

1 **BEFORE THE PUBLIC UTILITY COMMISSION**
2 **OF OREGON**
3 **DR 26/UC 600**

4 THE NORTHWEST PUBLIC
5 COMMUNICATIONS COUNCIL,

6 Complainant,

7 v.

8 QWEST CORPORATION,

9 Defendant.

QWEST CORPORATION'S MOTION TO
STRIKE FIRST AMENDED COMPLAINT

10
11 **I. MOTION**

12 Qwest Corporation ("Qwest") respectfully moves the Commission to strike the First
13 Amended Complaint filed by The Northwest Public Communications Council ("NPCC") and the
14 payphone service provider members of the NPCC listed in Exhibit A to the First Amended
15 Complaint ("NPCC's Members"). (NPCC and NPCC's Members are collectively referred to as
16 "Complainants.") The Commission should strike the First Amended Complaint because it does
17 not comply with Commission Order No. 09-155 (the "Order") which denied in part and granted
18 in part NPCC's Motion for Leave to Amend Complaint. Specifically, the First Amended
19 Complaint includes a claim for refund of CustomNet charges that the Commission denied
20 Complainants leave to include in this case.

21 **II. BACKGROUND**

22 **A. NPCC's Motion for Leave to Amend**

23 On February 26, 2009, NPCC filed a Motion for Leave to Amend Complaint ("Motion
24 for Leave"), seeking an order of the Commission permitting NPCC to file an amended complaint
25 in the form attached to the motion as Exhibit A. As discussed by NPCC in its Motion for Leave,
26 NPCC sought leave to expand this case in two ways. First, NPCC sought leave to add a claim

1 for refunds of alleged overcharges for a service called "CustomNet." Motion for Leave at 1. The
2 original Complaint in this case (filed in May 2001) sought refunds only for Public Access Line
3 ("PAL") services. *Id.* at 2. Second, NPCC sought leave to add its members as complainants in
4 this case in addition to NPCC. *Id.* at 1. NPCC sought leave to add its members as complainants
5 in response to Qwest's argument, asserted in Qwest's cross-motion for summary judgment filed
6 in January 2005, that NPCC lacked standing to seek refunds on behalf of its members. *Id.*

7 Qwest opposed NPCC's Motion for Leave arguing, among other things, that the claim for
8 refunds of alleged overcharges for CustomNet service was time-barred by the applicable statute
9 of limitations. Qwest also argued that the Commission should deny leave to add NPCC's
10 Members as complainants because that would expand the scope of the case and because the
11 claims of the individual payphone service providers ("PSPs") were time-barred.

12 **B. The Commission's Order**

13 The Commission granted NPCC's Motion for Leave in part and denied it in part in the
14 Order, issued on May 4, 2009. On the one hand, the Commission granted NPCC's motion to add
15 its 13 members as new complainants. Order at 8-9.

16 On the other hand, the Commission denied the Motion for Leave insofar as it sought
17 permission to add claims relating to CustomNet services. *Id.* at 7-8. The Commission held that
18 "the most recent relevant case law unequivocally concluded that the applicable statute of
19 limitations of two years poses an absolute bar to the addition of CustomNet services to the
20 instant case." *Id.* at 8.

21 NPCC did not file for reconsideration of the Order, nor has NPCC sought judicial review
22 of the Order.

23 **C. The First Amended Complaint**

24 On November 16, 2009, more than six months after the Commission issued the Order and
25 after asking for and receiving several extensions, Complainants filed the First Amended
26 Complaint. A careful comparison of the First Amended Complaint with the amended complaint

1 NPCC proposed to file with its Motion for Leave, however, reveals that the *only* change
2 Complainants made in the body of this pleading is to the name and address for the contact person
3 for NPCC in paragraph 2 of the First Amended Complaint. Declaration of Lawrence Reichman
4 ("Reichman Decl."), ¶ 3, Ex. A. Complainants did nothing to remove the allegations or claims
5 relating to CustomNet as required by the Order.

