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December 22, 2009

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
Filing of Reply and Memorandum to Qwest Motions to Strike
Filing of Two Declarations in Support of Reply**

Dear Judge Arlow,

Please find enclosed the NPCC Reply and Supporting Memorandum and Declarations. If there are any questions please advise. I trust you and the OPUC staff and Mr. Reichman all have a great Christmas.

Sincerely,

/s/

Frank G. Patrick
Attorney at Law

Cc: Lawrence Reichman (email; US Mail) reicl@perkinscoie.com

Jason W. Jones (email; US Mail) Jason.w.jones@state.or.us

Alex M. Duarte (email; US Mail) alex.duarte@qwest.com

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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

REPLY TO QWEST MOTION TO
STRIKE COMPLAINANTS'
FIRST AMENDED COMPLAINT
AND
SECOND AMENDED COMPLAINT

TO: Oregon Public Utility Commission

AND TO: All Parties

As Reply to Qwest's Motions to Strike the First Amended Complaint and Second
Amended Complaint of the Complainants, Frank G. Patrick appearing for the payphone service
providers (PSPs) now appearing as the real parties in interest (collectively the RPIs)
individually to wit: Central Telephone, Inc; Communication Management Services, LLC;

1 Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest
2 Telecom Services Corporation; NSC Communications Public Services Corporation; National
3 Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C
4 Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc. and The Northwest
5 Public Communications Council (“NPCC”) to avoid prejudice to those it has exerted standing
6 as representative for those unidentified Payphone Service Providers A to Z hereinafter
7 collectively the “Complainants”:
8

9 1. This Reply is to the motion(s) to strike the First Amended Complaint and the Second
10 Amended Complaint and is filed as a consolidated response. However, it would appear that
11 Qwest is seeking to strike the entire First Amended Complaint, although it would have been
12 more proper to have filed a Motion to Strike only that language to which it objects therein,
13 since the balance of the Complaint was already allowed. Technically, Qwest did not need to
14 file two motions but just its motion against the Second Amended Complaint which by operation
15 of law supercedes the First Amended Complaint; "a pleading loses its status as such when it is
16 superseded by an amended one." Klemgard et al v. Wade Seed Co., 217 Or. 409, 414, 342 P.2d
17 757 (1959); see also Mignot v. Parkhill, 237 Or. 450, 453, 391 P.2d 755 (1964); [81 Or.App.
18 503] iMumper v. Matthes, 186 Or. 357, 364, 206 P.2d 86 (1949); Condon Nat. Bank v. Rogers,
19 60 Or. 189, 191, 118 P. 846 (1911).
20

21 2. Qwest in both its motions, reveals its confusion as to the authority governing any
22 amendment before the PUC. The Oregon Public Utility Commission clearly has adopted no
23 rule with respect to the filing of an amended complaint other than the Oregon Rules of Civil
24 Procedure (ORCP). Qwest in error recites that the “rule” for amendment is set forth in ORS
25 756.500. In fact there is no case law interpreting that statute which is not a rule of procedure.
26

1 While counsel has not undertaken to review the entire history of ORS 756.500(3) (formerly
2 756.520) before a 1953 amendment. It was amended again in 1971, but to no effect in this
3 matter and renumbered 756.500(3). The ORCP were originally adopted in 1979 and effective
4 in 1980. It is clear that the adoption of the ORCP by the OPUC by 860-11-0000(3), apparently
5 some time after the adoption in Oregon of the ORCP, is the articulate authority on the
6 *procedure* for the amendment of a complaint before the OPUC. Rather than reading the two
7 provisions, ORS 756.500 and ORCP 23, as inconsistent as Qwest seems to do, the courts and
8 the PUC should view them consistent with each other. That can only lead one to conclude that
9 ORCP 23 and 12 are the controlling procedures of the OPUC with respect to amendments to
10 complaints in its proceedings.
11

12 3. The history of pleading and practice in Oregon is worthy of a brief but perhaps
13 enlightening observation. Prior to the enactment of ORS 756.500, recited as authority by
14 Qwest, and prior to the adoption of the ORCP by the State of Oregon, the conduct of pleading
15 in Oregon was under the prior and often harsh Oregon Code Pleading rules. Under those rules
16 a misstep by a Complainant, here either the State or a private party, could often put a party
17 which mis-plead, out of court altogether. It is clear that the statutory language which Qwest
18 construes as a limitation and condition of the right to amend, previously numbered 756.520,
19 was. given the backdrop of the rules of Code Pleading, probably to *liberalize* the right to amend
20 a pleading. (The author could not easily obtain the full statutory history but see the Roats case,
21 which establishes that this very statute is “inexact” requiring the application of the analysis of
22 context and usual meanings of the words, for a beneficial review of the balance of this statute
23 and its history.¹) In fact, prior to the original statute, the OPUC may have had no authority to a
24
25

26 ¹ See the recent review of parts of this same ORS provision in ROATS WATER SYSTEM, INC.,
Respondent Cross-Petitioner, v. GOLFSIDE INVESTMENTS, LLC, Petitioner Cross-Respondent, and
Page 3 REPLY TO QWEST MOTIONS TO STRIKE AMENDED COMPLAINTS

1 mend a pleading at all, either their own or those of third party complainants. However, it was
2 not a rule of *procedure* and even though it might be the authority for the promulgation of the
3 ORCP, it does not supercede that which was later adopted by 860-11-0000(3), adoption of the
4 ORCP and Rule 23A:

5 “AMENDED AND SUPPLEMENTAL PLEADINGS
6 RULE 23A Amendments. A pleading may be amended by a party once as a
7 matter of course at any time before a responsive pleading is served or, if the
8 pleading is one to which no responsive pleading is permitted, the party may so
9 amend it at any time within 20 days after it is served. Otherwise a party may
 amend the pleading only by leave of court or by written consent of the adverse
 party; and leave shall be freely given when justice so requires. ...” (Emphasis
 added)

