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April 6, 2010

Public Utility Commission of Oregon

Attn: Filing Center

550 Capitol St. NE, Ste. 215

PO Box 2148

Salem, OR 97308-2148

To: Hon. Allan Arlow

Public Utility Commission of Oregon

RE: NORTHWEST PUBLIC COMMUNICATIONS COUNCIL V. QWEST CORP.
Docket DR 26/UC600
Motion to Reconsider
Amended Memorandum to that Motion Filed on April 2, 2010

Dear Judge Arlow,

Please find enclosed an Amended 4.10.10 Memorandum in Support of Consolidated Motion to Reconsider and To Stay.

The original Memorandum had an error on page 15. That error identified Exhibit C as the Concise Statement of Material Facts. That has been corrected to reflect the e-filings designated Exhibit C correctly as the US DC Memorandum in Support of Plaintiffs' SJM.

Exhibit H, is in fact as e-filed the US DC SJM Concise Statement of Facts. Exhibit I, as tabbed in the hard copies filed, are those Exhibits 1 – 25 attached to the Declaration of Frank G. Patrick which was e-filed as Ex. F with the Listing as Ex. G.

I did not note until this morning that, the e-filings detailed two Ex. "E". In fact the second Ex E should have been designated Exhibit F. Sorry for the typo. The hard copy was correctly filed.

I apologize to you, counsel and the PUC Filing Center staff for the errors.

I would appreciate the opportunity to conference call with you and Mr. Reichman regarding the "renewed" motion to Bifurcate and Stay as the Alternative anticipated by the Motion Stay in the Consolidated Motion, as we have not able to reach an agreement as to how that earlier motion procedurally could be renewed. I have done so at this moment by referring to it. However, I will be happy to simply refile it. It is about 200 pages long and it seems to be redundant since you referenced nothing in your Prehearing Ruling and Report.

If you would advise me of how you would like that accomplished I will so comply.

Sincerely,

/s/

Frank G. Patrick
Attorney at Law

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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

AMENDED 4.6.10
MEMORANDUM IN SUPPORT OF
COMPLAINANTS' CONSOLIDATED
MOTIONS

TO RECONSIDER AND VACATE THE
COMMISSION'S ORDER NO. 10-027
DENYING THE COMPLAINANTS'
AMENDED COMPLAINTS

AND TO STAY PROCEEDINGS
PENDING DIRECTION FROM THE
UNITED STATES DISTRICT COURT IN
PORTLAND OREGON

TO: Oregon Public Utility Commission

AND TO: All Parties

MEMORANDUM

In a motion (application) for reconsideration there are two controlling statutory and
administrative provisions. The Oregon Public Utilities Commission's Orders are subject to the
provisions of ORS 756.561 et seq and OAR 860-014-0095 et seq. This memorandum sets out
the compliance with those two standards.

1 A. In an application for reconsideration (rehearing) under OAR 860-014-0095(2):

2 (2) The application shall specify:

3 (a) The portion of the challenged order which the applicant contends is erroneous
or incomplete;

4 (b) The portion of the record, laws, rules, or policy of the Commission relied
upon to support the application;

5 (c) The change in the order which the Commission is requested to make;

6 (d) How the applicant's requested changes in the order will alter the outcome;
and

7 (e) One or more of the grounds for rehearing or reconsideration set forth under
section (3) of this rule.

8 **DISCUSSION -0095(2)**

9 Movant respectfully submits that the portion of the Order in error in that:

10 **“(a) The portion of the challenged order which the applicant contends is erroneous or**
11 **incomplete is”:**

12 1. That portion which denies the right to an Amendment of the Complaint which limits
13 the grounds for relief plead therein by excluding or limiting the right of the Complainants to
14 seek all of its relief as provided by 47 U.S.C. §§201, 202, 206, 207 and 276 and the orders of
15 the FCC implementing that law referred to herein collectively as The Act, specifically
16 paragraphs IV. 1. B, C, and D and 2 of Order No. 10-027:

17 a. Order ¶B strikes the references to “CustomNet” to deny any consideration of
18 those claims regardless of Federal law recited to the contrary and clear notice to the Defendant
19 as established by the Court of Appeals Remand in November 2004:
20