6 It cannot be disputed that the First Amended Complaint includes a claim for refund of
7 charges for CustomNet services. The First Amended Complaint defines "Payphone Services" as
8 including both (1) PALs and (2) "a service variously called Fraud Protection, CustomNet,
9 Selective Class of Call Screening, or Originating Line Service ('CustomNet')" and further
10 describes CustomNet as "an important payphone service." First Amended Complaint, ¶ 1.
11 Having thus defined "Payphone Services" as including CustomNet, the First Amended
12 Complaint proceeds to make a number of allegations regarding the pricing requirements
13 applicable to Payphone Services. *See generally* First Amended Complaint, ¶¶ 6-24. The First
14 Amended Complaint then seeks refunds for the amount by which Qwest's "Payphone Services
15 rates exceeded the legal rates." First Amended Complaint, ¶¶ 29, 31-32, 33, and "Wherefore"
16 clause on p. 9.

17 III. ARGUMENT

18 A. The First Amended Complaint Does Not Comply With the Order.

19 There can be no dispute that the First Amended Complaint does not comply with the
20 Order. The Order clearly *denied* Complainants leave to add a claim for refund of CustomNet
21 charges. Yet the First Amended Complaint clearly continues to include a claim for refund of
22 CustomNet charges, which are expressly included within the operative term "Payphone Services"
23 in the First Amended Complaint.

24 The proposed amended complaint filed in February 2009 included a claim for refund of
25 CustomNet charges; indeed, adding such a claim was one of the two reasons NPCC asserted for
26 seeking leave to amend. In order to comply with the Order, Complainants were required to

1 delete in any amended complaint allegations regarding CustomNet and to modify the claims so
2 they did not include CustomNet. This Complainants clearly did not do; the only thing they
3 changed during the six months they took to file the First Amended Complaint was the name and
4 address for NPCC's contact.

5 **B. The Commission Should Strike the First Amended Complaint.**

6 The Commission should strike the First Amended Complaint because it fails to comply
7 with the Order by including a claim for refund of CustomNet charges when the Commission
8 unambiguously denied Complainants permission to add such a claim to this case. Complainants
9 did not file any explanation for failing to comply with the Order, nor is any apparent to Qwest.
10 Thus, the Commission should strike the First Amended Complaint and order Complainants to
11 file an amended complaint that complies with the Order.

12 **C. The Addition of NPCC's Members Provides No Basis to Ignore the Order.**

13 NPCC has presented no written argument as to why it should be permitted to file a First
14 Amended Complaint that is plainly unauthorized by the Commission's Order. During the
15 prehearing conference held on November 20, 2009, Complainants' counsel seemed to assert that
16 the Motion for Leave was made only by NPCC, so NPCC's Members are not bound by the Order
17 and are permitted to file a claim for refund of CustomNet services notwithstanding the
18 Commission's clear decision that any such claim is time-barred. This argument has no merit for
19 several independent reasons.

20 First, it cannot seriously be disputed that the Motion for Leave was filed on behalf of
21 NPCC's Members. Throughout this case, NPCC has purported to act *exclusively* on behalf of its
22 members, including when it filed the original Complaint seeking a refund of PAL rates that
23 NPCC's Members – not NPCC itself – paid. NPCC has purported to act on behalf of its
24 members in a representative capacity. The Commission noted this in the Order, stating:
25 "Litigation undertaken by a trade association *on behalf of its members* and seeking monetary
26 compensation from a single defendant is a common occurrence." Order at 8 (emphasis added).

1 Indeed, according to NPCC, the identity of interests between itself as an association and
2 its members is so strong that NPCC "did not name its members as individual complainants [in
3 the original Complaint] because it was unnecessary." Motion for Leave at 2. Nevertheless,
4 NPCC filed the Motion for Leave to "remove the distraction of [Qwest's] spurious defense" that
5 NPCC had no standing to pursue claims for refunds on behalf of its members. *Id.* at 1. In
6 addition to seeking leave to amend under ORCP 23, NPCC also invoked ORCP 30 in support of
7 its motion to add NPCC's Members as complainants. *Id.* at 7. In these circumstances, it is
8 absurd to argue (1) that the Motion for Leave was not filed on behalf of NPCC's Members, for
9 whom permission was sought to include as complainants in the case, and (2) that NPCC's
10 Members are not bound by the Commission's decision that their claim for CustomNet refunds is
11 time-barred and should not be allowed in this case.