10 It is clear from the time of the adoption by the PUC of the ORCP, which was after the
11 enactment of ORS 756.500 and its predecessor, the ORCP became the *procedure* for the
12 amendment to a Complaint. The ORCP and the case law interpreting ORCP 23 now establishes
13 the procedures for amending Complaints at the OPUC not ORS 756.500.
14

15 4. Given a proper reading and application of ORCP 23, the newly added real parties in
16 interest are entitled to the filing of not only the First Amended Complaint, but also the Second
17 Amended Complaint by which they filed their first amendment under ORCP 23A. Following
18 the addition of the “real parties in interest” they have only for the first time appeared by the
19 filing of the First Amended Complaint, the very pleading which added them, the real parties in
20 interest have never appeared nor amended any Complaint prior to the First Amended before the
21 commission all previously being filed by the NPCC. Being named as a party gave them, for the
22 first time, the right to appear on their own, to obtain a refund by a PUC Order, and each had the
23 right to file its own Complaint, but did so in a consolidated manner, after engaging and
24

25 _____
26 Oregon Public Utility Commission, Respondent Cross-Respondent; UM1248; A134978; Court of
Appeals of Oregon, decided February 11, 2009.

1 authorizing counsel herein to file the Second Amended Complaint to supercede the First
2 Amended Complaint. That amended filing was as a matter of right under ORCP 23A, filed in a
3 timely manner without the necessity of filing an additional motion to amend as Qwest has
4 incorrectly argued was required.

5 While it is clear that the First Amended Complaint is the first pleading to join the
6 individual real parties in interest, it is equally true that the Second Amended Complaint is the
7 first amendment to any Complaint filed by the real parties in interest (as opposed to for them) in
8 this proceeding and is governed by ORCP 23A. It is also clear that the filing of it was done
9 with a precautionary motion, but it is clearly one of right without the necessity of a motion
10 under the provisions of ORCP 23A. Counsel for Qwest did not return the call of Complainant's
11 counsel herein to discuss the amendment prior to the filing (See Declaration of Frank G.
12 Patrick, but now argues against the Second Amended Complaint on what really is not even a
13 technical point, but rather one without legal basis at all once a correct view of the ORCP is
14 provided. But given the best argument of Qwest regardless of the analysis of the statute on
15 which it relies, ORS 756.500(3), Complainants are entitled to have a motion for leave to amend
16 granted.
17
18

19 Further Qwest argues that Complainant is bound by the prior pleadings, but that is
20 inconsistent with the addition of a real party in interest. There has been no relief granted under
21 the first Complaint. The Motion for Amendment was made expressly to allow the addition of
22 the new parties, who could not at that time have been yet appearing. The motion was filed by
23 the NPCC consistent with resolving the earlier contentions of Qwest but as this counsel views
24 the rights of the newly added parties, they were not heard, nor could they have been bound
25 being a non-party at the time of the motion.
26

1 Furthermore, the assumptions as to the knowledge and complicity of the newly named
2 Complainants in the motion by Qwest reaches far beyond its knowledge of the parties and their
3 relationship to prior counsel and even the Motion to amend. It is clear that there was some kind
4 of impasse in that earlier relationship or new counsel would not now be present. Suffice to
5 provide that there was an unresolved conflict in direction which necessitated the substitution of
6 new counsel, but that cannot tar nor bind the newly added Complainants, nor should it under
7 any review of the case law governing the right to Amend.
8

9 For there to be a sustainable denial of an amended Complaint one would have to show
10 the basis why the Complaint should not be allowed. There has been no evidence received, and
11 there has been no ruling on the cross motions of the parties which in fact were for all intents
12 and purposes abandoned by both during the hiatus of about four (4) years to which all parties
13 were in agreement. It was not until the re-opening of the case and, apparently an agreement as
14 to the propriety of the filing of an Amended Complaint, that such filing was deemed the next
15 appropriate step in the reopening of the case. In fact, no economic relief could have been
16 allowed or ordered until the addition of the real parties in interest, nor could such relief be
17 provided to each of those unidentified Complainants A to Z, until they could be added as a
18 party with the requisite economic interest entitling them to the benefit of an order of the
19 Commission under ORS 756.500. None of that is in any manner new to Qwest as it had earlier
20 argued, not once but twice, and lost on the nature of the right of the NPCC to act in a
21 representative capacity.
22

23 COMPLAINT AND INVESTIGATION
24 PROCEDURE

25 756.500 Complaint; persons entitled to file; contents; amendments.

26 (1) Any person may file a complaint before the Public Utility Commission, or
the commission may, on the commission's own initiative, file such complaint.

 The complaint shall be against any person whose business or activities are

1 regulated by some one or more of the statutes, jurisdiction for the enforcement
2 or regulation of which is conferred upon the commission. The person filing the
3 complaint shall be known as the complainant and the person against whom the
4 complaint is filed shall be known as the defendant.

5 (2) It is not necessary that a complainant have a pecuniary interest in the matter
6 in controversy or in the matter complained of, but the commission shall not grant
7 any order of reparation to any person not a party to the proceedings in which
8 such reparation order is made. (Emphasis added)

9 But Qwest always knew that the real parties in interest, Complainants, would be
10 the beneficiaries of additional refunds due under UT-125. Qwest admitted its obligation to pay
11 such additional refunds to the PSPs, Complainants herein by its request to spread the additional
12 refund burden to other ratepayers, but which request was denied in Order No. 06-515. On
13 September 11, 2006, the Commission entered Order No. 06-515 denying Qwest's proposal to
14 raise residential Caller ID rates to offset the decrease in PAL and Fraud Protection rates
15 resulting from the Court-ordered remand in Docket No. UT-125. (See Order No. 06-515
16 Entered 09/11/06 Qwest Rebalancing Proposal Denied)

17 The operative language is consistent with the Second Amended Complaint which is the
18 basis of the Refund pled in the first Complaint as well as the First and Second Amended
19 Complaints. Further, it is clear that since the beginning of the AFOR which governed Qwest
20 until AFOR's termination effective May 1, 1996, until the final determination of NST
21 compliant and lawful rates in UT-125, all of the facts, findings and rates had not been
22 determined at the time of the initial Complaint was filed. That Complaint was filed, admittedly,
23 as a precautionary and perhaps premature filing. At that time, no Complainant could have filed
24 for a refund as lower final NST compliant rates had not been determined, such lower final rates
25 being a predicate to any refund claim. The Second Amended Complaint complies with the
26 provisions of ORS 756.500 by "...stating all of the grounds..." for which the Complainant