21 “The PUC approved Qwest's proposed rate for CustomNet
22 without examining Qwest's cost of providing the service.
23 Although a majority of Qwest's lines that have CustomNet
24 service are PALs, the service is available for other lines as well,
and 37 percent of lines with CustomNet serve customers other
25 than PSPs.” Id. ¶17
26

1 b. Order ¶C restricts the claim even as initially plead¹, too narrowly, restrictively
2 defining Payphone Services to just Public Access Line services. That is inconsistent with the
3 language of the Court of Appeals remand, which refers to “payphone services” as all services
4 the a PSP would pay Qwest “...for the use of a payphone access line (PAL).”²

5 “In its final order, the PUC adopted Qwest's proposal for the rates
6 that a payphone service provider (PSP), such as appellant's
7 members, will pay for the use of a payphone access line (PAL).
8 It agreed with Qwest that those rates should be essentially the
9 same as the rates that Qwest charges for a business phone line.
10 As well as paying for a PAL, a PSP will also need to use Qwest's
11 CustomNet call screening service, which permits a PSP to avoid
12 fraudulent use of the payphone. Id. ¶17 Emphasis added.²

13 c. Order ¶D strikes “All references to docket UT 125 and the calculation of any
14 refund claims thereunder are stricken from the First Amended Complaint.” which is the
15 authority established by the PUC which must necessarily be the basis for the calculation of any
16 damages or refunds under the 1996 Act, the Waiver Order or any other authority³ as UT 125
17 anticipated. The language arguably defeats any Complaint in any form that could submitted to
18 claim damages under §276 et seq of the Act, under Oregon Law or any other order that requires
19 the comparison of the rates in Order 07-497 of UT 125 which is the necessary predicate for any
20 claim of a PSP. The provision of Order 10-027 simply prejudices any claim at the PUC under
21 the Act and violates the 1996 Act and Oregon law.

22 “Appellant challenges the PUC's final order in Docket UT-125
23 and its order on reconsideration of the payphone aspects of that
24 final order. Id. ¶16.

25 ¹ See Initial Complaint in this proceeding filed May 18, 2001 at ¶¶ 7,9,10,11,19 & Prayer a and c(1,2 &
26 4) for a showing that PAL rates are referred to in the plural and cannot be just the for the dial tone but
must include consistent with the NST and the First Payphone Order ¶ 149, CustomNet et al.

² For a showing that any thought that the fraud protection services were separable from the Payphone
Access Lines, is simply specious. 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) (First Payphone Order) ¶149

³ See the PUC Staff response by Jason Jones DOJ January 2005 response where it is made clear the
relationship of UT 125 and DR26/UC 600. Qwest could not possible contend that it did not entertain the
“possibility” of a claim for CustomNet.

1 Appellant does not challenge the rates for PALs and CustomNet
2 under Oregon law. Rather, it argues that federal law requires the
3 PUC to use a different rate-setting method for payphone services
instead of the traditional method that the PUC used." Ibid. ¶18

4 d. Order paragraph IV 2 denies the filing of the second amended complaint
5 which contains all the Oregon law claims that arise from the very same unlawful overcharges
6 that serve as the basis for the refund claim under the Waiver Order. These claims arise under
7 Oregon law, including Orders issued by the PUC ordering refunds to PSPs which were
8 erroneously calculated on the higher non-NST compliant tariffs. They are all based on Qwest
9 charging the very unlawful rates on which the original complaint was based. Thus, there is a
10 clear nexus between the additional claims and the claims in the original complaint.

11 **(b) The portion of the record, laws, rules, or policy of the Commission relied upon to**
12 **support the application**

13
14 Specifically the Commission must rely on the Act and the Implementing Orders. The
15 first reliance must be on the Remand, for it is under that Order that the PUC has been found to
16 be in error in its compliance with the Act. It is to that Remand that the Commission is bound.

17 **(c) The change in the order which the Commission is requested to make;**

18 The Commission should allow the Complainants Second Amended
19 Complaint and then provide to the Defendants the time it needs to make its
20 defense as pointed out in the precautionary motion is the remedy that PUC
21 should employ not the striking or restricting of the Complainants relief. ORS
22 756.500(4), is not to deny the amendment but rather to avoid any prejudice by
23 providing the opposing party the right to fully investigate the matters plead so
24 that it might fully respond to the Amended Complaint. The standard is not that
25 the amendment should be denied, but rather that it should be allowed and the
26 opposing party be granted time to fully respond.