12 Second, even if the Motion for Leave were not considered to have been filed on behalf of
13 NPCC's Members, the Commission's decision that the claim for refund of CustomNet charges
14 dating back to 1997, and brought for the first time in 2009, is time-barred is the law of the case,
15 and that issue may not be relitigated. "Briefly stated, the doctrine of the law of the case
16 precludes relitigation or reconsideration of a point of *law* decided at an earlier stage of the *same*
17 case. The rationale is that a court should adhere to a previous ruling on an identical matter,
18 whether rightly or wrongly decided, in order to advance the policies enumerated above" (namely,
19 "consistency of judicial decision, putting an end to litigation of matters once determined, and
20 preserving the court's prestige"). *Koch v. So. Pac. Transp. Co.*, 274 Or. 499, 512, 547 P.2d 589
21 (1976) (emphasis in original). NPCC previously argued on behalf of its members that the claim
22 for refund of CustomNet charges is not time-barred, and the Commission firmly disagreed. Even
23 if NPCC's Members were not technically bound by the Commission's decision –which they are
24 because NPCC has acted throughout this case in a representational capacity on behalf of its
25 members – NPCC's Members are still precluded under the doctrine of the law of the case from
26 relitigating this precise issue which has already been decided in this case adversely to them.

1 Third, even if the Motion for Leave were not considered to have been filed on behalf of
2 NPCC's Members *and* even if they are somehow entitled to relitigate this issue, NPCC's
3 Members have made no argument whatsoever – nor could they make such an argument – that
4 should cause the Commission to reach a different result. The Order was solidly based on Ninth
5 Circuit precedent directly on point, and there is no reason that the Commission would reach a
6 different conclusion simply because the argument is made directly by NPCC's Members instead
7 of by NPCC (which has been speaking for NPCC's Members through the same attorneys
8 throughout this case).

9 Finally, while NPCC's Members received permission from the Commission to become
10 parties to this case, they neither sought nor obtained leave from the Commission to amend the
11 complaint to include a claim for CustomNet. The Commission has granted them leave only to
12 join the case and to assert a claim for refund of PAL charges. If NPCC's Members wanted to
13 assert a claim for refund of CustomNet charges notwithstanding the Commission's previous
14 rejection of such efforts, they are required to obtain leave from the Commission to do so. ORS
15 756.500(4) provides that "[t]he complaint may, at any time before the completion of taking of
16 evidence, be amended *by order of the commission.*" (Emphasis added.) Thus, the statutory
17 scheme under which the Commission operates requires that the Commission issue an order
18 allowing the amendment of a complaint before a party may do that. NPCC's Members neither
19 sought nor obtained an order of the Commission permitting them to add a claim for refund of
20 CustomNet charges.

21 Qwest does not mean to suggest by this last argument that NPCC's Members' failure to
22 obtain a Commission order permitting them to assert a claim for refund of CustomNet charges is
23 merely the failure to jump through a required procedural hoop. To the contrary, in view of the
24 disputed Motion for Leave brought on their behalf and the Commission's Order denying leave to
25 add CustomNet claims to this case, which is the law of the case, Qwest would consider it highly
26 improper, and potentially sanctionable, for NPCC's Members even to seek leave to do so again.

1 Failure to obtain such leave even after formally joining the case, however, is yet another reason
2 the Commission should strike the First Amended Complaint.

3 **IV. CONCLUSION**

4 For all the foregoing reasons, the Commission should strike the First Amended
5 Complaint and order Complainants to file an amended complaint that complies with the
6 Commission's Order.

7 DATED: December 8, 2009

Respectfully submitted,

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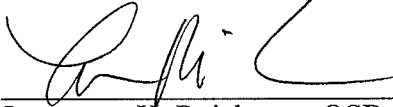
CERTIFICATE OF SERVICE

I hereby certify that I have this 8th day of December, 2009, served the foregoing QWEST CORPORATION'S MOTION TO STRIKE FIRST AMENDED COMPLAINT 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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