

1 **BEFORE THE PUBLIC UTILITY COMMISSION**

2 **OF OREGON**

3 **DR 26/UC 600**

4 THE NORTHWEST PUBLIC
5 COMMUNICATIONS COUNCIL, et al.

6 Complainants,

7 v.

8 QWEST CORPORATION,

9 Defendant.

QWEST CORPORATION'S
MEMORANDUM IN SUPPORT OF
MOTION FOR SUMMARY JUDGMENT

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1 Defendant Qwest Corporation ("Qwest")¹ respectfully submits this memorandum in
2 support of its motion for summary judgment.

3 **I. INTRODUCTION**

4 Complainants' claim is based upon a 1997 order of the FCC, commonly referred to as the
5 Waiver Order.² In order to establish that Qwest is obligated to make a refund under that order,
6 Complainants must establish that Qwest "relied upon" the 45-day extension granted in the
7 Waiver Order. The undisputed facts, however, show that Qwest did not rely upon the Waiver
8 Order in any respect. Complainants' claim is based upon a gross misreading of the Waiver
9 Order. For these reasons, the Commission should grant Qwest's motion for summary judgment
10 and dismiss the Complaint.

11 The FCC's Payphone Orders, issued in late 1996 and early 1997, required local exchange
12 carriers ("LECs") to file intrastate tariffs for certain payphone services by January 15, 1997, to be
13 effective by April 15, 1997, complying with certain requirements including the so-called "new
14 services test." In early April 1997, all Regional Bell Operating Companies ("RBOCs") jointly
15 requested from the FCC a 45-day extension to comply with portions of those orders. The FCC
16 granted that extension in the Waiver Order, giving the RBOCs additional time to review their
17 existing tariffs to decide whether they were adequate or whether they should file new tariffs to

18 _____
19 ¹ "Qwest" includes its predecessor U S WEST Communications, Inc. ("U S WEST"). On
occasion, this memorandum will use the term "U S WEST" when that is more historically accurate.

20 ² Complainant Northwest Public Communications Council ("NPCC") is a trade association of
payphone service providers ("PSPs"). Complaint, ¶ 1. NPCC filed its original Complaint (the
"Complaint") on May 21, 2001, and that has been the basis of these proceedings for the succeeding years.
21 NPCC moved for leave to amend the Complaint twice in 2009. The Commission allowed NPCC's
February 2009 motion to amend the Complaint, but only to the extent that it added as named
22 Complainants certain identified members of NPCC. Order No. 09-155. The Commission denied
Complainants leave to add a claim for refunds for a second set of services, known as "CustomNet." *Id.*
23 The Commission denied Complainants' November 2009 motions for leave to further amend the
Complaint and ordered Complainants to file an amended complaint that is consistent with the
24 Commission's orders in its February 1, 2010 order. Order No. 10-027. To date, Complainants have failed
to file any amended complaint as required by the Commission. Therefore, for purposes of this motion for
25 summary judgment, Qwest will treat the original Complaint as the operative complaint, but will assume
that the identified members of NPCC are also named Complainants, giving effect to the Commission's
26 orders.

1 comply with the federal requirements. In requesting that extension, the RBOCs volunteered to
2 make a refund, but *only* if they decided to file new tariffs by May 19, 1997, instead of relying
3 upon their existing tariffs to satisfy the federal requirements, and only if those new tariffs had
4 lower rates than those that were in effect on April 15, 1997.

5 Some RBOCs chose to file new tariffs by May 19, 1997, and did not contest their
6 obligation to make a refund. Other RBOCs, like Qwest and Verizon-New York, chose to rely
7 upon their existing tariffs and did not make any new filings by May 19, 1997. These RBOCs did
8 not rely upon the Waiver Order, as an appellate court in New York decided in denying a refund
9 claim identical to Complainants', *regardless of whether the tariffs that were effective April 15,*
10 *1997 are ultimately determined to comply with the federal requirements.*

11 Qwest complied with the Payphone Orders by filing Oregon tariffs on January 15, 1997,
12 which this Commission approved on April 1, 1997, and which became effective on April 15,
13 1997. Qwest did not rely upon the Waiver Order in any respect, because Qwest did not file any
14 new tariffs in reliance upon the 45-day extension granted by the order. For these reasons, Qwest
15 is not obligated to make a refund to Complainants, and their Complaint should be dismissed.

16 Complainants' claim is based on two fundamental misstatements regarding the Waiver
17 Order. First, Complainants are expected to argue that an RBOC relied upon the Waiver Order by
18 starting to collect dial-around compensation ("DAC") for use of its payphones on April 15, 1997
19 if the rates it had in effect for payphone services were determined **at any later time** – after
20 review by a state commission, and exhaustion of all appeals and completion of all remand
21 proceedings – not to comply with one or more of the federal requirements. Second,
22 Complainants are expected to argue that the refund period created by the Waiver Order was
23 open-ended and extended for that same period of time, from April 15, 1997 until the issuance of
24 a final, non-appealable order finding that the RBOCs' rates complied with the federal
25 requirements.

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1 Contrary to Complainants' arguments, the FCC required RBOCs only to **certify** to IXCs
2 that their tariffs complied with the federal requirements in order to collect DAC. The FCC did
3 not require that such tariffs be approved by any state commission for the RBOC to qualify for
4 DAC, let alone that all commission proceedings and any required appeals and remand
5 proceedings be completed in the short time between the FCC's Payphone Orders and April 15,
6 1997. When it granted the limited waiver in the Waiver Order, the FCC ordered RBOCs to make
7 a refund only to the extent that the tariffs they **filed** between April 15, 1997 and May 19, 1997 –
8 upon which the RBOC based its certification – had rates lower than those in effect as of April 15,
9 1997. The FCC did not order a refund to the extent the rates a state commission **ultimately**
10 **approved** as complying with the new services test, once such an order became final and non-
11 appealable, were higher than the rates in effect as of April 15, 1997. Further, the period for
12 which an RBOC who relied upon the Waiver Order was required to make a refund was
13 extremely limited, and extended to no more than the 45-day extension granted by the Waiver
14 Order, as a New York appellate court has held. Complainants' arguments are completely
15 unsupported by the language of the FCC's Payphone Orders.

16 Even if Complainants could establish that Qwest relied upon the Waiver Order and is
17 therefore required to make a refund, which they cannot, their Complaint should be dismissed for
18 the additional reason that Complainants failed to bring this claim within the two-year limitations
19 period provided by federal law. Complainants did not commence this action for more than **four**
20 **years** after their claim accrued, and thus it is completely barred by the statute of limitations. At
21 the very least, if the Commission decides that the refund period under the Waiver Order is open-
22 ended as Complainants argue, then the Commission should still dismiss any claim for refunds for
23 any period prior to May 21, 1999, which is the date two years before Complainants commenced
24 this action, under clear precedent.