1
2 **“(d) How the applicant's requested changes in the order will alter the
outcome;”**

3 The Order as it now stands virtually makes impossible the Commission
4 to do its role in “investigating” a consumer complaint to arrive at a decision that
5 is in the Public and the Consumer’s interest and rights because it too narrowly
6 allows the Complainants to plead their claims. Accordingly the outcome of this
7 proceeding will necessarily result in an Appeal and Movants believe that the
8 error is reversible in a Judicial review.
9

10 Resolving this could at least remove the Complainants motivation to appeal.

11 Qwest the entity the subject of UT 125 and the Complainant, was an intervenor from
12 early in that matter. Both knew that UT 125 was to form the basis of the Complaint in DR
13 26/UC 600 just as did the DOJ representative. That proceeding was to determine Compliance
14 with the FCC Orders and its correction under the Remand the basis for new rates for all of the
15 services that PSPs purchased from Qwest. The Action of the Commission apparently is based
16 on its earlier Order denying the right of the Complainant of record at that time known as the
17 NPCC to amend the Complaint to add CustomNet overcharge claims.
18

19 The distinction between the Complainants now is that the Commission found and
20 Ordered that the addition of the twelve Plaintiffs now named, did not present any prejudice to
21 Qwest in Order 09-155. That an Amended Complaint is rejected once is however, no basis for
22 the Commission to reject a later amended complaint. Apparently the Commission has regressed
23 to its earlier position in UT 125, but now repudiated by the Court of Appeals, that the PUC is
24 not obligated to follow the 1996 Act. Specifically, that Court found that federal law had
25 preempted the state’s authority regarding payphones (PSP rates). *“The District of Columbia*
26 *Circuit Court of Appeals treats the FCC's orders under section 276 as binding on every state,*

1 *and so do we.*⁴

2 **“(e) One or more of the grounds for rehearing or reconsideration set forth**
3 **under section (3) of this rule.”**

4 **DISCUSSION -0095(3)**

5
6 The grounds are set forth below:

7 B. The standard of review in this matter rests on OAR 860-014-0095(3)(c) and (d)
8 which in relevant parts provide:

9 **“(3) The Commission may grant an application for rehearing or**
10 **reconsideration if the applicant shows that there is:**

11 **(c) An error of law or fact in the order which is essential to the**
12 **decision; or**

13 **(d) Good cause for further examination of a matter essential to the**
14 **decision.”**

15 **(c) An error of law or fact:**

16 Complainants contend that the Commission in formulating its Order failed to consider
17 essential authority of the law of the Remand Order by the Court of Appeals Id. of UT 125,
18 which established the essential elements of the claims, and failed to consider the law and
19 authority previously submitted to the Commission in its proceedings to arrive at 09-155 and 10-
20 027. While this Motion is not, as contended by the Commission, a collateral attack on its earlier
21 order, the basis for this Motion is the same with the exception that the **newly added**
22 Complainants have joined in this motion. Those newly added parties do not contend that they
23 are not bound by the Orders of the Commission, but that the Commission is required to view
24 their application for an amended Complaint based on their submission. It is clear that the
25 Commission failed to consider that the denial of the amended complaint is not solely controlled
26 by the authority recited in the briefs of both counsel.

⁴ Id. ¶ 25 and 26.

1 The Commission failed to consider the law of the long standing rule of allowing an
2 amended complaint, which also relates back to the original filing, was not considered by the
3 Commission in the earlier consideration of the Motion to amend nor in the Motion for the
4 Second Amended Complaint. That error is that the Commission had not considered the
5 governing principle of the "nexus" between the proposed amended complaint to the initial one.
6 A review of the discussion of ORCP 23 C, in *Evans v. Salem Hospital*, 83 Or.App. 23, 730
7 P.2d 562 (Or.App. 12/17/1986, Rev. den. 303 Or. 331, 736 P.2d 565 (Or. 04/21/1987), stands
8 to this day to recite the key elements of what the standard for amendment are; "...*the conduct,*
9 *occurrence or transaction originally pleaded....*"

11 "Our subsequent opinions in *Parker v. May*, (omitting citations), make clear that
12 there can be relation back under *ORCP 23C* when, as here, the new complaint
13 substitutes or adds new plaintiffs. (Emphasis added) Indeed, the tests that
14 determine whether the later claim relates back do not differ when a new plaintiff
15 is involved, although it may be more likely in the abstract that a new plaintiff's
16 claim will be more remote from the events alleged in the earlier complaint than a
17 previously named plaintiff's and correspondingly less likely to satisfy the tests.
18 We summarized the nature of the inquiry in *Sizemore*:

16 "The focus of *ORCP 23C* is not on whether the amended pleading asserts the
17 same claim as did the previous pleading, but on whether there was '*notice to a*
18 *party by the original pleading that the conduct described therein is claimed to*
19 *have given rise to a claim * * **' [Citing *Parker v. May*, supra, 70 Or App at
20 719]." 79 Or App at 356.