1 could claim given the final results of UT-125 which established both the NST compliant rates
2 but also the right to claim a refund by revealing the difference between the interim rates
3 charged by Qwest and those which they were lawfully entitled to charge. Accordingly, all of
4 the grounds for the Complainants should be set forth in the complaint as provided by statute.
5 Not all the grounds could be known or pled until the final effective rates were established by
6 Commission Order 07-497 on November 15, 2007.
7

8 It would be a travesty for the Commission to cut short the claims pled by a Complaint
9 which claims could not have been pled prior to the completion of the over 8 year litigation to
10 develop lawful rates in UT-125 in compliance with Federal law. The lawful rates so
11 determined were only so determined after the reversal and remand of unlawful rates by the
12 Oregon Courts and the development of lawful rates by the PUC in compliance with such
13 remand. In short, while a complaint was filed early in this procedure, the most of the claims
14 alleged therein did not come into existence until November 15, 2007 when final NST compliant
15 rates were adopted and made effective.
16

17 Even if it were a requirement that a Motion and Order to Amend be granted by the
18 Commission before the Second Amended Complaint could be operative, not the case under the
19 facts of these filings, it would be an abuse of discretion for the Commission not to grant the
20 Second Amended Complaint and in fact the very authority which Qwest recites, is authority for
21 exactly the opposite of what it contends.
22

23 ORS 756.500

24 (3) The complaint shall state all grounds of complaint on which the complainant
25 seeks relief or the violation of any law claimed to have been committed by the
defendant, and the prayer of the complaint shall pray for the relief to which the
complainant claims the complainant is entitled.

26 (4) The complaint may, at any time before the completion of taking of evidence,
be amended by order of the commission. However, if a charge not contained in

1 the original complaint or a prior amended complaint is sought to be made by any
2 such amendment, the defendant shall be given a reasonable time to
3 investigate the new charge and answer the amended complaint. The final
4 hearing shall, if necessary, be continued until some date after the defendant has
5 had a reasonable time to investigate and be prepared to meet the amended
6 complaint.
7 (Emphasis added)

8 The remedy to correct any omission of a "...charge not contained in the original or a
9 prior amended complaint..." is to allow time and even postpone a final hearing so that no
10 prejudice would be suffered by an adverse party, Qwest herein.

11 The law in Oregon clearly is to allow for the trial on the merits of a party's case.
12 Pleadings are to be liberally construed and error to be disregarded unless it affects a substantial
13 right, under ORCP 12, and amendment is to be liberally granted.

14 "RULE 12

15 A Liberal construction. All pleadings shall be liberally construed with a
16 view of substantial justice between the parties.

17 B Disregard of error or defect not affecting substantial right. The court
18 shall, in every stage of an action, disregard any error or defect in the pleadings or
19 proceedings which does not affect the substantial rights of the adverse party.
20 [CCP 12/2/78]"

21 There has not been an Answer nor any motion or action by Qwest challenging the
22 allegations of fact in the original Complaint, nor has there ever been filed any finding with
23 respect to the allegations of the Complaint. The Complainants herein have only just now been
24 joined in this matter but are the only parties to which the Oregon Public Utilities Commission
25 (OPUC) can award any financial remuneration pursuant to ORS 756.500(2); 756.500(4).
26 Complainants are the real parties interest, under ORCP 26 and ORS 756.500(2), and should be
allowed to freely amend as provided in ORCP 23A and 12 given the status of the proceedings. In
the event that such an amendment works a hardship on the opposing party, the remedy, as
provided by ORS 756.500(4), is not to deny the amendment but rather to avoid any prejudice by

1 providing the opposing party the right to fully investigate the matters pled so that it might fully
2 respond to the Amended Complaint. The standard is not that the amendment should be denied,
3 but rather that it should be allowed and the opposing party be granted time to fully respond.

4 The commission had granted prior counsel for The Northwest Public Communications
5 Council, (NPCC) leave to file an Amended Complaint with limitations on the claims for relief,
6 on May 4, 2009 (Order No. 09-155). The First Amended Complaint was filed in substantially
7 the form as attached to that Motion.
8

9 Now that the rates for all of the PSPs payphone services has been established by UT-
10 125, it is appropriate that the Commission allow the proceeding under the Second Amended
11 Complaint. The Commission's obligations to the ratepayers was resolved after years of work
12 and several appeals and settlements. The Second Amended Complaint requests only that the
13 Commission allow the Complainants the relief that it has already granted the Complainants in
14 UT-125; that it be paid the refunds as ordered in the Commission's Orders in UT-125 Nos. 00-
15 190, 00-191 and Order No. 01-810 as required to be modified by the Oregon Court of Appeals
16 and then clarified in Order No. 06-515 on September 11, 2006 and as such modification was
17 made and implemented in the stipulation of the PUC and the parties entered in UT-125 on
18 10/15/2007 and adopted by the PUC in Order No. 07-497 on November 15, 2007.
19

20 7. In UT-125, the rate making case out of which the right of the Complainants are
21 entitled to refunds, the PUC advised that the refunds due under UT-125 should be accomplished
22 in this proceeding DR-26. (See D21 STAFF REPLY TO QWEST 2-4-05) the PUC Staff filing
23 in which it recites that once there is a refund liability, the calculation of the amount of the
24 "...refund amount would be in this proceeding (DR-26) and not in UT-125." Such request for
25 refunds could not be accomplished nor any refunds demanded prior to the rates in UT-125
26

1 being established in that proceeding. The Second Amended complaint makes the basis for
2 those refunds transparently clear, but which apparently may have been overlooked in the
3 proceedings by the PUC or prior counsel to the NPCC and unfortunately also the PUC to this
4 date.