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1 **II. BACKGROUND**

2 **A. The Payphone Orders.**

3 Complainants' claim for a refund is based on an overbroad and incorrect reading of the
4 Waiver Order, as well as an erroneous factual assumption. Because Qwest did not rely on the
5 short extension granted in the Waiver Order, it has no legal obligation to make a refund of
6 payphone service charges. In order to fully appreciate the limited scope of the Waiver Order, it
7 is useful to understand the FCC's three prior Payphone Orders.³

8 The FCC issued the Payphone Orders to meet the requirements of Section 276 of the
9 Telecommunications Act of 1996. Section 276(a) prohibits RBOCs from subsidizing or
10 discriminating in favor of their own payphone services. Section 276(b) required the FCC to
11 issue regulations to promote competition in payphone services. Specifically, it required the FCC
12 to "establish a per call compensation plan to ensure that all payphone service providers are fairly
13 compensated for each and every intrastate and interstate call completed using their payphone
14" 47 U.S.C. § 276(b)(1)(A). It also required the FCC to issue regulations to discontinue
15 carrier access charge payphone service elements and subsidies from basic exchange and
16 exchange access revenues for LEC payphones. 47 U.S.C. § 276(b)(1)(B). Section 276 further
17 required nonstructural safeguards for RBOC payphones, to implement the requirements of
18 47 U.S.C. § 276(a), and equal rights for RBOCs and independent payphone service providers
19 ("PSPs") to negotiate with location providers on the choice of presubscribed intraLATA and
20 interLATA carriers. 47 U.S.C. § 276(b)(1)(C) - (E).

21 ³ The FCC's first payphone order was issued on September 20, 1996 in CC Docket No. 96-128, *In*
22 *the Matter of Implementation of the Pay Telephone Reclassification Provisions of the*
23 *Telecommunications Act of 1996*, FCC 96-388, 11 FCC Rcd 20541 (1996)' ("First Payphone Order").
24 The FCC's second order, its Order on Reconsideration, was issued on November 8, 1996, FCC 96-439, 11
25 FCC Rcd 21233 (1996), also in CC Docket 96-128 (the "Reconsideration Order"). The FCC issued a
26 third order, clarifying a few items that remained uncertain following the Reconsideration Order on
April 4, 1997, and granting a limited waiver of certain federal filing requirements of the previous orders,
DA 97-678, 12 FCC Rcd 20997 (1997) (the "Clarification Order"). On April 15, 1997, the FCC granted
LECs a limited waiver until May 19, 1997, to comply with certain intrastate filing requirements of the
foregoing orders, DA 97-805, 12 FCC Rcd 21370 (1997) (the "Waiver Order"). Together, these orders
are referred to as the "Payphone Orders."

1 The Payphone Orders implement these requirements, including a per-call compensation
2 system (DAC) for all PSPs. Non-LEC PSPs were entitled to receive DAC from the effective
3 date of the First Payphone Order. With respect to LEC payphones, however, the orders tie
4 eligibility for DAC to compliance with the other requirements of Section 276 that apply to LECs
5 in general and RBOCs in particular. The FCC interpreted Section 276 to require that LECs
6 remove subsidies from their rates and implement the non-structural safeguards before they could
7 receive compensation for calls originating from their payphones. First Payphone Order, ¶ 127.
8 The instant case turns upon the FCC's intrastate tariff filing requirements. The only payphone
9 service at issue in this case is called "Public Access Line" ("PAL"), which is a service that
10 connects payphones to the telephone network.

11 **1. The First Payphone Order.**

12 The FCC issued the First Payphone Order on September 20, 1996, addressing all of the
13 issues required by Section 276. Much of the order discusses the appropriate parameters of the
14 required per-call compensation plan. The most pertinent parts of the order for purposes of this
15 case are the sections relating to the elimination from LEC rates of subsidies for LEC payphones,
16 implementing the requirements of 47 U.S.C. § 276(b)(1)(B), as well as the non-structural
17 safeguards, implementing the non-discrimination requirement of 47 U.S.C. § 276(a)(2).

18 The FCC required LECs to introduce new services pursuant to filed tariffs. The FCC
19 decided that ILECs "must offer individual central office coin transmission services to PSPs under
20 nondiscriminatory, public, tariffed offerings if the LECs provide those services for their own
21 operations." First Payphone Order, ¶ 146. The FCC required this so that PSPs could offer
22 payphone service using either "smart" or "dumb" payphones.⁴ *Id.* The FCC further stated,
23 "[b]ecause the incumbent LECs have used central office coin services in the past, but have not
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25 ⁴ Central office coin services provided on a public access line ("PAL") are sometimes referred to
26 as a "smart" line, or "smart PAL," which allows a PSP to use a "dumb" payphone. "Smart" payphones
have such features built-in, and PSPs need only a basic access line ("basic PAL") to use them.

1 made those services available to independent payphone providers for use in their provision of
2 payphone services, we require that incumbent LEC provision of coin transmission service on an
3 unbundled basis be treated as a new service" subject to the "new services test." *Id.* The order
4 required ILECs to file tariffs for those services with the FCC by January 15, 1997. *Id.* The FCC
5 did not require unbundling of such features; rather it required "that any basic transmission
6 services provided by a LEC to its own payphone operations must be available under tariff to
7 other payphone providers . . ." *Id.*, ¶ 148.

8 The FCC also addressed the removal of subsidies from tariff rates. The FCC concluded
9 that ILECs are required to remove the interstate portion of payphone costs from their interstate
10 Common Carrier Line ("CCL") charges. First Payphone Order, ¶ 181. The FCC required ILECs
11 to file such revised tariffs with the FCC by January 15, 1997, to be effective no later than
12 April 15, 1997. *Id.*, ¶ 183. The order also required ILECs "to remove from their intrastate rates
13 [presumably, for non-payphone services] any charges that recover the costs of payphones.
14 Revised intrastate tariffs must be effective no later than April 15, 1997." *Id.*, ¶ 186. The FCC
15 required the states to "determine the intrastate rate elements that must be removed to eliminate
16 any intrastate subsidies within this time frame." *Id.* The FCC clarified in its ordering paragraphs
17 that LECs are required to file all of the tariffs required by paragraphs 180 to 187 on January 15,
18 1997, to be effective April 15, 1997. *Id.*, ¶ 370.

19 **2. The Reconsideration Order.**

20 On November 8, 1996, the FCC issued the Reconsideration Order, revising limited
21 provisions of the First Payphone Order. The FCC reiterated its conclusion that ILECs must offer
22 central office coin transmission services and any other "basic transmission services provided by a
23 LEC to its own payphone operations" to PSPs under public tariffs, and that such services are
24 subject to the new services test. Reconsideration Order, ¶¶ 146, 148. Upon reconsideration, the
25 FCC ordered LECs to file these tariffs with the states, and not the FCC. *Id.*, ¶ 162. Thus, the
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1 FCC ordered that: "LECs must file intrastate tariffs for these payphone services [basic payphone
2 services] and any unbundled features they provide to their own payphone services."

