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January 14, 2009

**VIA FEDERAL EXPRESS &
ELECTRONIC MAIL**

Public Utility Commission of Oregon
ATTN: Filing Center
550 Capitol Street NE, Suite 215
Post Office Box 2148
Salem, Oregon 97308-2148

Subject: Docket DR 26/UC 600

Dear Sir/Madam:

Enclosed, for filing, are an original and one copy of The Northwest Public Communications Council's Motion To Lift Order Holding Case In Abeyance in the above-referenced docket. If you have any questions, please contact the undersigned.

Very truly yours,



Brooks E. Harlow, P.C.

cc w/enc.: Mr. Lawrence Reichman
Mr. Jason Jones

BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON
DR 26/UC 600

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

**THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL'S
MOTION TO LIFT ORDER HOLDING CASE IN ABEYANCE**

January 14, 2009

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL'S MOTION TO LIFT
ORDER HOLDING CASE IN ABEYANCE - 1

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I. INTRODUCTION

On May 3, 2005, the Commission entered an order holding this case in abeyance (Order 05-208, "Abeyance Order") to await guidance from the FCC in its docket CC 96-128 ("FCC Payphone Docket"). The Northwest Public Communications Council ("NPCC")¹ respectfully moves the Commission to lift the Abeyance Order due to the lack of any visible progress by the FCC after almost four years of abeyance. Because the FCC failed to act under the Bush administration, the pending change of administration means that the FCC is unlikely to act anytime soon and they never act. The Abeyance Order, stated that the NPCC could ask the PUC to "revisit" the abeyance if the FCC failed to rule by the end of 2005, over three years ago. Understandably, NPCC has lost patience with the FCC.²

Although the FCC has failed to provide guidance, there is recent controlling federal law that clarifies Qwest's obligations under Section 276 of the Communications Act and should give the Commission more than a sufficient legal basis for determining the issues presented in this case.³ Accordingly, the NPCC requests an order lifting the abeyance. The Commission should promptly thereafter hold a scheduling conference to determine a briefing schedule to refile or update the pending cross-motions for summary judgment regarding liability. Additionally, with the case pending for almost seven years, the NPCC believes that clarification of the law as well as changed facts requires amendment of the complaint, to assist the Commission in understanding and efficiently resolving the case.

¹ The NPCC was formerly known as the Northwest Payphone Association ("NWPA"), and some OPUC orders relevant to this case refer to the NPCC as the "NWPA."

² NPCC filed a motion to lift the abeyance a year ago, but when activities in early 2008 suggested the FCC might finally be ready to act the NPCC moved to withdraw the motion to lift on March 18, 2008, which was granted April 1st. Unfortunately, NPCC's optimism was clearly misplaced.

³ *TON Services, Inc. v. Qwest Corp.*, 493 F.3rd 1225 (10th Circuit 2007); *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3rd 1075 (9th Circuit 2006).

II. BACKGROUND

The NPCC originally filed its complaint in this docket on May 14, 2001. The Complaint seeks refunds of PAL rates that Qwest charged NPCC's members in excess of the legal amount under Section 276 and the FCC's new services test ("NST").⁴ Section 276 prohibits Qwest from charging NPCC's members discriminatory rates for payphone services and features, and the NST requires cost based rates, among other things.⁵ NPCC's request for refunds is based on the reduced PAL rates established in Docket UT-125 ("Rate Case"), which the Commission commenced in 1995 to examine all of Qwest's rates.⁶ The right to refunds arises out of Section 276⁷ and the FCC's *Refund Order*. The Rate Case was still ongoing at the time NPCC filed its Complaint, but was finally concluded early last year when the appeal period ran out. See Final

⁴ The new services test requires Qwest to set payphone features and services rates that are based on direct and overhead costs, among other things. See *In the Matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd. 20541, ¶¶ 146-147 (1996) ("*First Payphone Order*"), and Order on Reconsideration, 11 FCC Rcd. 21233, ¶¶ 131, 163 (1996) ("*Reconsideration Order*") *aff'd in part and remanded in part sub nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Comm'n. v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released April 4, 1997) ("*Waiver Order*"); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("*Refund Order*") (collectively "*Payphone Orders*").

⁵ This Commission must implement the new services test and Section 276 based on the requirements of the FCC and Congress. See, e.g., *Northwest Public Comm.'s Council v. PUC*, 100 P.3rd 776 (Oregon 2004).

