 F.2d 1170 (D.C. Cir. 1975). In *One Red Chevrolet, supra*, the court held that where there was no reasonable possibility of successfully pursuing a claim until there was a change in the law, the claim did not arise until the law was changed. Thus, the claim did not arise when the property in question was forfeited but when the Supreme Court made the change in the law that permitted the claim.

The court pointed out that the claim does not always accrue at the time of wrong, citing *Cooper v. United States*, 442 F.2d 908 (7th Cir. 1971). In *Hodge v. Service Machine Company*, 438 F.2d 347 (6th Cir. 1971) the court stated "A cause of action accrues when a suit may be maintained upon it. Black's Law Dictionary 37 (4th ed. 1951). A cause of action does not exist until all its elements coalesce. In civil actions for damages, two elements must coalesce before a cause of action can exist: (a) a breach of some legally recognized duty owed by the defendant to the plaintiff; (b) which causes the plaintiff some legally cognizable damage."

Hodge, supra at p. 349. The product liability claim at issue in that case did not arise or accrue until all the elements of the claim coalesced. This meant the claim did not accrue when the defective product was purchased but when the injury was sustained because there was no legally cognizable damage on the date of sale. See also *Mack Trucks, Incorporated v. Bendix-Westinghouse Automotive Air Brake Company*, 372 F.2d 18 (3d Cir. 1966) for the well known proposition that "the statute begins to run when the cause of action arises, as determined by the occurrence of the final significant event necessary to make the claim suable." *Mack Truck, supra* at p. 20.

Applying the foregoing standards, a claim that plaintiffs were overcharged for Oregon PAL tariffs does not accrue until it can be shown that the rate being charged is unlawful. That cannot be known until the lawful rate is finally established. Then and only then could the existing rate be compared against the lawful rate and shown to be lower than the tariffs previously in place. 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,* In Oregon that occurred on November 15, 2007.

The fact that the claims in question could not arise until after November 15, 2007 is demonstrated by hypothetically assuming that Plaintiffs could prove to the PUC on June 1, 1997 the facts that the Court of Appeals found, to wit, that (1) Qwest PAL rates included rate elements that were prohibited from being considered by Section 276 and Payphone Orders, in this case the rate elements were certain costs, and (2) the PUC had not obtained and considered sufficient cost

data to determine an NST compliant CustomNet tariff under Section 276 and the Payphone Orders. As will be shown below, not only could damages not be determined but whether Qwest had *any* liability for overcharges could not be found.

One would assume that by eliminating the improper rate elements, the final rates would have to be lower than the rates developed with the prohibited rate elements. However, it is well established that elimination of a rate element does not necessarily mean the final rate will be reduced. This is demonstrated by an order issued by the PUC, PUC Order No. 08-487 issued in the case of *In the Matter of the Application of Portland General Electric Company for an Investigation the Least Cost Plan Retirement*, et al, PUC Docket No. DR 10, UE 88 & UM 989 dated September 30, 2008. The PUC had to develop rates on remand consistent with the Oregon Court of Appeals determination that in setting rates that had been reversed because of the improper inclusion of a rate of return for a large investment. In redeveloping the rates without the inclusion of the improper rate of return element, the PUC said the following about the rate making process.

> It may *seem* logical to conclude that the inclusion of an improper *rate element* necessarily results in unlawful *rates*. But such a conclusion is contrary to the well-established principle that it is the legality of the end result of the ratemaking process, and not the legality of each calculation or import used doing that process that controls: PUC Order No. 08-487 at page 22

The PUC then cited the following cases as support for this proposition: *Federal Power Commission v. Hope Natural Gas Co.*,320 U.S. 591, 602, 64 S.Ct. 281, 88 L.Ed. 333 (1944); *Duquesne Light Co. v. Barasch*, 488 U. S. 299, 314, 109 S. Ct. 609, 102 L.Ed.2d 646 (1989); *Valley & Selitz, R. Co. v. Flagg*, 195 Oregon 683, 699, 247 P.2d 639 (1952).

In that case, the PUC determined that even after eliminating the rate of return as a rate element to be taken into account, and redetermining what the rates would have been had this element not been included, the PUC determined that the rates would have been *higher* than the rates the Oregon Court of Appeals reversed and therefore the rates established using the improper rate element were nonetheless just and reasonable and no refund with respect to such rates was required. See Conclusion at p. 79 of Order No. 08-487.

Thus, even if Plaintiffs were able to prove all the things the Court of Appeals found in reversing the unlawful rates, no court could have entered a judgment of liability against Qwest because until the PUC determined what the final NST compliant rates were, there was no assurance that the final compliant rates would be less than the rates previously charged as was precisely the case in Order No. 08-487. For this reason, without the determination of the NST compliant rate, the threshold question of is there an overcharge cannot be determined. Not just to what degree there has been an overcharge but the *fact* of whether or not there was an unlawful rate is based on the final rate determination.