3 Reconsideration Order, ¶ 163. The FCC required these tariffs to be: (1) cost-based;
4 (2) consistent with Section 276 with regard, for example, to the removal of subsidies; and
5 (3) non-discriminatory. *Id.* "States must apply these requirements and the Computer III
6 guidelines [the new services test] for tariffing such intrastate services." *Id.* The FCC required
7 that these tariffs "be filed no later than January 15, 1997 and must be effective no later than
8 April 15, 1997." *Id.*

9 The FCC also stated: "We will rely on the states to ensure that the basic payphone line is
10 tariffed by the LECs in accordance with the requirements of Section 276." *Id.* "States unable to
11 review these tariffs may require the LECs operating in their states to file these tariffs with the
12 Commission [the FCC]." Significantly for this case, the FCC also ruled: "Where LECs have
13 already filed intrastate tariffs for these services, states may . . . conclude: (1) that existing tariffs
14 are consistent with the requirements of the Report and Order as revised herein; and (2) that in
15 such case no further filings are required." *Id.*

16 The FCC ruled that LECs would be eligible for per-call compensation (DAC) "like other
17 PSPs" when they have completed the FCC's requirements for implementing the payphone
18 regulatory scheme. *Id.*, ¶ 131. Specifically, the FCC stated that, in order to receive DAC, a LEC
19 must be able to **certify** several things to inter-exchange carriers ("IXCs") who would be required
20 to pay DAC. As far as intrastate tariffs are concerned, the FCC required a LEC to be able to
21 certify only that (a) "it has in effect intrastate tariffs for basic payphone services (for 'dumb' and
22 'smart' payphones);" and (b) "it has in effect intrastate and interstate tariffs for unbundled
23 functionalities associated with those lines." *Id.* Significantly, the Reconsideration Order
24 required LECs to "be able to certify" their compliance, based upon effective tariffs, in order to
25 receive compensation; *it did not require, for example, that the filed rates be determined by a*
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1 *court of last resort to be in compliance by that time, nor did it specify any consequence other*
2 *than ineligibility to receive compensation (such as a refund) for a LEC's inability to make a*
3 *certification of compliance.*

4 **3. The Clarification Order.**

5 On April 4, 1997, the FCC issued the Clarification Order, clarifying and providing a
6 limited waiver of the federal tariff filing requirements of the previous orders, which required
7 federal tariffs to be filed by January 15, 1997 for certain unbundled payphone features and
8 functions. The FCC found that LECs had not filed the required tariffs for all of the unbundled
9 features and functions, and clarified the requirement. It also concluded that the RBOCs had
10 made a good faith effort to comply with the FCC's requirements and waived the January 15,
11 1997 filing deadline and April 15, 1997 effective date for the required federal tariffs. Under the
12 terms of this waiver (which is not at issue in this case), any LEC that filed the required federal
13 tariffs by May 19, 1997, to be effective within 15 days after filing, would be eligible to receive
14 DAC as of April 15, 1997, as long as the LEC met all the other requirements of the
15 Reconsideration Order. Clarification Order, ¶ 21. If a LEC failed to make the required filing by
16 May 19, 1997, or if the tariffs were not effective within 15 days after filing, the LEC would not
17 be eligible to receive DAC as of April 15, 1997. *Id.*

18 The FCC also took that opportunity to clarify the state tariffing requirements. The
19 American Public Communications Council ("APCC") had filed a motion on March 26, 1997,
20 asking the FCC to rule that RBOCs were ineligible to receive payphone compensation because
21 they had not made the state filings required by paragraphs 162-163 of the Reconsideration Order.
22 *Id.*, ¶ 26. The RBOC Coalition argued in response that under the FCC's previous orders, the new
23 services test applied only to the unbundled elements of lines used for "dumb" payphones. *Id.*,
24 ¶ 27. The FCC denied APCC's motion, although it disagreed with the RBOC Coalition's
25 interpretation of the Reconsideration Order. The FCC emphasized that LECs were required to
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1 certify that they have state tariffs for basic payphone services that comply with the new services
2 test effective by April 15, 1997, in order to qualify for payphone compensation for that state. *Id.*,
3 ¶ 30. In response to the APCC's and certain IXCs' claims that RBOCs' state tariffs did not meet
4 the federal requirements, the FCC noted that: "Any party who believes that a particular LEC's
5 intrastate tariffs fail to meet these requirements has the option of filing a complaint with the
6 Commission [the FCC]." *Id.*, n.93. ***The FCC did not establish any remedy, such as a refund,
7 in the event such a complaint were filed.***

8 **4. The Waiver Order.**

9 On April 10, 1997, the RBOC Coalition⁵ and Ameritech requested that the FCC grant a
10 limited waiver to extend the requirement for LECs to file intrastate tariffs that comply with the
11 federal guidelines, specifically the new services test, to May 19, 1997. The Coalition stated that
12 "none of us" understood the previous Payphone Orders to require existing, previously tariffed
13 intrastate payphone services to meet the new services test. Ex parte filing of Michael K.
14 Kellogg, dated April 10, 1997, Declaration of Lawrence Reichman ("Reichman Decl."), ¶ 2,
15 Ex. 1 at 1. Rather, they understood that the new services test applied only to new services, such
16 as an access line for "dumb" payphones, and did not learn otherwise until the Clarification Order.
17 *Id.*

18 Significantly, the Coalition was confident that new tariff filings would be the exception
19 rather than the rule:

20 In most States, ensuring that *previously tariffed* payphone services
21 meet the "new services" test . . . should not be too problematic.
22 We are gathering the relevant cost information and will be
23 prepared to certify that *those tariffs* satisfy the costing standards of
24 the "new services" test. In some States, however, there may be a
25 discrepancy between the existing state tariff rate and the "new
26 services" test; as a result, new tariff rates may have to be filed.

5 The RBOC Coalition consisted of all RBOCs except Ameritech. Waiver Order, n.7.

1 *Id.* at 1 (emphasis added). The Coalition indicated that its members would review cost data for
2 existing tariffed services and either certify that the services met the new services test *or* file new
3 tariffs by May 19, 1997. Indeed, the Coalition suggested that in some states the existing rates
4 might be too low. *Id.* at 1-2. The Coalition indicated that this extension would permit the LECs
5 "to file new intrastate tariffs *in the states where it is necessary . . .*" Waiver Order, ¶ 14
6 (emphasis added).

7 The RBOCs also committed to reimburse customers purchasing services back to
8 April 15, 1997, "to the extent that the new tariff rates are lower than the existing ones." *Id.* The
9 RBOCs made clear that the offer to make a refund provided a remedy beyond what the FCC or a
10 state commission could order. In its April 10, 1997 ex parte filing, the RBOC Coalition noted
11 that "the filed-rate doctrine precludes either the state or federal government from ordering such a
12 retroactive rate adjustment." Reichman Decl., Ex. 1 at 2. The Coalition, thus, voluntarily
13 undertook to provide the refund specified in the Waiver Order. Given the voluntary nature of
14 this refund offer, the refund obligation should be construed narrowly.

15 In an April 11, 1997 filing, the Coalition reiterated the basis for its waiver request and the
16 nature of its refund offer:

17 The waiver will allow LECs 45 days (from the April 4 Order) to
18 gather the relevant cost information and either be prepared to
19 certify that the existing tariffs satisfy the costing standards of the
20 "new services" test *or to file new or revised tariffs* that do satisfy
21 those standards. Furthermore, as noted, *where new or revised*
tariffs are required and the new rates are lower than the existing
ones, we will undertake (consistent with state requirements) to
reimburse or provide a credit back to April 15, 1997, to those
purchasing the services under the existing tariffs.

22 Ex parte filing of Michael K. Kellogg, dated April 11, 1997, Reichman Decl., ¶ 3, Ex. 2 at 1
23 (emphasis added). The Coalition could not have been clearer in stating that its offer to make a
24 refund applied only in situations where LECs filed "new or revised tariffs" in the 45 days
25 following April 4, 1997.