⁶ The OPUC entered its "final" order in the Rate Case on September 4, 2001 by approving PAL rates for Qwest that were substantially lower than those that Qwest had previously charged, but much higher than those for which NPCC advocated. Order No. 01-810, Docket UT 125 (Sept. 14, 2001). NPCC sought reconsideration, which the OPUC denied. Order No. 02-009, Docket No. UT 125 (Jan. 8, 2002) ("*Reconsideration Order*"). The Oregon Court of Appeals in 2004 reversed the Commission's Final Order and Reconsideration Order and remanded to the Commission. *Northwest Public Comm's Council v. PUC*, 100 P.3d 776 (2004). After further proceedings on remand, the Commission issued its final order moving and establishing rates in compliance with the Oregon Court of Appeals, as well as 47 U.S.C. § 276 and FCC Rules and Orders. *In the Matter of Qwest Corporation*, Order No. 07-497, Docket UT 125 (November 15, 2007) ("*Final Order*").

⁷ Plus any applicable state law that is not inconsistent with governing federal law. See 47 U.S.C. § 276(c) (pre-empting inconsistent state law).

Order.⁸ The rates approved in the Final Order were less than one-third of the rates approved in Order No. 01-810, and the rates approved in Order No. 01-810 were substantially less than the rates charged from 1997-2002.

Although this case could have proceeded based on the rate reductions approved in Order No. 01-810 in the rate case, on March 22, 2002, the OPUC unexpectedly dismissed NPCC's Refund Case Complaint without notice or hearing, apparently based on a misunderstanding about the relief NPCC sought. Order, OPUC Docket UT 600 at 1 (Mar. 21, 2001). NPCC appealed the OPUC's dismissal to the Marion County Circuit Court, which effectively remanded this case.⁹

The Marion County Circuit Court has held a number of status conferences among the parties regarding this case, as it retains supervisory jurisdiction under ORS 756.600. Each time, the court has continued the stay of its case based on the stipulation of the three parties to the case (Commission, NPCC, and Qwest), with the understanding (or perhaps hope) that the FCC would provide the desired guidance. At the most recent status conference on December 8, 2008, NPCC advised the court that NPCC was no longer willing to wait for FCC action and would be asking the PUC to lift the abeyance. The parties agreed that the next status report should be filed on April 13, 2009, by which time hopefully the PUC will have either taken action or at least established a process to conclude the case.

Although there were indications early last year that the FCC might act on the payphone refund petitions, it failed to do so under the current administration. Moreover, an FCC order is unlikely in the foreseeable future. Congress requested the current FCC to take no action

⁸ See Note 6, *supra*.

⁹ The Court directed the OPUC on remand to "take additional evidence as set forth in ORS 756.600" and to "entertain[] such evidence, briefing, and argument as may be required by law or as the OPUC may find appropriate. . . ." Order Granting Plaintiffs' Motion, Oregon Circuit Court for Marion County, Case No. 02C14442 at 2 (2004).

on any matters not involving the DTV transition. The new Obama administration will take over next week and it could take months or the better part of 2009 to get all new commissioners and high level staff in place. The new Chairman and any new Commissioners will want to focus on major policy issues that concern them, not vestigial, unresolved, technical cases like this one involving payphone compensation. There is no way to say when or if the FCC will ever act. The likelihood of any – let alone prompt – action now is worse than ever.

Originally, the complaint in this docket and the motion for summary judgment on liability filed four years ago were predicated on the expectation that Qwest would be forced to substantially reduce its payphone services rates to comply with the New Services Test. Thus, a full resolution of this action would not have been possible until the NST-compliant rates were finally determined. But now the Commission has established Qwest's NST-compliant rates in an order that became final and unappealable on January 15, 2008. *See* Order 07-497. Thus, all procedural prerequisites to determination of appropriate refunds to NPCC members for Qwest's failure to comply with the New Services Test and Section 276 of the Communications Act are finally in place. Given the many years these proceedings have already taken, the apparent lack of any FCC progress, and the *Davel* and *TON Services* rulings¹⁰ against Qwest, it is now appropriate for the Commission to lift the abeyance.

