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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

MEMORANDUM IN SUPPORT OF  
COMPLAINANTS' CONSOLIDATED  
MOTIONS

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

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

TO: Oregon Public Utility Commission

AND TO: All Parties

MEMORANDUM

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

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

2 (2) The application shall specify:

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

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

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

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

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

8 **DISCUSSION -0095(2)**

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

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

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

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

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

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

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

13 c. Order ¶D strikes “All references to docket UT 125 and the calculation of any  
14 refund claims thereunder are stricken from the First Amended Complaint.” which is the authority  
15 established by the PUC which must necessarily be the basis for the calculation of any damages  
16 or refunds under the 1996 Act, the Waiver Order or any other authority<sup>3</sup> as UT 125 anticipated.  
17 The language arguably defeats any Complaint in any form that could submitted to claim  
18 damages under §276 et seq of the Act, under Oregon Law or any other order that requires the  
19 comparison of the rates in Order 07-497 of UT 125 which is the necessary predicate for any  
20 claim of a PSP. The provision of Order 10-027 simply prejudices any claim at the PUC under  
21 the Act and violates the 1996 Act and Oregon law.

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

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

25 <sup>2</sup> For a showing that any thought that the fraud protection services were separable from the Payphone  
26 Access Lines, is simply specious. In the Matter of Implementation of the Pay Telephone Reclassification  
and Compensation Provision of the Telecommunications Act of 1996 CC Docket No. 96-128, First  
Report and Order, 11 F.C.C. R. 20541 (Sept. 20, 1996) (First Payphone Order) ¶149

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

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

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

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

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

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

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

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

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

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

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

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

1 *and so do we.*"<sup>4</sup>

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

4 **DISCUSSION -0095(3)**

5  
6 The grounds are set forth below:

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

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

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

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

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

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

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<sup>4</sup> Id. ¶ 25 and 26.

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

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

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

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

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

1 examination of the essential nature of these items.

2 **(d) Good Cause:**

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

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

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



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

8 The addition of the Complainants now moving and named herein was based on PUC  
9 Order Nos. 09-155 and 10-027 dated 5/4/2009 and 2/1/2010 respectively. The source of all the  
10 claims for relief pled in the original complaint on file and as filed in both Motions to Amend<sup>6</sup>,  
11 arise out of the 1996 Act and the requirements that it imposed on Qwest and the Oregon  
12 Commission and the final Order of the PUC in its general rate docket UT 125. That Order 07-  
13 497 is the final act of compliance by Qwest and the PUC under the Remand from the Oregon  
14 Court of Appeals; dated November 10, 2004 which required compliance with the Federal Act.  
15 The Remand makes it clear that the PUC had to apply federal law of the Act in UT 125, which  
16 it had not done, and that the rates, including CustomNet, had to be set according to the Act's  
17 requirements.  
18

### 19 ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

#### 4 MOTION FOR STAY

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

10  
11 Movant hereby renews as though originally filed this date, as the Alternative  
12 Motion herein to the Consolidated Motion to Bifurcate and to Partially Stay previously filed as  
13 PUC Docket Item Dated 1/27/2010. No action was taken to strike nor respond, nor was any  
14 expected because at the Prehearing Conference held on 3/11/2010 the status of that Motion to  
15 Bifurcate, was considered by ALJ Arlow as withdrawn by Complainants. Because  
16 Complainants have filed essentially the same allegations of the Second Amended Complaint, in  
17 an action in the US District Court of Oregon Portland Division filed herewith as **Exhibit A**,  
18 Complainants have filed this Motion to Reconsider along with this Motion to Stay in the  
19 Alternative, to provide for judicial economy. The PUC is given the Alternative to Stay the  
20 entire proceedings or to proceed on just the Oregon Refund, (the Fourth Claim of the US DC  
21 Complaint) which the PUC has jurisdiction to complete. That claim is essentially for the  
22 enforcement of the Commission's  
23

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

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

1 Petitioner and a showing of “colorable claim of error in the Order.” The declaration of Frank  
2 G. Patrick filed herewith and the following recitals provide a basis for the two requirements. As  
3 Order 06-229 establishes,  
4 “...the phrase “a colorable claim of error” as appearing in the Oregon statutes relating to agency  
5 actions has been recently defined by the Supreme Court as follows: ‘Here, the ordinary  
6 meaning of the term “colorable” is “seemingly valid and genuine: having an appearance of  
7 truth, right or justice: PLAUSIBLE[.]” Id. at p.1.  
8

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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





1 CERTIFICATE OF SERVICE

2 I, the undersigned below, hereby certify that I served the foregoing MOTION FOR  
3 RECONSIDERATION and DECLARATION OF FRANK G. PATRICK AND  
MEMORANDUM IN SUPPORT and Referenced Exhibits on:

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

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

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

19 by the following indicated method or methods:

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

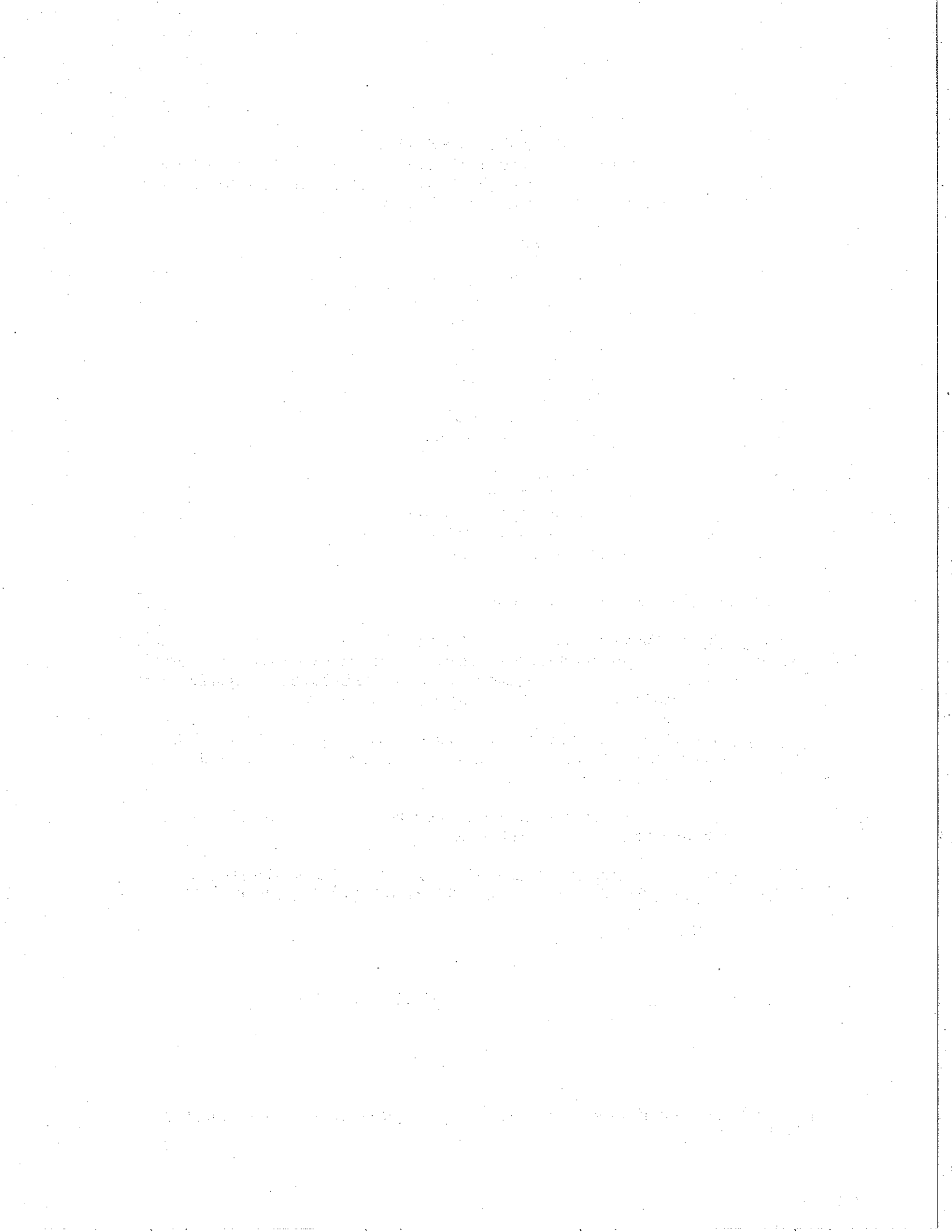
24 \_\_\_\_\_ by sending full, true and correct copies thereof via **overnight courier** in sealed,  
25 prepaid envelopes, addressed to the attorneys as shown above, the last-known office addresses  
26 of the attorneys, on the date set forth below;

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

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 APRIL 2, 2010

\_\_\_\_\_  
/S/  
Frank G. Patrick, OSB 76022



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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

DOCKET NO. DR 26/UC 600  
DECLARATION OF COUNSEL IN SUPPORT OF  
CONSOLIDATED MOTIONS TO RECONSIDER  
AND VACATE  
AND TO STAY

Complainants,  
v.  
QWEST CORPORATION,  
Defendant.

I Frank G. Patrick, do declare and say:

1. I am counsel for the Complainants in the pending matter.
2. I have reviewed the history of this case at the PUC and have come to the conclusion that the prejudice to which the Complainants have been put and to which they will continue to be put if the Commission does not vacate its Order No. 10-027 to allow the filing of an Amended Complaint that allows a full consideration of its claims will be extreme.
3. That those matters alleged in the Memorandum are on my personal investigation accurately stated on my information and belief and constitute irreparable injury to the Complainants.
4. That the attached pleadings at the US District Court, the motion for summary judgment and the supporting materials thereto are accurate as filed in that tribunal

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

Dated: APRIL 2, 2010

/s/ \_\_\_\_\_

FRANK G. PATRICK, OSB 76022  
Attorney for Complainants

1 CERTIFICATE OF SERVICE  
I, the undersigned below, hereby certify that I served the foregoing DECLARATION OF FRANK G.  
2 PATRICK AND EXHIBITS ELECTRONICALLY BY AGREEMENT on:

3 Lawrence Reichman  
Perkins Coie  
1120 N.W. Couch Street, 10<sup>th</sup> Floor  
4 Portland, Oregon 97209-4128  
reicl@perkinscoie.com  
5

6 Jason W. Jones  
Department of Justice  
1162 Court Street NE  
7 Salem, Oregon 97301  
Jason.w.jones@state.or.us  
8

9 Alex M. Duarte  
Qwest Corporation  
421 SW Oak St., Suite 810  
10 Portland, Oregon 97204  
alex.duarte@qwest.com  
11

12 by the following indicated method or methods:

13  X  by **mailing & emailing** (if indicated above) 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,  
14 and deposited with the United States Postal Service at Portland, Oregon, and by electronic mail on the date set forth  
below;

15 \_\_\_\_\_ 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  
16 below;

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

18 And Certify that I did electronically file same with the PUC Filing Center, with a hard copy to PUC, Filing Center,  
19 550 Capitol Street NE, Ste 215, PO Box 2148, Salem, OR 97308-2148.

20 DATED this April 2, 2010

21 /S/  
Frank G. Patrick, OSB 76022  
22  
23  
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25  
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