1 The FCC granted the request and extended the time for LECs to file intrastate tariffs for
2 payphone services that comply with the federal guidelines to May 19, 1997, in order to be
3 eligible to receive payphone compensation as of April 15, 1997. Waiver Order, ¶ 19. The
4 waiver required LECs to "have in place intrastate tariffs for payphone services that are effective
5 by April 15, 1997," even if they did not comply with the federal requirements. *Id.* Finally, the
6 FCC ordered that: "A LEC who seeks to rely on the waiver granted in the instant Order must
7 reimburse its customers or provide credit from April 15, 1997 in situations where the newly
8 tariffed rates, when effective, are lower than the existing tariffed rates." *Id.*, ¶ 25. This was
9 intended to "mitigate any delay in having in effect intrastate tariffs that comply with the
10 guidelines . . . , including the concern raised by MCI that the subsidies from payphone services
11 will not have been removed before the LECs receive payphone compensation." *Id.*, ¶ 20. The
12 FCC emphasized that the waiver "is for a limited duration to address a specific compliance issue"
13 and rejected APCC's proposal that LECs be required to re-file all intrastate rates. *Id.*, ¶ 21.
14 Thus, not only did the FCC emphasize the "limited duration" of the Waiver Order and its refund
15 obligation, it also made clear that the only requirements of the Payphone Orders were that LECs
16 **certify** that they had certain tariffs in effect, not that such tariffs be approved by a state
17 commission in a final, non-appealable order.

18 The Waiver Order is the **only one** of the Payphone Orders that requires a refund, and then
19 only in very limited circumstances. Under the Waiver Order, only a LEC who relied upon the
20 extension granted thereby could be required to make a refund, and then only to the extent that the
21 newly tariffed rates, when **effective**, were lower than the rates existing on April 15, 1997. A
22 LEC could rely upon the Waiver Order only by making a new or revised payphone tariff filing in
23 the 45 days between April 4 and May 19, 1997. LECs who made no such tariff filings in that
24 time period simply did not rely upon the Waiver Order in any respect and cannot be required to
25 make any refund. The Reconsideration Order, which had no refund obligation, had required
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1 LECs to be able to certify their compliance with the federal requirements by April 15, 1997 to
2 receive payphone compensation. That order also permitted such certification to be based upon
3 pre-existing tariffs. In requesting the limited waiver, the RBOC Coalition stated that its
4 members would *either* certify that their existing payphone services met the new services test *or*
5 file new or revised tariffs by May 19, 1997. The refund obligation, however, applied only to
6 those RBOCs who filed new or revised tariffs by May 19, 1997, not to those who certified
7 compliance based upon previous filings.

8 In addition, it is clear that the FCC intended LECs to base their certifications on
9 "effective" tariffs, and did not require that such tariffs were also reviewed and approved by state
10 commissions, in a final, non-appealable order, as being in compliance with the federal
11 requirements. Moreover, the refund period under the Waiver Order was limited to up to 45 days,
12 and was not open-ended, as Complainants will argue.

13 **B. Qwest's Oregon Compliance With the Payphone Orders.**

14 Qwest's Oregon tariff filings were made pursuant to the Payphone Orders that preceded
15 the Waiver Order. Qwest did not rely upon the Waiver Order in any respect and, thus, is not
16 liable to make any refund in this case.

17 **1. Filings with the Oregon Commission.**

18 On January 15, 1997, Qwest filed Advice No. 1668 with the Oregon Commission, with a
19 proposed effective date of April 15, 1997. Declaration of Alex M. Duarte ("Duarte Decl."), ¶ 2,
20 Ex. 1. This filing introduced tariffs for Smart PAL (access lines for "dumb" payphones) "to meet
21 the requirements in" the FCC's Payphone Orders, expressly including paragraph 163 of the
22 Reconsideration Order. *Id.* at 1. It also withdrew tariff language that imposed operational
23 regulations on PSP pay telephones. The advice letter recites that Qwest currently offers a Basic
24 PAL line, and does not indicate that any changes to those rates are being made. *Id.* at 1.

1 The Commission considered this tariff filing at its April 1, 1997 public meeting. All of
2 the LECs operating in Oregon had submitted filings to the PUC to comply with the Payphone
3 Orders. Specifically, Staff noted that the four fully regulated telecommunications utilities and 12
4 partially regulated utilities who are required to file tariffs made tariff filings. In addition, the
5 four other partially regulated utilities and 11 cooperatives filed letters indicating how they
6 intended to comply with the Payphone Orders. Transcript of Public Meeting of Oregon PUC,
7 April 1, 1997, Reichman Decl., ¶ 4, Ex. 3 at 1. Each of the filings had in common the addition
8 of a payphone access line that could be used with "dumb" payphones, in the case of U S WEST,
9 a "Smart PAL."⁶ *Id.* No party disputed Qwest's compliance with the Payphone Orders or
10 objected to Staff's recommendation. *Id.* Based on Staff's recommendation, the Commission
11 decided that Qwest's tariffs would become effective on April 15, 1997, as requested by Qwest.
12 *Id.* at 4; *see also* Duarte Decl., Ex. 2.⁷

13 Qwest made no additional Oregon tariff filings relating to payphone service until
14 September 16, 1997, when Qwest filed Advice No. 1689. Duarte Decl., ¶ 4. That tariff filing
15 introduced a flat-rated Basic PAL, reduced the rate of Smart PAL, and removed a restriction on
16 subscribing to flat-rated Smart PAL. The advice letter states that filing was made to comply with
17 1997's Oregon House Bill 3168 (codified at ORS 759.235) which had an effective date of
18 October 4, 1997, and prohibited measured-only service.⁸ *Id.*, Ex. 3 at 1.

21 _____
22 ⁶ Staff raised a concern that U S WEST did not introduce a flat-rated Smart PAL, but only one on
23 a measured basis. *See* Staff Report for April 1, 1997 Public Meeting, Reichman Decl., ¶ 6, Ex. 4. This
24 concern was not based on Section 276 or the Payphone Orders. In response, U S WEST agreed to
25 introduce a "semi-flat PAL" (a measured line with a 300-call allowance) with a filing by September 12,
26 1997, to be effective October 15. *Id.*

27 ⁷ Also based on Staff's recommendation, the Commission decided to suspend the tariff filings of
28 utilities Pacific Telecom, Inc. and United Telephone Company of the Northwest. Reichman Decl., ¶ 5.
29 Accordingly, these LECs apparently did not have effective payphone tariffs by April 15, 1997, as required
30 by the Payphone Orders.

31 ⁸ That filing satisfied U S WEST's previous commitment to offer a "semi-flat" Smart PAL.

1 Qwest relied upon its January 15, 1997 filing and its existing tariffs to comply with the
2 Payphone Orders, and did not rely upon the extension granted in the Waiver Order in any
3 respect. Qwest's certification of its compliance with the federal requirements confirms this.