The foregoing discussion demonstrates that Plaintiffs' claims did not begin to accrue on or after April 15, 1997 or at any time prior to November 15, 2007 for statute of limitations purposes because before that time Complainants had no claim on which they could recover because there was no enforceable claim. Qwest claims that the statute of limitations began to run at various times prior to November 15, 2007[13]. For the reasons discussed above, this

13 Complainants submit the statute does not begin to run until a reasonable time after expiration of the time to appeal or reconsider Order No. 07-497 and the time Qwest could calculate and pay refunds. However for ease of reference and not by way of concession, we will refer to November 15, 2007 as the latest date to which the statute of limitations would be tolled.

assertion is clearly wrong. However, assuming, *arguendo*, that Plaintiffs' claims arose at various points of time prior to November 15, 2007, the statute of limitations was tolled until no earlier than November 15, 2007 at the issuance of the final rate order in the Rate Case.

NPCC intervened in the Rate Case to challenge the rates in question in the only proceeding that was determining what the compliant rates were. In September 2000, Qwest admitted the PAL rates were illegally high and agreed to temporary bill credits to effectively reduce those rates going forward. In the Rate Case, there was no question that NPCC was challenging Qwest rates and seeking higher refunds. It filed this case within less than a year of the Qwest admission. While this case, *arguendo*, may be in the wrong tribunal, it still serves to toll the statute of limitations from the date it was filed which we contend was the Rate Case. The PUC ordered refunds in that case and its jurisdiction to set the rates in that proceeding and to order refunds has not been challenged. Before the Rate Case terminated, NPCC filed this case. If this is the wrong tribunal, it was not clearly so at the time the suit was filed and therefore the statute is further tolled until a final non appealable order made that clear.

It is well established that where suit is filed in a forum which does not have jurisdiction of the claim, the statute of limitations is tolled upon the filing of the case unless it is clear that the forum in question did not have subject matter jurisdiction of the claim. *Shofer v. Hack Co.*, 970 F.2d 1316 (4th Cir. 1992), 118 ALR Fed. 717; to same effect *Miller v. International Telephone and Telegraph Corp.*, 755 F.2d 20 (2nd Cir. 1985), cert. denied 106 S.Ct. 148, 474 U.S. 851, 88 L.Ed.2d 122, rehearing denied 106 S.Ct. 552, 474 U.S. 1015, 88 L.Ed.2d 479; *Silverberg v. Thomson McKinnon Securities, Inc.*, 787 F.2d 1079 (6th Cir. 1986); *Glavor v.*

Shearson Lehman Hutton, Inc., 879 F.Supp. 1028 (N.D.Cal. 1994) aff'd 89 F.3d 845 (9th Cir. 1996).

At the time this case was filed, the Ninth Circuit decision in *Coeur d'Alene, supra*, had not been rendered. That decision was not rendered for about a year after the case was filed assuming that *Coeur d'Alene, supra,* made it clear that the PUC did not have subject matter jurisdiction. Although it may not have subject matter jurisdiction, the PUC clearly had the delegated duty to set the intrastate payphone rate. Although Complainants' counsel have concluded that the PUC does not have such jurisdiction, it is clear that Qwest is taking the opposite view and has never challenged the subject matter jurisdiction of the PUC.

IX. SUMMARY

For the reasons set forth above, Qwest's motion for summary judgment should be denied in all respects.

Dated: July 29, 2010

Respectfully submitted,

/s Franklin G. Patrick
Franklin G. Patrick, OSB ID Number 760228

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc. Complainants, v. Qwest Corporation, Respondent.	DOCKET NO. DR 26/UC 600 DECLARATION IN SUPPORT OF NPCC RESPONSE TO QWEST SUMMARY JUDGEMENT MOTION

The undersigned, Frank G. Patrick does submit this Declaration in Support of the Response of the Complainants (NPCC et al) to the Qwest Motion Motion for Summary Judgment. I make this declaration of my own personal knowledge of the facts below recited:

1. I am counsel for the Complainants.

2. The attached Exhibits are accurate copies and excerpts from the referenced documents on information and belief, and have been retrieved from the dockets referenced at the PUC the FCC and the Courts respectively as follows:

FRANK G. PATRICK, OSB 76022
PO Box 231119 PORTLAND, OR 97281
Phone (503) 245-2828 Fax (503) 245-1448

Exhibit 4 FCC Order on Reconsideration

Exhibit 9 PUC Order No. 06-515

Exhibit 11 PUC Order No. 07-497

Exhibit 12 Waiver Order dated April 15, 1997

Exhibit 14 Affidavit of Sheila Harris with exhibits submitted by Qwest on NPCC motion and Qwest cross motion for summary judgment in the Refund Case

Exhibit 17 Affidavit of Lawrence Reichman with exhibits submitted by Qwest on NPCC motion and Qwest cross motion for summary judgment in the Refund Case

Exhibit 20 Waiver Request Letter dated April 10, 1997 addressed to the FCC

Exhibit 22 FCC Clarification Order

3. The Declaration of Charles W. Jones is that which has been submitted to the Federal Court in consideration of the matter proceeding in that case.

4. The Complainants rely on the entire record of this proceeding, DR 26 in support of its response.

"I hereby declare that the above statement is true to the best of my knowledge and belief, and that I understand it is made for use as evidence in a PUC (court) proceeding and is subject to penalty for perjury."

DATED this JULY 29, 2010.

/s/
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