19 "In evaluating whether the new claims related back to the original pleading, we
20 synthesized from earlier cases, including *Welch*, the principle that the relation-
21 back inquiry turns "*on whether there is a similarity or relationship between the*
22 *original and new claims sufficient to put the defendant on notice that the specific*
23 *claim which is later asserted could arise out of the conduct, occurrence or*
24 *transaction originally pleaded.*" Emphasis in original). We concluded that a new
25 claim cannot relate back to an earlier pleading unless there is at least enough of a
26 nexus between the claims for the defendant to have been able to have discerned
from the first that the existence of the second was a possibility." *Id.* at 31-32.
(Emphasis added.)

26 Just those two issues are essential to a correct application of the law in the
reconsideration of its Order 10-027. It is submitted that they serve as the basis for further

1 examination of the essential nature of these items.

2 **(d) Good Cause:**

3 This proceeding, consolidated as DR 26 and UC 600 was initiated by the filing of the
4 initial Complaint in the PUC dockets of the Complainants⁵ pleading for Declaratory Relief and
5 for a Refund respectively. While the gravaman of the rejected Second Amended Complaint is
6 for relief of the violations the 1996 Telecommunications Act, the FCC rules and regulations and
7 orders which implemented the Act, the Commission appears to be disregarding the law of the
8 case; that both the Commission and Qwest were engaged in violations of the Federal
9 Telecommunications Act of 1996 and ordered to repent and sin no more, but they did, they have
10 and they continue. There is no way to review the history of this case than to ask how did the
11 Commission intend to calculate and order the payments of the damages under § 276 of the 1996
12 Act once the Commission issued its Order establishing the "effective NST" compliant rates as
13 required by the Remand Order, §276, the Waiver Order or the Act? Has the Commission just
14 been going through the motions through which Qwest has put it, but really had no plan to
15 enforce its orders or those of the Act once it finished UT 125. That is what the Order 10-027
16 appears to intend, to simply end the case with no real application of the eleven plus years of UT
17 125.
18
19

20 The need for the Amended complaint was that the case law and orders of the FCC
21 since the original filing of the Complaint had clarified several aspects of the Act itself and their
22 application to the PUC's proceedings, but no enforcement action could be taken at even the
23 FCC, prior to the completion of the FCC delegated task to the state commissions to establish the
24 NST compliant rates. It took the Commission from May of 1997 until November 2007 to finish
25
26

⁵ Complainants consist of the NPCC formerly the NWPA, and the twelve individual claimants that were initially represented by the NPCC.

1 that delegated task. An amended complaint taking into account the changes in the case law and
2 the Remand by the Oregon Court of Appeals should be allowed to be formulated by Plaintiff to
3 become the basis for any further proceedings which of course would have to meet the nexus and
4 notice test to relate to the original complaint. In the event there is an objection to the Amended
5 Complaint the appropriate procedure is to apply the Oregon Rules of Civil Procedure and allow
6 the opposing party to challenge the Complaint once it is filed but not before.
7

8 The addition of the Complainants now moving and named herein was based on PUC
9 Order Nos. 09-155 and 10-027 dated 5/4/2009 and 2/1/2010 respectively. The source of all the
10 claims for relief pled in the original complaint on file and as filed in both Motions to Amend⁶,
11 arise out of the 1996 Act and the requirements that it imposed on Qwest and the Oregon
12 Commission and the final Order of the PUC in its general rate docket UT 125. That Order 07-
13 497 is the final act of compliance by Qwest and the PUC under the Remand from the Oregon
14 Court of Appeals; dated November 10, 2004 which required compliance with the Federal Act.
15 The Remand makes it clear that the PUC had to apply federal law of the Act in UT 125, which
16 it had not done, and that the rates, including CustomNet, had to be set according to the Act's
17 requirements.
18