4 **2. Qwest's certification of compliance with the Payphone Orders.**

5 On May 20, 1997, Qwest certified to IXCs its compliance with the FCC's four-part
6 payphone test and its eligibility to receive interim compensation as of April 15, 1997 in 13 of its
7 14 states (all states except New Mexico). Letter dated May 20, 1997 from Frank H.
8 Hatzenbuehler of U S WEST to IXCs, Reichman Decl., ¶ 7, Ex. 5. Specifically, Qwest certified,
9 among other things, that it has "effective intrastate tariffs reflecting the removal of charges that
10 recover the cost of payphones and any intrastate subsidies" and that "it has in effect intrastate
11 tariffs for basic payphone services (for 'dumb' and 'smart' payphones)." *Id.* at 1. Further, Qwest
12 certified that "it has effective intrastate payphone services tariffs which are cost-based, consistent
13 with the requirements of Section 276, nondiscriminatory and consistent with the Computer III
14 guidelines [i.e., the new services test]." *Id.* at 2. Attached to the letter was a matrix
15 demonstrating compliance for the 13 states. For Oregon, the matrix noted that no adjustment to
16 the existing rates was required because "[a] specific analysis of payphone revenue to costs shows
17 there is no payphone subsidy." *Id.* at 10. It also noted that Qwest complied with the intrastate
18 tariff filings for Oregon by filing Advice No. 1668 on January 15, 1997, which was approved on
19 April 1, 1997 and effective April 15, 1997. *Id.* at 11.

20 The FCC had occasion to determine the sufficiency of Qwest's self-certification. MCI
21 refused to pay Qwest payphone compensation, arguing that Qwest's certification was inadequate.
22 Qwest filed a complaint with the FCC to recover compensation. The FCC Common Carrier
23 Bureau specifically reviewed Qwest's May 20, 1997 letter to IXCs and concluded that it "clearly
24 met" the FCC's requirements, and that MCI had no basis to refuse to pay compensation. *In the*
25 *Matter of Ameritech Illinois, U S WEST Communications, Inc. et al. v. MCI Telecommunications*

1 *Corporation*, DA 99-2449, 14 FCC Rcd 18643 (1999). The Bureau noted that there is no
2 exception to IXCs' obligation to pay compensation after receiving the LEC's certification. "IXCs
3 questioning the veracity of a LEC's certification may challenge the LEC's compliance by
4 initiating a proceeding at the Commission. . . . Determination of the sufficiency of the LEC's
5 compliance, however, is a function solely within the Commission's and state's jurisdiction." *Id.*,
6 ¶¶ 26-27. This confirms the distinction between the requirement of the Payphone Orders that a
7 LEC *certify* its compliance, and not that such compliance be determined by a state commission,
8 in order for the LEC to qualify to receive DAC. *See TON Services, Inc. v. Qwest Corporation*,
9 493 F.3d 1225, 1233 (10th Cir. 2007) (discussing difference between "the relatively easy process
10 of LEC 'certification' for the purposes of receiving per-call compensation [and] . . . the far more
11 burdensome process of ensuring actual NST [new services test] compliance . . .").

12 **3. PUC considers Qwest's payphone rates during general rate case.**

13 From 1995 through 2001, the PUC was considering Qwest's overall rates for intrastate
14 telecommunications service during a general rate case, PUC Docket UT 125. As part of this
15 review, and in the context of revising Qwest's overall intrastate rate structure, the PUC
16 considered and revised Qwest's rates for payphone services.

17 The PUC analyzed Qwest's tariffed rates for PAL services by comparing those rates to
18 other business phone line services, comparing rates to costs, and analyzing profit margins.
19 Commission Order No. 01-810 ("*UT 125 Order*"), *rev'd, Northwest Public Communications*
20 *Council v. Public Utility Commission of Oregon*, 196 Or. App. 94, 100 P.3d 776 (2004) ("*UT*
21 *125 Appeal*"). The Commission noted that the new services test does "not specif[y] what kind of
22 evidence is necessary to determine whether [payphone line service] rates satisfy the new services
23 test." *UT 125 Order* at 50.

24 Complainant NPCC was not satisfied with the payphone services rates the Commission
25 established in 2001 in Docket UT 125, and appealed the Commission's order. The only issue on
26

1 appeal was whether Qwest's payphone service rates complied with the New Services Test. *UT*
2 *125 Appeal*, 196 Or. App at 97.

3 **4. Qwest files new, lower rates to comply with the *Wisconsin Order*.**

4 While NPCC's appeal of the PUC's Docket UT 125 order was pending, the FCC issued
5 the so-called *Wisconsin Order*, establishing new requirements for payphone services to meet the
6 New Services Test. *In re Wis. Pub. Serv. Comm'n*, Mem. Op. & Order, 17 F.C.C. Rcd. 2051,
7 2060-64 ¶¶ 31-42 (2002) ("*Wisconsin Order*"). In the course of reviewing PSPs' claims
8 concerning PAL rates in the state of Wisconsin (not involving Qwest), the FCC offered a new,
9 specific articulation of the new services test. In general, the FCC instructed RBOCs to ignore
10 certain kinds of costs when calculating the costs of providing PAL services. *Wisconsin Order*,
11 17 F.C.C. Rcd. at 2069-72 ¶¶ 56-69. As a result of this change to the new services test, carriers
12 "modif[ied] their tariffs to lower their existing rates." *New England Pub. Commc'ns Council,*
13 *Inc. v. FCC*, 334 F.3d 69, 74 (D.C. Cir. 2003) .

14 Throughout the country, RBOCs like Qwest had to revisit existing PAL rates and, in most
15 cases, had to file brand new tariffs to comply with this change in the new services test. This
16 change, however, was prospective only. In Oregon, Qwest filed reduced PAL rates with the
17 Commission on February 14, 2003. This filing was expressly made to comply with the
18 *Wisconsin Order*. Reichman Decl., ¶ 8, Ex. 6 at 1. The Commission acknowledged those rates
19 which became effective with the Commission's approval on March 17, 2003. Reichman Decl.,
20 ¶ 9, Ex. 7.

21 **5. The Court of Appeals reverses and remands the UT 125 Order.**

22 The Court of Appeals issued its decision in November 2004, finding that the
23 Commission, in its 2001 order, had not appropriately considered whether Qwest's rates complied
24 with the new services test and remanding the matter to the Commission to establish rates for
25 payphone services that comply with the new services test. *UT 125 Appeal*, 196 Or. App. at 100.

1 **6. On remand to Commission, NPCC stipulates Qwest's 2003 rates meet new**
2 **services test.**

3 Following remand to the Commission, several parties to the Commission proceeding,
4 including Complainant NPCC on behalf of its members, executed and filed a Stipulation that the
5 same rates Qwest filed in February 2003 and that the Commission approved on March 17, 2003
6 comply with the new services test. Reichman Decl., ¶ 10, Ex. 8 at 2 n.1. The Commission
7 adopted this Stipulation, finding that the rates Qwest had filed in 2003, and had been charging
8 plaintiffs and other PSPs since March 17, 2003, comply with the new services test and the Court
9 of Appeals' remand. Order No. 07-797 at 3-4.