5 DATED this 22nd day of December, 2009.

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7 /s/
8 Frank G. Patrick, OSB 76022
9 Attorney for Complainants

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1 CERTIFICATE OF SERVICE

2 I, the undersigned below, hereby certify that I served the foregoing MOTION TO FILE A
3 SECOND AMENDED COMPLAINT for newly added "COMPLAINANTS" 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** a full, true, and correct copy thereof in a sealed, first-class postage-
21 prepaid envelope, addressed to the attorney as shown above, the last-known office address of
22 the attorney, and deposited with the United States Postal Service at Seattle, Washington, and by
23 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.

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

29 DATED this 22nd day of December, 2009

30 _____
31 /s/
32 Frank G. Patrick, OSB 76022

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of Unidentified 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 IN SUPPORT OF NPCC COMPLAINANTS REPLY TO QWEST MOTIONS TO STRIKE

TO: The Oregon Public Utility Commission

AND: All Parties

This memorandum of law is submitted on behalf of the payphone service providers (PSPs) now appearing as the real parties in interest (collectively the RPIs) as captioned individually and Northwest Public Communications Council (NPCC) and the unidentified payphone service providers referred to collectively with NPCC as the Complainants) and in opposition to the two motions of Qwest

1 Corporation (Qwest) to strike the Complainants First Amended Complaint and Complainants Second
2 Amended Complaint. As is discussed below, NPCC also acts on behalf of all payphone service
3 providers (PSPs) who were customers of Qwest during relevant periods who are entitled to the refund
4 that is the subject of the second amended complaint. This memorandum is in response to both of
5 Qwest's motions to strike.

6
7 **BACKGROUND FACTS LEADING TO
8 FILING OF THE FIRST AND SECOND AMENDED COMPLAINTS**

8 Qwest has presented two categories of bases for its motions to strike. The first category of
9 argument has no substantive basis and relies on a hyper technical reading of the applicable rules that
10 Qwest claims serve as a basis to strike the amended complaints. The second category of argument is
11 an attempt to argue the merits of the claims raised in the complaints. With essentially one exception,
12 arguments that go to the substance of the claims contained in the amended complaints are clearly not
13 proper on a motion for leave to amend, *if* it were determined that a motion to amend was required. The
14 only potential exception is the raising of the statute of limitations. For the reasons addressed in the
15 body of the memorandum, the payphone providers added to the case are entitled to be heard on the
16 statute of limitations issue. The facts relevant to the motions to strike are as follows.

17
18 In or about 1991, Qwest sought to be regulated under an alternative form of regulation that
19 provided more pricing flexibility. Pursuant to that request, in 1991, the Oregon Public Utilities
20 Commission (the PUC) adopted Order No. 91-1598 which permitted Qwest to operate under an
21 alternative form of regulation (AFOR"). There were two important provisions contained in the Order
22 as they related to the termination of the AFOR. In the event the AFOR was terminated prior to the end
23 of the five year term of the program, the Order provided as follows:

24
25 Subparagraph (3) specifies that the rates in effect from the date the plan is
26 terminated until the date the new permanent rates are set shall be interim rates
subject to refund.

1 The amount subject to refund with interest shall be that portion of USWCs
2 earnings which the Commission finds has exceeded a reasonable rate of return,
3 commencing with the date of the order terminating the plan and ending with the
4 date the permanent rates are set and in effect. Order No. 91-1598 pp. 27-28 at
5 3.

6 Order No. 91-1598 also required that Qwest file a general rate filing under ORS
7 759.180 nine month before the end of the expiration of the five year term of the AFOR. These rates
8 were to take effect upon the expiration of the Plan unless the Plan was extended. Importantly, the
9 Order stated the following with respect to such rates:

10 “In the event the Commission does not complete its review of USWCs proposed
11 rates prior to the end of the term of the Plan, the Commission may allow the
12 proposed rates to take effect subject to the refund provisions set forth in
13 paragraph 10(f) [this incorporates the quoted language above from subparagraph
14 3 at page 27-28 of the Order]” Order No. 91-1598 at p. 29.

15 The conditions of Order No. 91-1598 were not *imposed* on Qwest (formerly USWC)
16 over its objection but rather by its acquiescence and adoption. Qwest had sought the AFOR. As Order
17 No. 91-1598 makes clear, if Qwest had chosen not to proceed under the terms of the AFOR as finally
18 ordered by the PUC, it could do so and continue to be regulated under the terms of the historical rate of
19 return form of regulation. Order No. 91-1598 at p.1. Qwest *chose* to have the Order adopted. Thus,
20 Qwest successfully applied for, and received, the form of AFOR it sought. Qwest avoided other
21 consequences by its adoption of the AFOR. In fact, its actions constitute not only the basis for estoppel
22 but, because this was in a proceeding before the OPUC that resulted in Qwest successfully seeking and
23 obtaining the benefits of the OPUC order, also the basis for judicial estoppel.

24 In December 1995, Qwest made a general rate filing pursuant ORS 759.180 - 759.190 as
25 required by Order No. 91-1598 and the PUC opened a general rate case under Docket UT 125 to
26 review all Qwests proposed rates, including payphone tariffs. In February 1996, the
Telecommunications Act of 1996 was adopted and pursuant to Section 276 thereof, intrastate payphone

1 Tariffs were required to comply with the non discrimination and non preferential treatment
2 requirements of the Telecommunications Act as amended (the Act). Through a series of orders
3 commencing with the first payphone order and the order on reconsideration implementing the non
4 discrimination and non preferential treatment requirements of the Act, it was made clear that all
5 intrastate payphone tariffs had to comply with the new services test (NST).