III. DISCUSSION

A. **The FCC has been considering issues surrounding the *Refund Order* since at least 2004**

As the ALJ in this docket noted in 2005, the FCC has been considering petitions regarding interpretation of the *Refund Order* since 2004. In 2005, the pending FCC petitions were not that old. But since then, the delay at the FCC has become substantial. The requests for

¹⁰ Note 3, *supra*.

guidance have piled up, years have passed, and nothing has been accomplished. Regretably, such FCC inaction is not unusual. Below is a partial list of unresolved matters in the FCC Payphone Docket, all but one of which raise the issue of interpretation of the *Refund Order*:

(1) **APCC** – Pending nearly 12 years. On May 5, 1997, the American Public Communications Council ("APCC")¹¹ requested the FCC clarify the order that precipitated the *Refund Order*.¹²

(2) **Illinois** – Pending four and a half years. On July 30, 2004, the Illinois Public Telecommunications Association ("IPTA") petitioned the FCC for a declaratory ruling regarding interpretation of the *Refund Order*.¹³

(3) **Southern Public** – Pending over four years. On November 9, 2004, the Southern Public Communication Association ("SPCA") petitioned the FCC for a declaratory ruling regarding interpretation of the *Refund Order*.¹⁴

(4) **New York** – Pending over four years. On December 29, 2004, the Independent Payphone Association of New York ("IPANY") petitioned the FCC for a declaratory ruling regarding interpretation of the *Refund Order*.¹⁵

¹¹ "APCC is a national trade association of some 1,200 independent (non-telephone company) providers of pay telephone equipment and services." *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, p. 1 n.1.

¹² See *Petition for Reconsideration* at <http://www.fcc.gov/cgb/ecfs/> (enter Dkt. 96-128 and search for filings on May 5, 1997). While unrelated to the issue at hand, it illustrates the potential futility of waiting for FCC orders.

¹³ See 19 FCC Rcd 14939 (2004).

¹⁴ See 19 FCC Rcd 22796 (2004).

¹⁵ See 20 FCC Rcd 476 (2005).

(5) **Florida** – Pending three years. On January 31, 2006, the Florida Public Telecommunications Association, Inc. ("FPTA") petitioned the FCC for a declaratory ruling regarding interpretation of the *Refund Order*.¹⁶

(6) **Massachusetts** – Pending nearly three years. On March 6, 2006, the Massachusetts Supreme Court sought the FCC's guidance regarding interpretation of the *Refund Order*.¹⁷

(7) **Ohio** – Pending over two years. On December 28, 2006, the Payphone Association of Ohio ("PAO") petitioned the FCC for a declaratory ruling regarding interpretation of the *Waiver Order*.¹⁸

B. A proposed order on the Payphone Providers' petition is not even on the FCC's "circulation list," which indicates that no immediate action is likely.

The FCC's "Items on Circulation" list is another example that demonstrates that the FCC is unlikely to resolve the Payphone Provider's *Waiver Order* issue anytime soon. See http://www.fcc.gov/fcc-bin/circ_items.cgi (last visited Jan. 13, 2009). This list serves as a compilation of all the items that the full FCC Commission is considering and has yet to take action on. The circulation list is updated weekly. None of the petitions listed above have ever been or are currently on the circulation list.

Even if an order on the petitions were on circulation list—which is likely a prerequisite to an actual order—there is no way to know if the FCC Commissioners would issue

¹⁶ See 21 FCC Rcd 1373 (2006).

¹⁷ See New England Public Communications Council, Inc. Notice of Ex Parte at <http://www.fcc.gov/cgb/ecfs/> (enter Dkt. 96-128 and search for filings on January 14, 2008). On February 9, 2007 the FCC's General Counsel wrote to the Court and projected a ruling within six months. See *id.* Passage of time has demonstrated that prediction over 100% in error.

¹⁸ See 27 FCC Rcd 2547 (2007).

an order soon. At the time that this motion was filed, the FCC still has not acted on items that have been on circulation for two and a half years. The FCC has had almost five years to rule regarding interpretation of the *Waiver Order*. In the meantime, NPCC members go out of business as the payphone industry contracts, memories fade, and evidence may become unrecoverable.¹⁹

C. The Tenth and Ninth Circuit Courts of Appeal Have Provided Sufficient Guidance For This Commission to Proceed Without Awaiting the FCC.

Qwest's primary defenses to this case were the "Filed Tariff" doctrine and the statute of limitations.²⁰ This Commission does not need to await further guidance from the FCC on these two issues, as the Ninth Circuit, which includes Oregon, as well as the Tenth Circuit, have explicitly rejected those very defenses. *See Davel* and *TON Services*, *supra*, note 3, Controlling law more directly on point could not be found, unless this very case had gone up on appeal of those issues and been remanded. Both the *Davel* and *TON Services* cases involve the very same type of claims as this complaint: refunds for PAL and Customnet overcharges based on violations of the *Refund Order* and Section 276. They involve the same defendant: Qwest. They dealt with the same affirmative defenses: filed tariff doctrine and statute of limitations.