19 ARGUMENT

20 The action of the PUC in its Order 10-027 clearly does not comply with Oregon law
21 regarding an Amendment of a Complaint. Further, the Commission acted on the opposing
22 party's attacks against the proffered amended complaint, by making an evidentiary ruling
23 without the basis of any evidence before it. The Commission accepted as true the allegations of
24 Qwest without the benefit of even an affidavit or declaration to support its contentions that:

- 25 1) there was no merit to the proposed claim for CustomNet damages because it was
26

⁶ PUC Docket Item dated: 2/26/2009 NPCC Motion for Leave to File Amended Complaint.

1 time barred. The commission took as true statements of fact Qwest's arguments in opposition
2 to Complainants' motion to amend that would have required an evidentiary analysis and
3 finding, and without the benefit of any evidence as to the facts, much less a review of them to
4 make such a determination. The error is understandable but none the less clear; attacking the
5 Complaint to prevent its filing is preclusive of the standards of pleading and procedural due
6 process.

7
8 2) The commission took as probative Qwest's claim of prejudice with nothing in the
9 record to support that claim.

10 3) Finally the Commission failed to see that the appropriate standard of review to the
11 allowance of the filing of an Amended Complaint is whether or not the opposing party had
12 notice as to the "possibility" of the claims raised as opposed to weighing their merits.

13 3. The standard is to allow the pleading and then after it has been pled the opposing
14 party is entitled to move against the pleading. That did not happen. The error that was
15 perpetuated was the Commission's view that the Second Amended Complaint, which was
16 accompanied with a precautionary Motion, was denied based on its earlier ruling in a filing by
17 the NPCC the "representative" raising the Complaint as opposed to movants herein.

18
19 4. There is no basis for the Commission to simply deny the filing of an Amended
20 Complaint in Order No. 10-027 based on its prejudgment as it did in Order No. 09-155. The
21 perpetuation of the error by denying a second amendment, based on the same error earlier made
22 by the Commission should be corrected now rather than later. The Complainants need merely
23 to show that its motion to Reconsider is based on the Commission's allowing of Qwest to
24 continue an unlawful practice to give rise to the grant of the motion. It is the contention of the
25 Complainants that Qwest engaged in the charging of unlawful rates to the PSPs in Oregon, by
26 persuading the PUC that its rates were first reasonable, (resolved by Order No. 01-810 in UT

1 125) and then NST compliant, as they were proposed to the PUC in early 1997 and approved at
2 a hearing on April 1, 1997. But in fact they were judicially determined to be unlawful. The
3 Court of Appeals (and the First Payphone Order Id.) addressed all the **services** purchased by the
4 PSPs from Qwest not just the "dial tone" provided on a PAL. Such purchase was based on
5 interim rates that were in fact discriminatory under both Federal and State law. The
6 withholding of the funds violates not only Federal law but for the PUC to refuse to allow an
7 amendment to the Complaint and a sufficient hearing on the merits of all its claims as required
8 by the Act and all its Orders.
9

10 5. There has been no showing of any fact of prejudice by Qwest. The proceedings
11 are devoid of any sworn statement of prejudice. In fact, the Commission found the opposite in
12 its earlier order 09-155, allowing the additional named Plaintiffs because Qwest could not be
13 prejudiced thereby. Mere allegations that are naked of any facts or declaration supporting those
14 facts in the light of the Commissions expansive action to prejudge the merit of the claim
15 without the benefit of the examination of those claims is simply wrong procedurally.
16

17 6. The Commission has made a decision in the application of Federal Case law (the
18 Davel Case) that would have to be based on an evidentiary consideration. It has made this
19 evidentiary determination in both of its Orders denying the proffered amendments without
20 affording a factual examination for considering the merits of that claim either under a standard
21 for a motion for summary judgment or a motion to dismiss under the Oregon Rules of Civil
22 Procedure. Under the standards of those two motions, there is a factual question which would
23 have to be considered in the former, requiring an examination of evidence which would prohibit
24 the granting of such a motion. In the latter the complaint would have to be viewed in its most
25 favorable light which would be to allow the complaint to stand and be considered on its merits
26 in a trial. The standard for allowing an amended complaint is accordingly much less stringent

1 than either of the two standards to which that Complaint would have to be evaluated by a court.
2 The inequity of prejudging the merits of the proffered Amended Complaint was pointed out by
3 counsel for NPCC in its Reply March 31, 2009 in DR26/UC 600.