6 One condition of the AFOR was that Qwest maintain the quality of its service to its customers.
7 After the adoption of the AFOR, service became a continuing concern to the PUC and its Staff. During
8 the period the AFOR was in place, Qwests service did not meet the applicable service standards.
9 Qwest was cited for several service violations. As a result, PUC Staff (the Staff) initiated a settlement
10 conference in accordance with the terms of Order No. 91-1598. As a result of that conference, Qwest,
11 TRACER, Telnet Internet Services, Citizens Utility Board and the Staff entered into a stipulation that
12 provided for the termination of the AFOR effective May 1, 1996. The stipulation further provided that
13 Qwests then current rates became interim subject to refund with interest at 11.2% per annum. On April
14 24, 1996, the PUC issued Order Number 96-107 in Docket Number UT 80 terminating the AFOR
15 effective May 1, 1996 and adopting the recommendations of the Staff and the stipulation in its entirety.
16 Order Number 96-107 provided with respect to rates as follows.

17
18
19 In making this decision, the Commission acknowledges that, pursuant to the
20 terms of the AFOR, U.S. WEST has filed numerous price listings with the
21 Commission. Upon the termination of the AFOR, US WEST need not re-file
22 these listings as tariffs. Rather, the Commission will consider any price list
23 filing with an effective date of May 1, 1996, as a fully regulated tariff, subject to
24 all suspension and investigation procedures set forth in ORS 759.180 to 759.190.

25 The Qwest general rate case under Docket UT 125 was split into two phases. The first was the
26 revenue requirement phase (Phase I) and the second was the rate design phase (Phase II). In 1997, the
revenue requirement phase was finalized. However, due to appeals and ongoing litigation the issues
involved in the revenue requirement phase of the general rate case were not resolved until a settlement

1 was reached in 2000. After this settlement, the design phase of the general rate case commenced.
2 Order Nos. 00-190 and 00-191.

3 In May 2001, due to an interim rate reduction in PAL rates, as a precautionary matter, NPCC
4 filed a complaint in this docket seeking a refund (the Refund Case). As the refund sought was
5 dependent on the final determination of rates in the design phase of docket UT 125, at the joint request
6 of Qwest and NPCC, the Refund Case was held in abeyance pending a final resolution of docket UT
7 125 by order entered June 21, 2001. No application was made for refund at the time with respect to
8 CustomNet rates because (i) there had been no comparable interim reduction in such rates comparable
9 to what occurred with respect to PAL rates, (ii) UT-125 had not yet concluded, (even in error, which
10 error was successfully appealed to result in the Court of Appeals Remand in 2004), (iii) no reduction
11 had been determined (because lawful rates were not yet ascertained in UT-125 under the 2004
12 Remand), and (iv) refunds for such rates had not yet been ordered and a final rate reduction was a
13 predicate of any refund claim. The complaint in the Refund Case was filed on May 19, 2001. Under
14 ORS 756.512, within 10 days of the service of the complaint, the defendant, Qwest, has to file a
15 responsive pleading. The rule makes clear what constitutes a responsive pleading as it goes on to state
16

17 Within the time so fixed, or such further time as the commission shall fix, the
18 defendant shall file an *answer* to the complaint, taking issue on such parts of the
19 complaint as the defendant desires and setting forth such additional matter as
shall be pertinent to the matter in controversy [emphasis added].

20 Qwest has not filed an answer in this action, after eight years, leaving open the right of the
21 Complainant to file an amendment with impunity and *without necessity of a motion*.

22 In September 2001, the design phase of the Qwest general rate case in Docket No. UT-125 was
23 concluded by the issuance of Order No. 01-810. During the proceedings, NPCC raised a number of
24 objections to the PAL and CustomNet rates agreed to by Qwest and the Staff. NPCC argued that the
25 PAL and CustomNet tariffs proposed were not NST compliant and therefore too high, discriminatory
26

1 and unlawful under both Federal and State law. In addition to arguing that PSPs were entitled to lower
2 tariffs for payphone services and a larger refund, NPCC also raised objections to the rates as being
3 discriminatory and operating in favor of Qwests payphone services to the competitive disadvantage of
4 competing PSPs in violation of the Act. See pp. 50-52 of Order No. 01-810. Over NPCCs objections,
5 the PUC adopted the rates proposed by Qwest and NPCC appealed the order as it related to the
6 payphone tariffs.

7
8 Between November 2004 and January 2005, NPCC and Qwest filed motions and cross motions,
9 respectively, for summary judgment. By decision dated March 23, 2005, the ALJ ruled that the case
10 should be held in abeyance pending receipt of guidance from the FCC on questions of federal law
11 pertinent to resolution of the motions and the case generally. The reasons for holding the case in
12 abeyance were confirmed by the PUC in its Order No. 05-208 dated May 3, 2005.

13 By decision and order dated November 10, 2004, the Oregon Court of Appeals reversed the
14 decision of the PUC in Order No. 01-810 and remanded the case for further proceedings in accordance
15 with the decision of the Court of Appeals. The Court of Appeals specifically found that the PAL rates
16 established by the PUC were not NST compliant and new NST compliant rates had to be determined.
17 With respect to CustomNet, the Court held that insufficient cost data was available to determine
18 whether such rates were NST compliant (a requirement under §276 of the Act) and directed the PUC to
19 take additional evidence to determine and establish compliance.
20

21 The reversal and remand from the Oregon Court of Appeals meant that the payphone rates
22 would be substantially lower than was reflected in Order No. 01-810 issued in September 2001. In
23 accordance with Order No. 01-810, Qwest had made the refund ordered and reduced their revenue
24 requirement through temporary bill credits. After the remand, Qwest knew that it would have to pay
25 PSPs, such as Complainants, higher refunds than they had been provided during the period May 1,
26

1 1996 through the date final NST compliant PAL and CustomNet rates were determined and made
2 effective. In or about April 2006, Qwest made clear that it wanted to seek higher rates to offset lost
3 revenues resulting from the lower payphone rates and higher refunds that were required as a result of
4 the Oregon Court of Appeals decision. In its brief in support of its position, Qwest sought to reopen
5 the entire general rate case to re-balance rates to take into account the lower payphone service rates
6 required by the decision of the Oregon Court of Appeals and so that Qwest would recover all of its
7 revenue requirement. The PUC rejected Qwest's arguments finding that under the terms of the
8 stipulation pursuant to which Order Nos. 00-190 and 00-191 were issued, Qwest was obligated to pay
9 the higher refund and **suffer the** revenue reduction required by the Oregon Court of Appeals decision
10 without any offsetting rate increases. Order No. 06-615 at p. 10.