10 **III. ARGUMENT**

11 **A. Qwest Did Not Rely Upon the Waiver Order.**

12 Complainants' extraordinary claim for a refund of PAL rates they paid from April 15,
13 1997 through 2007 is based on a fundamental mischaracterization of the Waiver Order and a
14 complete disregard of the facts relating to Qwest's intrastate tariff filings made to comply with
15 the Payphone Orders. Complainants claim that the Waiver Order requires RBOCs to refund
16 payphone service rates paid by PSPs from April 15, 1997 until such time as a state commission
17 establishes payphone rates that comply with all federal requirements, whenever that may occur.
18 Complainants' argument would turn the simple 45-day extension to file tariffs granted by the
19 Waiver Order into an open-ended obligation, triggered only by a final determination that PAL
20 rates, whenever filed, comply with the new services test. In this case, Complainants will argue
21 that Qwest's PAL rates did not comply with the new services test until the Commission reset
22 those rates in 2007 pursuant to the Court of Appeals' remand. Complainants' claim is without
23 merit because the Waiver Order does not provide such extraordinarily broad relief.

24 First, the Waiver Order imposes a refund obligation only on a LEC "who seeks to rely on
25 the waiver granted in" the order. Waiver Order, ¶ 25. The waiver granted in the order was of the
26 requirement that LECs *file* intrastate tariffs that they believe comply with the new services test

1 by January 15, 1997, to be effective by April 15, 1997. The waiver was also limited in that it
2 extended the time *for such filings* only to May 19, 1997. The FCC expressly left open the
3 possibility that LECs could determine that their existing tariffs complied with the new services
4 test and be able to certify as such by May 19, 1997, without having to make any additional filing,
5 and with no obligation to make a refund. Thus, the only LECs who relied on the Waiver Order
6 were those who **filed** state payphone tariffs between April 4 and May 19, 1997. LECs who
7 relied on their existing tariffs, and made their certifications on that basis, did not rely on the
8 Waiver Order in any respect.

9 Qwest did not rely on the Waiver Order because it made no additional Oregon payphone
10 filings after January 15, 1997 and before May 19, 1997. It is clear from the undisputed facts that
11 on January 15, 1997, Qwest made a tariff filing in Oregon to comply with the Payphone Orders.
12 Pursuant to the Commission's order, that tariff filing was effective on April 15, 1997. Further,
13 Qwest made no other tariff filings relating to payphone service between January 15, 1997 and
14 May 19, 1997. Thus, notwithstanding the extension the FCC made available in the Waiver
15 Order, Qwest chose to rely upon its January 15, 1997 filing and its existing tariffs to comply with
16 the Payphone Orders, and did not rely upon the Waiver Order in any respect.

17 Second, the potential refund obligation of the Waiver Order applied only to "situations
18 where the newly tariffed rates, when effective, are lower than the existing tariffed rates." Waiver
19 Order, ¶ 25. The "newly tariffed rates" referenced in that sentence are the rates that a LEC who
20 relied on the waiver would have filed during the time period between April 4, 1997 and May 19,
21 1997. "Newly tariffed rates" do **not** require that the rates have been approved by a state
22 commission including any approvals that may be required following any appeal and remand
23 proceedings.⁹ The refund obligation was intended to mitigate the advantage that a LEC would

24
25 ⁹ The FCC could not know with certainty when such rates would become effective, as that would
26 depend upon each state's process for making rates effective; however, it is clear that the time period for
the refund was relatively short: between April 15, 1997 and the date when rates filed no later than
May 19, 1997 became effective. Indeed, the FCC required states to act on tariffs filed pursuant to the

1 have by receiving payphone compensation as of April 15, 1997, even though its new payphone
2 service rates would not be effective until a later date. The only LECs that could receive
3 payphone compensation as of April 15, 1997, however, were those LECs who could certify that
4 they had filed compliant state tariffs by May 19, 1997. Of this group, only those LECs that
5 relied upon the Waiver Order by filing tariffs between April 4 and May 19, 1997, were obligated
6 to make a refund. When Qwest certified its compliance with the Payphone Orders on May 20,
7 1997, it did so based upon its tariffs filed on January 15, 1997, and its existing tariffs, and did not
8 do so based upon any state tariffs filed after April 4, 1997. Thus, Qwest did not rely on the
9 Waiver Order.

10 The facts of this case are indistinguishable from those in a New York appellate case, the
11 only reported case to address a refund claim based upon the Waiver Order. In *In the Matter of*
12 *Independent Payphone Association of New York, Inc. v. Public Service Commission of the State*
13 *of New York*, 5 AD 3d 960, 774 NYS2d 197 (2004), the court decided that Verizon¹⁰ was not
14 required to refund portions of PAL rates because Verizon did not rely upon the Waiver Order,
15 ***even if the rates Verizon relied upon in 1997 to comply with the FCC's Payphone Orders were***
16 ***later determined not to comply with the new services test.*** To comply with the FCC's Payphone
17 Orders, Verizon filed with the New York PSC new rates for its "smart" payphone lines on
18 January 15, 1997, to become effective on April 15, 1997, just as Qwest did in Oregon. Also like
19 Qwest, Verizon left unchanged its rates for basic PALs. Verizon also was a member of the
20 RBOC Coalition that requested the 45-day waiver granted by the FCC in the Waiver Order. Like
21 Qwest, Verizon did not file any new tariffs by May 19, 1997, but continued to rely upon its pre-
22 existing basic PAL rates to comply with the Payphone Orders.

23
24
25 Waiver Order within a reasonable period of time, and retained jurisdiction to review intrastate tariffs in
the event a state did not act as required. Waiver Order, n.60.

26 ¹⁰ "Verizon" includes Verizon's predecessor, the RBOC in New York.

1 The New York Supreme Court (the trial-level court), reviewing the New York PSC's
2 approval of the payphone rates, remanded the basic PAL rates to the PSC to determine whether
3 they comply with the new services test. The court also determined that Verizon would be
4 required to refund PAL rates to the extent that new compliant rates were determined to be lower
5 than the rates existing as of April 15, 1997. Verizon appealed this portion of the court's decision,
6 and the Appellate Division reversed the refund requirement, concluding that Verizon did not rely
7 upon the Waiver Order:

8 We differ with Supreme Court, however, with regard to its
9 conclusion that petitioners will be entitled to a refund or credit in
10 the event that the PSC concludes that new rates be established in
11 accordance with the new services test and such rates prove to be
12 lower than those presently in existence. The basis for Supreme
13 Court's conclusion was a letter from representatives of Verizon's
14 predecessor requesting an extension of time in which to review
15 existing rates and file new rates if it were determined that the
16 existing rates were not compliant with the new services test,
17 proposing an agreement to refund or provide a credit to PSPs for
18 the difference if the newly filed rates were lower than existing
19 rates and requesting an order of the Federal Communications
20 Commission granting a 45-day extension for filing new rates and
21 ordering a refund in the event such new rates were indeed lower
22 than existing rates.^[11] *Suffice to say that new rates were not filed
23 and the refund order was thus never effective.* The fact that the
24 PSC's prior approval of the preexisting rates has now been
25 judicially called into question and the matter has been remanded
26 for further consideration cannot be the basis of potential refunds
that were only agreed to and contemplated for a period ending
May 19, 1997.

19 5 A.D.3d at 963-64 (emphasis added). This is the only case Qwest could find in which the
20 applicability of the Waiver Order to a refund claim was litigated. Not only does this case
21 establish that Qwest, like Verizon, did not rely on the Waiver Order, it also holds that the refund
22 period was limited, not open-ended as Complainants argue, and ended on May 17, 1997.