As to Qwest's Filed Tariff defense, the Ninth Circuit was succinct and blunt in dismissing it:

Nevertheless, the filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff.

* * *

¹⁹ The payphone companies have retained their records, but they are in danger of becoming unretreivable. For example, computers needed to process the data have become obsolete or stopped working, software needed to process the data is no longer supported by the vendors, and personnel trained to operate the legacy systems have left or may no longer remember how to operate the old systems.

²⁰ *See* Qwest Corporation's Cross Motion For Summary Judgment (January 4, 2005).

This principle applies to regulations implementing the statutory command as well as to the statute itself.

Davel Communications, Supra, 460 F.3rd at 1085; see also *TON Services, supra*, 493 F.3rd at 1236. Thus NPCC's complaint for refunds, whether under the *Refund Order* or Section 276 are not barred by the state Filed Tariff doctrine due to the supremacy of applicable Federal law.

The Ninth Circuit's opinion also disposes of Qwest's statute of limitations defenses:

On Davel's construction of the Waiver Order, the right to reimbursement under the Order came into existence only upon the filing of NST-compliant rates. On that interpretation, Davel had no right to reimbursement against Qwest until Qwest filed compliant rates, allegedly in 2002, and its cause of action for Qwest's alleged violation of the Waiver Order thus accrued thereafter, when Qwest failed to pay the reimbursements.

Davel Communications, supra, 460 F.3rd at 1092. Here, the NPCC filed its complaint within two years of the first rate reduction that occurred in the Rate Case, even though they were not NST-compliant rates. The Final Order approving NST-compliant rates was not entered until November of 2007. Thus, under the holding in *Davel*, the NPCC's complaint would be timely if filed before November of 2009.

With the issuance of the opinions in *Davel* and *TON Services* cases, the Commission has more than sufficient guidance to proceed with this case now.

IV. CONCLUSION

Based on the foregoing the NPCC respectfully requests that the Commission enters an order lifting the abeyance of this case that was ordered in 2005. Further, the NPCC requests that the Commission set a scheduling conference in this case at the earliest possible date for the following purposes:

1. Establish a case schedule;
2. Determine if the parties will stipulate to allowing the NPCC to amend and update its complaint;

3. If the parties will not stipulate, establish a briefing schedule for the filing of a motion to amend the complaint or, if the parties will so stipulate, establish a date for the NPCC to file its amended complaint;

4. Establish a procedure and briefing schedule for re-filing the pending cross-motions for summary judgment or filing updated briefing on the pending motions;

5. Determining any other procedural or scheduling matters that the parties may deem necessary or advisable.

The NPCC respectfully submits that further delay is no longer warranted and will be prejudicial to the complainants, who have waited for many years to obtain appropriate relief.

DATED this 14th day of January, 2009 .

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PROOF OF SERVICE
DOCKET NO. DR 26/UC 600

I hereby certify that a true and correct copy of the above, on behalf of the Northwest Public Communications Council, was provided via electronic mail and first-class U.S. Mail on January 14, 2009, to the following:

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DATED at Seattle, Washington this 14th day of January, 2009.

/s/

Carol Munnerlyn, Secretary

ATTACHMENT A

DR 26/UC 600

Congress of the United States
Washington, DC 20515

December 12, 2008

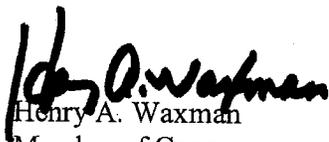
The Honorable Kevin J. Martin
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Mr. Chairman:

We are writing to express our concern about the December 18, 2008, Federal Communications Commission (FCC) Open Meeting.

The most important challenge for the Commission over the next nine weeks is to ensure the smoothest possible transition to digital television (DTV). At a time when serious questions are being raised about transition readiness, it would be counterproductive for the FCC to consider unrelated items, especially complex and controversial items that the new Congress and new Administration will have an interest in reviewing. We strongly urge you to concentrate the Commission's attention and resources only on matters that require action under the law and efforts to smooth the transition to digital television.

Sincerely,



Henry A. Waxman
Member of Congress
U.S. House of Representatives



John D. Rockefeller
Senator
U.S. Senate

cc: Michael J. Copps, FCC Commissioner
Jonathan S. Adelstein, FCC Commissioner
Deborah Taylor Tate, FCC Commissioner
Robert M. McDowell, FCC Commissioner