12 Qwest, NPCC and the Staff ultimately agreed to NST compliant payphone tariffs including
13 PAL and CustomNet. By PUC Order 07-497, dated November 15, 2007, final NST compliant PAL
14 and CustomNet tariffs were stipulated by all the parties, adopted and made effective by the PUC. At
15 that point in time, and only at that point was it possible to determine that refunds were due PSPs such
16 as Complainants. Complainants claims under Federal and state law for refunds and for discrimination
17 damages arise from the same core of operative facts the collection of tariffs on non NST compliant
18 tariffs by Qwest. But those refunds are not dependent on the application of Federal law, or even State
19 law, which do require them, but rather the very sequential Orders of the PUC which are referenced in
20 the Orders of the PUC starting with the AFOR Order 91-1598. The refund period commenced with the
21 termination of AFOR by Order No. 06-107 effective May 1, 1996 and ended November 15, 2007 with
22 the effective date of the NST compliant rates pursuant to Order 07-497.

24 In May 2009, NPCC's counsel moved for leave to add PSP Complainants as parties and for
25 leave to amend the complaint. This was less than two years after the PAL *and* CustomNet tariffs were
26

1 final and made effective in Oregon. Accompanying the NPCC 2009 motion was a proposed amended
2 complaint. Through mis-communication or perhaps misunderstanding, no authorization had been
3 given by the individually named PSP Complainants to file the motion for leave to amend, nor had the
4 claims in the proposed amended complaint nor the legal positions taken in support of the motion been
5 approved or authorized by the PSP Complainants. While the NPCC authorized the filing of the Motion
6 to lift the stay and file an amended Complaint, none of the individuals had which resulted in one of the
7 consequences of this failure in communication as to the filing; the retention of new counsel to
8 represent Complainants. Declaration of Charles W. Jones dated December 22, 2009.
9

10 From the filing of the Refund Case to the date of this motion, no discovery or evidence has
11 been taken on the substance of the claims asserted in the original complaint. No final hearing date has
12 been set nor has any discovery been propounded by any party. Qwest has never filed an Answer and
13 there is no responsive pleading pending.

14 Complainants new counsel herein, believed the proposed First Amended Complaint was subject
15 to Amendment without motion, was incomplete and did not encompass all the claims that were within
16 the jurisdiction of the PUC and required to be plead as required by ORS 756.500(3) which provides as
17 follows:
18

19 (3) The complaint shall state all grounds of complaint on which the complainant
20 seeks relief or the violation of any law claimed to have been committed by the
21 defendant, and the prayer of the complaint shall pray for the relief to which the
22 complainant claims the complainant is entitled.

23 Since the first amended complaint had been presented to the PUC by the NPCC, it was filed as
24 originally presented. This was the first filing by the PSP complainants in the case. Pursuant to ORCP
25 23, the second amended complaint was filed shortly after the filing of the first amended complaint to
26 reflect all the claims against Qwest over which the PUC was believed to have jurisdiction.

However, the most important element of the filings to strike the amendments, is that Qwest

1 raises no fact of prejudice to the filing of the Second Amended Complaint; it claims that it will broaden
2 the case, but that is not a basis countenanced in law to deny the filing of the Second Amended
3 Complaint the subject of this reply nor of any amendment to a complaint. Broadening a case is not a
4 statutory or case law basis for denying an amendment. Here, more importantly, Qwest would have the
5 PUC deny the amendment and disregard the consideration of its own Orders under UT-125 which was
6 the promoting reason for the filing of the NPCC complaint in 2001. The PUC would by adopting the
7 Qwest Motions, deny the very validity of its own regulatory process and its results. Worse, it would be
8 allowing the party liable for the Refunds that have already been Ordered and partially paid, but not yet
9 enforced to the full extent already ordered in UT-125, to avoid the very refund liability established by
10 UT-125 under its final Order 07-497.
11

12 Second, Qwest's claim of an "unequivocal" application of an overriding statute of limitations in
13 a Federal case, is made without any representation or other inquiry into the underlying state law. The
14 Qwest claim assumes knowledge about the status of state proceedings without inquiry, an error which
15 the Commission may have fallen prey to in its denial of the NPCC claim to CustomNet. In this case
16 there has been a consistent PUC matter pending in which the propriety of CustomNet tariffs have been
17 at issue since 1996. This issue was not finally resolved until November 15, 2007 and finally brought to
18 conclusion, unlike the facts in Davel where the basis of the decision was that *no* fraud protection rates
19 had been filed. These factual issues and others such as whether Qwest is estopped from asserting a
20 statute of limitations defense, were never examined by the PUC in its consideration of that case. Such a
21 factual inquiry would reveal that there was no pending procedure at a state PUC such as the Oregon
22 PUC since 1996. The application of the law of Davel is simply not consistent with the facts of the
23 Oregon PUC proceedings, in UT-125 nor this action but the analysis of Davel as it relates to a
24 *proposed* Amended complaint is not appropriate *prior* to its filing. The appropriate manner of
25
26

1 challenging an allegation in an amended complaint is by way of motions against the filed Complaint
2 not before the pleading is operative.

3 The Forsi case, recited by Qwest as authority, is actually one of several cases that establish the
4 factors to consider in allowing an amendment to a Complaint. The chief distinguishing characteristic
5 in Forsi is that in that case there was no addition of a party plaintiff as there has been in this case which
6 the Commission found was not prejudicial to Qwest.

7
8 “In evaluating whether a trial court abused its discretion in ruling on a motion
9 to amend, we have identified four relevant factors: (1) the proposed
10 amendment's nature and its relationship to the existing pleadings; (2) the
11 prejudice, if any, to the opposing party; (3) the timing of the proposed
12 amendment; and (4) the colorable merit of the proposed amendment. Safeport,
13 Inc. v. Equipment Roundup & Mfg., 184 Or. App. 690, 699, 60 P3d 1076
14 (2002), rev den, 335 Or. 255, 66 P.3d 1025 (2003). We turn, then, to an
15 evaluation of this case in light of those factors.”