4 MOTION FOR STAY

5 Complainants are separately requesting a Stay of all proceedings or in the
6 Alternative that portion of the proceedings in DR26/UC600 which Complainants contend herein
7 are **outside the jurisdiction of the PUC**; those items which relate to claims other than the
8 claims denominated the OREGON REFUND in the Fourth Claim for Relief of the US DC First
9 Amended Complaint incorporated herewith.
10

11 Movant hereby renews as though originally filed this date, as the Alternative
12 Motion herein to the Consolidated Motion to Bifurcate and to Partially Stay previously filed as
13 PUC Docket Item Dated 1/27/2010. No action was taken to strike nor respond, nor was any
14 expected because at the Prehearing Conference held on 3/11/2010 the status of that Motion to
15 Bifurcate, was considered by ALJ Arlow as withdrawn by Complainants. Because
16 Complainants have filed essentially the same allegations of the Second Amended Complaint, in
17 an action in the US District Court of Oregon Portland Division filed herewith as **Exhibit A**,
18 Complainants have filed this Motion to Reconsider along with this Motion to Stay in the
19 Alternative, to provide for judicial economy. The PUC is given the Alternative to Stay the
20 entire proceedings or to proceed on just the Oregon Refund, (the Fourth Claim of the US DC
21 Complaint) which the PUC has jurisdiction to complete. That claim is essentially for the
22 enforcement of the Commission's
23

24 That request is now made based on the provision of ORS 183.482(3)(a)(A) and (B)
25 its Order 06-229 in ARB 671.
26

The standard for the grant of that request is: "a showing of irreparable injury to the

1 Petitioner and a showing of “colorable claim of error in the Order.” The declaration of Frank
2 G. Patrick filed herewith and the following recitals provide a basis for the two requirements. As
3 Order 06-229 establishes,
4 “...the phrase “a colorable claim of error” as appearing in the Oregon statutes relating to agency
5 actions has been recently defined by the Supreme Court as follows: ‘Here, the ordinary
6 meaning of the term “colorable” is “seemingly valid and genuine: having an appearance of
7 truth, right or justice: PLAUSIBLE[.]” Id. at p.1.

9 Complainant submits, just as in that case that it has made the required showing of
10 “...a substantial non-frivolous plausible argument that the Commission has committed legal
11 error that will result in its order being set aside.” Id. The Commission should simply Stay
12 further proceedings in DR 26/UC600 as requested.

13 1. The Complainants have continuously litigated this matter as an intervenor since
14 September 1996, an Appellant and a Complainant since 2001. It has vigorously and relentlessly
15 guarded its rights and kept both the PUC and Qwest apprised of its claims and the basis
16 therefore. Despite such efforts Qwest has managed to protract this matter so that it could not be
17 heard at the PUC prior to the establishment of Order No. 07-497 in UT 125. That order became
18 the predicate to determine if there was a violation of the Act, i.e. whether the new NST
19 compliant rates, once they were beyond appeal or withdrawal, were in fact lower than the
20 earlier rates that had already been determined to be not NST compliant.

22 2. Once the rates were filed it was clear that the earlier rates created a violation of
23 the Act making Qwest subject to the damages under §276 et seq of the Act and its
24 implementing orders including the Waiver Order.

25 3. For the Commission to disallow the full pleading of all the damages under the
26 provisions of the Act and the PUC’s own orders would prevent the Complainant from

1 recovering all its damages arising from the same unlawful charges working an incredible
2 prejudice.

3 4. That the Commission does not have the jurisdiction to make any kind of
4 authoritative Order and findings under the Act, which jurisdiction is exclusively vested in either
5 the US District Court or the FCC, is clear and was established in the Ninth Circuit under *AT&T*
6 *Corporation v. Coeur D'Alene Tribe*, No. 99-35088 (9th Cir. 03/19/2002) starting at ¶44:
7

8 "Section 202 of the FCA [the 1996 Telecommunications Act]
articulates the chapter's antidiscriminatory purpose, whereby it is:

9
10 unlawful for any common carrier to make any unjust or
11 unreasonable discrimination in charges, practices, classifications,
12 regulations, facilities, or services for or in connection with like
communication service . . . or to subject any particular person,
class of persons, or locality to any undue or unreasonable
prejudice or disadvantage. 47 U.S.C. § 202.