23 The facts of the instant case are indistinguishable from those in the Verizon-New York
24 case. Qwest filed new Smart PAL rates in Oregon on January 15, 1997, and relied upon its

25 ¹¹ Although the decision does not specify, this letter is undoubtedly the April 10, 1997 *ex parte*
26 filing by the RBOC Coalition discussed above. See Section II.A.4.

1 existing basic PAL rates to satisfy the federal requirements. While Qwest also had the option to
2 benefit from the Waiver Order, Qwest did not rely upon the Waiver Order because it did not file
3 any new payphone tariffs by May 19, 1997. And even though a court remanded Qwest's existing
4 PAL rates to the Commission for application of the new services test, and Qwest lowered those
5 rates in 2003, no refund is available since Qwest did not rely upon the Waiver Order. Thus,
6 Complainants' Complaint should be dismissed.

7 Based upon arguments they have made elsewhere, Qwest expects Complainants to
8 minimize their reliance on the Waiver Order and attempt to argue that they are entitled to a
9 refund directly under 47 U.S.C. § 276. The Commission should not even consider such an
10 argument. Complainants' Complaint clearly seeks relief under the Waiver Order and not under
11 Section 276: "Qwest must refund to NPCC's members and other PAL subscribers all
12 overcharges, as required by the FCC's Waiver Order;" and "Qwest's PAL subscribers are entitled
13 to refunds of all overcharges, as required by the FCC's Waiver Order . . ." Complaint at 7.

14 Moreover, there is no basis whatsoever for Complainants to base a refund claim under
15 Section 276 because all of Qwest's specific obligations arose under the FCC's Payphone Orders
16 and the claim for refund may be based only on the Waiver Order. Section 276 required the FCC
17 to issue regulations accomplishing certain things, and the FCC issued the Payphone Orders to
18 implement Section 276. The specific obligations of RBOCs – including each of the deadlines
19 Complainants claim Qwest missed and the specific tariffing requirements Complainants claim
20 Qwest failed to satisfy – are imposed by the FCC's orders, not the Telecommunications Act.

21 Moreover, the *only* authority for a refund is found in the FCC's Waiver Order. As
22 discussed above, the FCC issued the Waiver Order after the RBOC Coalition offered to make a
23 refund in exchange for a brief extension of time. In making that offer, the Coalition noted that
24 "the filed-rate doctrine precludes either the state or federal government from ordering such a
25 retroactive rate adjustment." Reichman Decl., Ex. 1 at 2. If neither the FCC nor the state
26

1 commissions could impose such a refund obligation absent agreement of the RBOCs, then the
2 **only** source of the refund obligation is the Waiver Order. If Complainants argue that the refund
3 obligation does not depend on the Waiver Order, it is only because they realize that they have no
4 right to a refund under the Waiver Order; however, based upon the law and their pleading,
5 Complainants' claim must live or die under that order.

6 **B. Complainants' Claim Is Barred by the Two-Year Statute of Limitations.**

7 Complainants filed their Complaint in this case on May 21, 2001, more than four years
8 after the FCC required Qwest to have effective PAL rates that complied with the new services
9 test and more than four years after Qwest certified that its Oregon PAL rates complied with the
10 federal requirements. Federal law, however, requires parties to file complaints against carriers
11 seeking monetary damages within *two years* after the claim accrues. Any claim Complainants
12 had for a refund accrued on April 15, 1997, when federal law required intrastate PAL rates to
13 comply with the new services test and other requirements. Complainants' claims are time-barred,
14 since they were not brought within the two-year period.

15 **1. Complainants' refund claims are governed by a two-year statute of**
16 **limitations.**

17 Complainants' claims, which are based upon the FCC's Waiver Order, are governed by
18 the federal statute of limitations. 47 U.S.C. § 415(b) establishes a two-year statute of limitations
19 for claims against carriers for the recovery of damages not based on overcharges.¹²
20 Complainants' claims are claims against a carrier (Qwest) for damages (refunds), and
21 Complainants, therefore, were required to bring such claims within two years of the claims'
22 accrual or suffer a time-bar. Complainants' claims are based upon their allegation that Qwest's
23 PAL rates that were effective April 15, 1997 did not comply with the new services test, and thus
24 they paid too much for such services as of that date. Under these circumstances, their claims

25 _____
26 ¹² Overcharges are defined as charges in excess of FCC tariffed rates, which is not the basis of
Complainants' claim in this case. 47 U.S.C. § 415(g).

1 necessarily accrued as of April 15, 1997. Complainants' complaint, filed more than *four years*
2 after their claims accrued, simply came too late.

3 The Ninth Circuit, in *Davel Communications, Inc. v. Qwest Corporation*, 460 F.3d 1075,
4 1091 (9th Cir. 2006), applied this two-year statute of limitations to an identical claim by a group
5 of PSPs (including many of the same Complainants as in this case¹³) seeking a refund of amounts
6 they paid for payphone services, pursuant to the *Waiver Order*. The Commission also applied
7 this statute of limitations in denying Complainants' motion for leave to amend their Complaint to
8 include a claim for refund of amounts they paid for CustomNet service. Order No. 09-155 at 4,
9 8. There can be no dispute that Complainants' claims are governed by this two-year statute of
10 limitations.

11 **2. Complainants' claims accrued in 1997.**

12 There also should be no serious dispute that Complainants' refund claims accrued in
13 1997. Complainants claim that Qwest failed to file rates for its payphone services in 1997 that
14 complied with the new services test. Complaint, ¶¶ 18-19. Under their theory, Complainants
15 started paying too much for the payphone services they purchased from Qwest starting in
16 April 1997 and are entitled to a refund. Under these allegations, Complainants' claims accrued in
17 April 1997.

18 For purposes of applying the statute of limitations in 47 U.S.C. § 415, a claim accrues
19 "when the injured party discovers – or in the exercise of due diligence should have discovered –
20 that it has been injured." *Sprint Communications v. F.C.C.*, 76 F.3d 1221, 1227-31 (D.C. Cir.
21 1996). "Accrual does not wait until the injured party has access to or constructive knowledge of
22 all the facts required to support its claim. . . . Nor is accrual deferred until the injured party has
23 enough information to calculate its damages." *Id.* at 1228. Under this analysis, Complainants'
24

25 _____
26 ¹³ Indeed, most of the plaintiffs in this case were also parties to the *Davel* litigation, seeking
refunds for amounts they paid Qwest for payphone services in 11 states, not including Oregon.

1 claims accrued in 1997, when they claim Qwest failed to file new services test-compliant rates
2 and Complainants, therefore, started paying too much for PAL service.