16
17 1. The nature of the proposed amendment other than the addition of the real parties in interest,
18 is consistent with the proceedings in which both Qwest and the NPCC were in constant adversarial
19 relationship. UT-125 commenced as indicated in the history above, was what spawned the need, albeit
20 prematurely given the belated final outcome six years post filing of UT-125, for the filing of this
21 present case DR-26. The claims asserted in the Second Amended Complaint arise from the same core
22 of operative facts, Qwest’s failure to file NST compliant intrastate rates by April 15, 1997. There is
23 nothing inconsistent with the filing of the Second Amended complaint to plead each of the bases upon
24 which UT-125 was ultimately Remanded by the Court of Appeals for proceedings consistent with its
25 findings; that UT-125 failed to set rates consistent with the TCA, §276 et al and specifically to make
26 the rates established for CustomNet, lawful under the federal law. Even if the CustomNet rates had not
27 been specifically mentioned by the Court of Appeals, which in fact it was, the proceedings in UT-125
28 would still have had to make all rates to PSPs compliant with Federal law.

29 2. There can be no prejudice to Qwest over the amendment. UT-125 already has established

1 the liability for the Refunds claimed in the Second Amended Complaint. That was the mechanism that
2 proved up the difference in the rates being charged by Qwest in 1996 and that which it could lawful
3 charge the PSPs under the final rates set by UT-125. Qwest even argued that no rate payer under UT-
4 125 could proceed to claim a refund prior to the final determination in UT-125. See page 2 of the
5 Staff's Reply to the summary judgment motions of NPCC and Qwest dated January 2005.

6 3. Timing of the Amendment to the complaint is actually based on two principles. The first is
7 that the First Amended Complaint naming the real parties in interest was ordered by the Commission.
8 The second principle is that the Second Amended Complaint filed by the real parties in interest, not the
9 NPCC, was allowed as a matter of right under ORCP 23A. But just as important, the complaint could
10 not have been amended to include the results of UT-125 until sometime after the final order, No. 07-
11 497 was made final in November 15, 2007 and perhaps not even before the 60 days for reconsideration
12 had run (January 15, 2008) and Qwest had a reasonable time to both calculate and pay the required
13 refunds (another 60 to 90 days). Qwest wants to claim some violation of the procedure but inartfully
14 ignores the PUC procedures for amendment, ORCP 23A. Finally, the timing is such that it complies
15 even with the claims of Qwest in that it adds the parties with a pecuniary interest as parties timely,
16 prior to the taking of evidence.
17

18 4. Colorable merit is clearly met by the Second Amended Complaint. The claims alleged arise
19 out of the proceedings of the PUC itself, were required by Federal law as the PUC was ordered by the
20 Oregon Court of Appeals in its Remand specifically addressing the two claims which were the basis of
21 the appeal and were finally corrected by the PUC in UT-125. There can be no clearer "colorable"
22 claim and even if some of the claims are later successfully challenged it is not in a motion challenging
23 the Amendment prior to its filing that the validity of the claim should be judged.
24

25 Complainant recognizes that this case has gone on far too long, although there is at least one
26

1 other case of similar age struggling with similar issues. Here the PUC had already done the work of
2 the two Phases of UT-125 in setting rates. It got tangled up by its error, in Order 01-810 but ultimately
3 corrected that error and the parties stipulated to the final order and its basis in Order No. 07-497. The
4 good news is that there are no further appeals that can be filed on the effect of the Order under UT-125.
5 They were either appealed and incorporated into the interim sequential Orders of the PUC or were
6 resolved by stipulations and Orders. The end of DR-26 is in site and the PUC should not let Qwest
7 confuse the issues by hyper technical procedural claims which are not well founded nor based. Just as
8 important, there is simply no prejudice to proceeding under the Second Amended Complaint and none
9 has been raised by Qwest.
10

11 To resolve any conflict over the claims under the UT-125 and its PUC orders which the PUC
12 finds are based in Federal law not yet resolved, the Complainants have filed a Federal Declaratory
13 Judgment action along with other purely Federal causes of action. Complainants will file shortly a
14 motion to bifurcate the proceeding with the PUC to allow the abatement of any Federal law issue to
15 allow its resolution in that filed case.
16

17 Also any Oregon claim which is not within the jurisdiction of the PUC, a matter which is the
18 subject of some new proceedings, will be the subject of a motion to abate the proceeding with respect
19 to any claim over which the PUC does not have jurisdiction for resolution by the Federal proceeding,
20 under it ancillary jurisdiction, or the Marion County Circuit Court. There is no reason that the PUC
21 cannot proceed to apply the Orders in UT-125, to enforce them by having the refunds already ordered,
22 but awaiting calculation and payment, to be made as the PUC and counsel for Staff earlier anticipated
23 would be the case once liability for refunds was established. That liability has been established by the
24 completion of UT-125 and there is no reason to delay that enforcement.
25

26 CONCLUSION

1 The only explanation that this new arriving counsel can divine with his new clients in tow, is
2 that all of the parties and the PUC and respective counsel simply lost track of the effects of the
3 proceedings in UT-125 and instead got caught up in the consideration of the Federal orders while
4 forgetting that the Court of Appeals of Oregon had remanded to the PUC the standards to determine
5 both the PSP Tariff Rates and service overcharges including PAL and CustomNet tariffs. Everyone,
6 including the PUC, fell into the spell of Federal pre-emption and forgot that Oregon law applied to the
7 regulatory proceedings in UT-125 which ultimately did apply the standards of the Act, the Payphone
8 Orders and 47 USC 276 and the remedies thereunder as well the Oregon Revised Statutes and the prior
9 orders of the PUC albeit over a period of eleven years.
10

11 It is that authority which was not brought to the attention of the PUC by prior counsel, which
12 never represented the newly added real parties in interest who should not be denied their right to all of
13 the allegations and claims of the Second Amended Complaint. There simply is no basis to deny its
14 filing on behalf of the newly added Complainants. As to those unidentified PSPs, they should not be
15 denied the benefits of the very same orders as alleged either provided that they can be identified before
16 the closing of evidence. To do so would be to discriminate against them which is why the NPCC
17 continues to appear for them in the representative capacity until their identities are ascertained.
18

19 DATED this 22nd day of December, 2009
20

21 /s/
22 Frank G. Patrick, OSB 76022
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CERTIFICATE OF SERVICE

I, the undersigned below, hereby certify that I served the foregoing SECOND AMENDED COMPLAINT OF COMPLAINANTS on:

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

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

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

by the following indicated method or methods:

 X by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorney as shown above, the last-known office address of the attorney, and deposited with the United States Postal Service at Seattle, Washington, and by electronic mail on the date set forth below.