13 In the event that a common carrier "shall omit to do any act,
14 matter, or thing in this chapter required to be done," 47 U.S.C. §
206 dictates that:

15 such common carrier shall be liable to the person or persons
16 injured thereby for the full amount of damages sustained in
17 consequence of any such violation . . . together with a reasonable
counsel or attorney's fee[.]

18 Section 207 of the Act then sets forth how a party may pursue
19 remedies for claimed injuries sustained under the preceding
sections. Specifically, 47 U.S.C. § 207 provides that:

20 [a]ny person claiming to be damaged by any common carrier
21 subject to the provisions of this chapter may either make
22 complaint to [the FCC] . . . or may bring suit for the recovery of
23 the damages for which such common carrier may be liable under
24 the provisions of this chapter, in any district court of the United
States of competent jurisdiction; but such person shall not have
the right to pursue both such remedies.

1 [4] While plaintiffs typically invoke § 207 in damages actions
2 alleging deviation from common carriers' filed rates, the provision
3 is equally applicable where a plaintiff claims a complete denial of
4 service in violation of § 201. The Supreme Court recently stressed
5 that the antidiscriminatory provisions of the FCA applied equally
6 to services and rates. See American Tel. and Tel. Co. v. Central
7 Office Tel., Inc., 524 U.S. 214, 223-225 (1998).

8 [5] By its express language, § 207 establishes concurrent
9 jurisdiction in the FCC and federal district courts only, leaving no
10 room for adjudication in any other forum -- be it state, tribal, or
11 otherwise. The Tribe had no recourse to its own courts for
12 vindication of its FCA-based claim and like any other plaintiff
13 could choose only between filing a complaint with the FCC or
14 suing AT&T in federal district court.

15 [6] Because exclusive jurisdiction rested in either of the two
16 statutorily-provided federal fora, the Tribal Court lacked
17 jurisdiction to entertain the Tribe's claim.”

18 Motion should be granted in all respects or in the alternative to Bifurcate and Stay
19 the proceedings as set forth in the Renewed Motion to Bifurcate and Stay, a renewal of that
20 motion filed with the PUC on January 27, 2010. That alternative to the Stay moved above,
21 requests a stay of these proceedings other than enforcement of the Commission's Orders as set
22 forth in the Motion to Bifurcate, and to determine all but the Oregon Refund as set forth in the
23 Amended Complaint and Motion for Summary Judgment and the USDC filings designated as:
24 Exhibit A – Amended Complaint Filed with the US District Court of Oregon Portland Div.
25 Exhibit B – Motion for Summary Judgment
26 Exhibit C – US DC Memorandum In Support of Plaintiffs' SJM
Exhibit D – Declaration of Randy Linderman
Exhibit E – Declaration of Charles W. Jones
Exhibit F – Declaration of Frank G. Patrick
Exhibit G – List of Exhibits attached to Declaration of Frank G. Patrick
attached and incorporated herewith as additional authority.

Exhibit H – US DC SJM Concise Statement of Facts

1 Exhibit I – Exhibits 1-25 Referenced in Exhibit F & G above

2 Movant hereby renews its Motion to Bifurcate its Proceedings by Renewal filed
3 herewith as the alternative to a full stay of proceedings.

4 There simply is no basis for the PUC to do other than Stay its proceedings and
5 await direction from the US District Court which has the exclusive and concurrent jurisdiction
6 with the FCC to determine any matter having to do with the enforcement of the 1996 Act other
7 than to set the rates by this Commission in compliance therewith.
8

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10 DATED this APRIL 6, 2010

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12 /S/
13 Frank G. Patrick, OSB 76022
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1 CERTIFICATE OF SERVICE

2 I, the undersigned below, hereby certify that I served the foregoing AMENDED
3 4.6.10 MEMORANDUM IN SUPPORT OF MOTION FOR RECONSIDERATION on:

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

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

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

19 by the following indicated method or methods:

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

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

_____ by handing/delivering true and correct copies thereof to the attorney or one of the
clerks at the above address, on the date set forth below;

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

23 DATED this APRIL 6, 2010

24 /S/
25 Frank G. Patrick, OSB 76022