3 Complainants are likely to assert that their claims did not accrue until November 2007,
4 when the Commission approved Qwest's payphone services rates under the new services test in
5 Docket UT 125. Such an argument is belied by the fact that Complainants filed their Complaint
6 in 2001, when they must have thought it was ripe, and also moved for partial summary judgment
7 on liability (earlier in this case) in 2004. Moreover, such an argument runs counter to the Ninth
8 Circuit's decision in *Davel*. The plaintiffs in *Davel* argued that their claim for a refund of
9 CustomNet rates did not accrue until Qwest filed new services test-compliant rates in 2002. The
10 *Davel* court rejected that argument, holding that the plaintiffs' claim accrued in 1997, when
11 Qwest was required to file new services test-compliant rates. 460 F.3d at 1092. According to
12 the Ninth Circuit, as soon as Qwest failed to file fraud protection¹⁴ rates with the FCC, the
13 plaintiffs could claim that Qwest was in non-compliance with the Payphone Orders, and the
14 plaintiffs were on inquiry notice that they might be paying excessive rates for fraud protection.
15 Their cause of action, therefore, accrued at that time. The fact that the plaintiffs were not in a
16 position to determine the precise amount of the alleged overcharges, or even whether the charges
17 were excessive at all, until Qwest filed its new fraud protection rates in 2002, did not change this
18 result. *Id.*; see also *Sprint Communications, supra*.¹⁵

19 ¹⁴ "Fraud protection" is a payphone service for which Qwest's brand name is "CustomNet."

20 ¹⁵ In what is only *dicta*, the *Davel* court discussed a possible difference between the claim for
21 refund of CustomNet rates that it was addressing and a claim for refund of PAL rates based on the FCC's
Waiver Order.

22 This analysis reflects a key difference between the damages claims concerning
23 the fraud protection services and the claims based on the Waiver Order. On
24 *Davel*'s construction of the Waiver Order, the right to reimbursement under the
25 Order came into existence only upon the filing of NST-compliant rates. On that
26 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. In contrast, there was no reimbursement order
applicable to the fraud protection services, so any cause of action necessarily

1 What the *Davel* court held with respect to CustomNet rates applies with equal force to a
2 claim for refund of PAL rates. Complainants could have filed a claim for a refund as early as
3 1997, so their claim accrued at that time.

4 **3. Complainants' claim is completely barred by the statute of limitations.**

5 As discussed above, and as the New York appellate court decided, the refund period
6 under the Waiver Order ended on May 19, 1997. Thus, any claim for a refund had to be brought
7 by May 19, 1999 or face a time-bar. Complainants' claim, filed May 21, 2001, was filed too late
8 and is completely barred by the two-year statute of limitations.

9 Plaintiffs may argue that they chose not to challenge Qwest's payphone tariff filings in
10 1997 because they intended to challenge the PAL rates in Qwest's then-pending rate case before
11 the Commission, Docket UT 125. Such an argument, of course, provides no excuse for missing
12 the statute of limitations for a refund claim. Moreover, plaintiffs could have challenged the
13 payphone rates outside of the rate case, as the FCC, in the Payphone Orders, repeatedly invited
14 parties to do if they believed that LECs were not in compliance with those orders. Qwest filed
15 the payphone rates in 1997 as separate tariffs, and the PUC approved them at that time, even
16 though the rate case was pending. Likewise, Qwest filed new payphone rates and the PUC
17 approved them in early 2003, even though NPCC's appeal of the *UT 125 Order* was then
18 pending. Moreover, plaintiffs have always argued that PAL rates are governed by different
19 standards under federal law than typically apply in retail rate cases under state law. *UT 125*
20 *Appeal*, 196 Or. App. at 97 ("[NPCC] argues that federal law requires the PUC to use a different
21

22 accrued when Qwest failed to comply with the Payphone Orders and *Davel* was
23 injured as a result.

24 460 F.3d at 1092. The Ninth Circuit was not agreeing with the plaintiffs' "construction" or
25 "interpretation" of the *Waiver Order*, but rather, was explaining why it disagreed with the plaintiffs'
26 argument regarding CustomNet. Just like the *Davel* plaintiffs' claim for refund of CustomNet rates,
Complainants' claim for refund of PAL rates accrued in 1997, when Complainants began paying PAL
rates that were allegedly too high, and not in 2007, when the Commission finally approved Qwest's PAL
rates.

1 rate-setting method for payphone services instead of the traditional method that the PUC used.")
2 Thus, plaintiffs could have challenged Qwest's proposed PAL rates in April 1997, as did many
3 other PSPs and PSP associations around the country. *See, e.g., Davel*, 460 F.3d at 1092 n.10
4 (PSP association filed complaint in Colorado challenging Qwest's payphone service rates in
5 March 1998).

6 Closer to home, in Washington, MCI and AT&T challenged Qwest's compliance with the
7 Payphone Orders by filing a complaint on April 16, 1997, the day after Qwest's rates became
8 effective. *MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, Docket No. UT-
9 970658, 1999 WL 359773 (WUTC, 5th Supp. Order, Mar. 23, 1999).¹⁶ In fact, MCI was
10 represented in that proceeding by the same attorneys who represented Complainants in this case
11 from the time they filed their Complaint in 2001 through July 2009, and who represented NPCC
12 in Oregon in Qwest's rate case, UT 125. In contrast to all of those cases, neither NPCC nor any
13 of its members challenged Qwest's payphone rates when they were proposed in January 1997 or
14 after they were approved in April 1997. By waiting more than four years to seek a refund,
15 Complainants simply missed their chance to assert this claim.

16 **4. At the minimum, Complainants may not recover refunds for any time before**
17 **May 21, 1999.**

18 The *Davel* court ruled that the plaintiffs' CustomNet claim was not completely barred, but
19 that the plaintiffs could recover refunds only for amounts they paid for CustomNet within two
20 years before the date they filed their complaint. This was based on the theory that the plaintiffs
21 may have been injured every time they paid a bill for services. *Davel*, 460 F.3d at 1092-93. As
22 shown above, the Waiver Order authorized a refund only for a limited period, through May 19,
23 1997, so Complainants' claim for a refund is completely barred because it was not filed within

24 _____
25 ¹⁶ These IXCs challenged U S WEST's intrastate access charges, not its payphone rates; thus, no
26 issue was presented under the Waiver Order. Significantly, the Staff witness in that case testified that
U S WEST *had* met the FCC's requirements with respect to intrastate tariffs for basic payphone services.
1999 WL 359773 at *7.

1 two years of the end of that refund period.¹⁷ Even if the refund period were open-ended, as
2 Complainants argue, Complainants would still be barred from recovering any refunds for any
3 period prior to May 21, 1999, two years before this Complaint was filed, under *Davel*. Thus, at
4 the very least, the Commission should dismiss any claim for refund for any period prior to
5 May 21, 1999.

6 **IV. CONCLUSION**

7 For the foregoing reasons, the Commission should grant Qwest's motion for summary
8 judgment, dismissing NPCC's Complaint. At the minimum, the Commission should decide that
9 Complainants are barred from recovering any refunds for any period prior to May 21, 1999.

10 DATED: April 30, 2010

Respectfully submitted,

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25 ¹⁷ Only CustomNet service, which is not covered by the Waiver Order, was at issue in the statute
26 of limitations discussion in *Davel*. That is why the refund potentially covered a period extending past
May 19, 1997, as compared to PAL service, which is expressly covered by the Waiver Order.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that I have this 30th day of April, 2010, served the foregoing QWEST
3 CORPORATION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY
4 JUDGMENT upon all parties of record in this proceeding by causing a copy to be sent by
electronic mail and U.S. mail to the following addresses:

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6 fgplawpc@hotmail.com
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