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

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

DATED this 22nd day of December, 2009

/s/
Frank G. Patrick, OSB 76022

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2
3 BEFORE THE PUBLIC UTILITY COMMISSION
4 OF OREGON
5

6 THE NORTHWEST PUBLIC
7 COMMUNICATIONS COUNCIL, on behalf
8 of PSPs A to Z, and NPCC MEMBERS:
9 Central Telephone, Inc; Communication
10 Management Services, LLC; Davel
11 Communications a/k/a Phonetel Technologies,
12 Inc., Interwest Tel, LLC; Interwest Telecom
13 Services Corporation; NSC Communications
14 Public Services Corporation; National
15 Payphone Services, LLC; Pacific Northwest
16 Payphones; Partners in Communication; T & C
17 Management, LLC; Corban Technologies, Inc.;
18 and Valley Pay Phones, Inc.

14 Complainants,
15 v.

16 Qwest Corporation,

17 Respondent.
18

DOCKET NO. DR 26/UC 600

DECLARATION IN SUPPORT OF
REPLY TO QWEST MOTIONS TO
STRIKE
FIRST AMENDED COMPLAINT AND
SECOND AMENDED COMPLAINT

19 The undersigned, Frank G. Patrick does submit this Declaration in Support of the Reply
20 of the Complainants to the Qwest Motion(s) to Strike Complainants' First Amended Complaint
21 and Complainants' Second Amended Complaint. I make this declaration of my own personal
22 knowledge of the facts below recited:

- 23 1. I am the new counsel in the pending matter.
24 2. I became aware of the contention between former counsel and what are now appearing
25 as the real parties in interest. I have been personally engaged by each and the NPCC in its now
26

1 limited capacity for the unidentified Complainants A to Z acting out of an abundance of caution
2 not to prejudice any PSP which may have been aware of DR-26 and UT-125 being of the wrong
3 impression that the NPCC would have standing to obtain payment of a refund based on
4 comments of former counsel. I will endeavor to identify those parties through discovery.

5
6 3. I was surprised by the direction of the NPCC to its former counsel Miller Nash, in
7 DR-26 of the claim of CMS LLC, and believe that former counsel sincerely believed its right to
8 proceed as it did.

9
10 4. I have reviewed the Orders of the PUC since the AFOR termination in 1995 and prior,
11 and represent that to the best of my knowledge and belief that they have been accurately recited
12 in the Replies and the Memorandum once the meticulous reading of each is tracked from May 1,
13 1996 through November 15, 2007, and on information and belief have arrived at the conclusion
14 that such Orders are factually currently capable of enforcement by the Complainants herein.

15
16
17 “I hereby declare that the above statement is true to the best of my knowledge and belief, and
18 that I understand it is made for use as evidence in a PUC (court) proceeding and is subject to
19 penalty for perjury.”

20 DATED this December 22, 2009.

21 /s/

FRANK G. PATRICK, OSB 76022

Attorney for Plaintiff

1
2
3 BEFORE THE PUBLIC UTILITY COMMISSION
4 OF OREGON
5

6 THE NORTHWEST PUBLIC
7 COMMUNICATIONS COUNCIL, on behalf
8 of PSPs A to Z, and NPCC MEMBERS:
9 Central Telephone, Inc; Communication
10 Management Services, LLC; Davel
11 Communications a/k/a Phonetel Technologies,
12 Inc., Interwest Tel, LLC; Interwest Telecom
13 Services Corporation; NSC Communications
14 Public Services Corporation; National
15 Payphone Services, LLC; Pacific Northwest
16 Payphones; Partners in Communication; T & C
17 Management, LLC; Corban Technologies, Inc.;
18 and Valley Pay Phones, Inc.

14 Complainants,
15 v.

16 Qwest Corporation,

17 Respondent.

DOCKET NO. DR 26/UC 600
DECLARATION IN SUPPORT OF
REPLY TO QWEST MOTIONS TO
STRIKE
FIRST AMENDED COMPLAINT AND
SECOND AMENDED COMPLAINT

18
19 The undersigned, Charles W. Jones does submit this Declaration in Support of the Reply
20 of the Complainants to the Qwest Motion(s) to Strike Complainants' First Amended Complaint
21 and Complainants' Second Amended Complaint. I make this declaration of my own personal
22 knowledge of the facts below recited:

23 1. I am the President and Manager of the individual real party in interest named herein as
24 Communication Management Services, LLC (CMS LLC aka TelAd International Inc.) and have
25 been at all times material to the proceedings in UT-125 and DR-26.
26

1 2. I have at material times during those proceedings been an officer and or director of
2 THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, NPCC.

3 3. I personally objected to the direction exercised by the NPCC to its former counsel
4 Miller Nash, in DR-26 of the claim of CMS LLC, and at no time ever engaged the prior counsel
5 of NPCC to represent CMS LLC in DR-26.

6 4. I personally informed the NPCC Board and officers and its former counsel that it
7 could not take the initiative to act on behalf of the real parties in interest, CMS LLC et al without
8 its express written authorization.
9

10 5. I have personally reviewed the engagement by the NPCC and each individual real
11 party in interest, Complainants herein, of Frank G. Patrick, current counsel herein.

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

15 DATED this December 22, 2009.

16 /s/
17 _____
18 Charles W. Jones, President
19 Communications Management LLC
20 (aka TelAd International Inc.)
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