

# *FRANK G. PATRICK & ASSOCIATES*

*CORPORATE LAWYERS P.C.*

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April 27, 2010

Public Utility Commission of Oregon

Attn: Filing Center

550 Capitol St. NE, Ste. 215

PO Box 2148

Salem, OR 97308-2148

To: Hon. Sarah Wallace

Public Utility Commission of Oregon

**RE: NORTHWEST PUBLIC COMMUNICATIONS COUNCIL V. QWEST CORP.  
Docket DR 26/UC600  
Motion To Strike Current Briefing Schedule, To Enlarge Time To Reply And  
Brief, Supporting Memorandum And Declaration Of Counsel**

Dear Judge Wallace,

Please find enclosed the above referenced Motion and Supporting filings requesting an Order To Enlarge time to file a response to Qwest's recent filings in Response to the Motion for Reconsideration. Judge Arlow had established a briefing schedule as referenced but the changes since that time dictate a different approach and timeline. I am hereby requesting given the time frame a conference call to discuss the immediate status and to clarify the Reply which Mr. Reichman does not believe is appropriate.

I am out of the office this afternoon and would appreciate a call on my cell to facilitate the timing issue. That number is 503 318 1013.

Sincerely,

/s/

Frank G. Patrick  
Attorney at Law

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

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

Alex M. Duarte (email; US Mail) [alex.duarte@qwest.com](mailto:alex.duarte@qwest.com)

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BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, on behalf of the 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

v.

QWEST CORPORATION,  
Defendant..

DOCKET NO. DR 26/UC 600

MOTION TO STRIKE CURRENT BRIEFING SCHEDULE

TO ENLARGE TIME

TO REPLY AND FURTHER BRIEF

TO: Oregon Public Utility Commission

AND TO: All Parties

COMPLAINANTS Move the Commission for an Order striking the briefing schedule under Conference Report of Hon. Allan J. Arlow dated 3/11/2010 to Enlarge the time to Reply to the Qwest Response and to Further Brief, until after the US District Court acts on pending motions of the parties herein ordered under a briefing schedule established by that Court on April 1, 2010. Currently pending with the PUC, is Complainants Consolidated Motions to Reconsider the PUC Order No. 10-027, or in the Alternative to Stay the Proceedings at the PUC.

No party is under any order regarding utility services which would be affected by this Motion or the Order requested. There is no stay necessary of the effectiveness of any Order

1 of the Commission.

2 **PROCEEDING STATUS AT THE PUC**

3 The motion to Reconsider was only under contemplation by the Complainants at the  
4 Conference Call on 3/11/2010 but the disposition of that Motion must be resolved before  
5 briefing can be intelligently done given that amendment of the Complaint is the issue. The  
6 Motion to Reconsider along with the consolidated motion to Stay, was in fact filed at the PUC  
7 timely. Since the due date and filing of the Motion to Reconsider there are now pending  
8 Motions at the Federal US District Court, which could be dispositive of issues which either  
9 would provide the direction to the PUC to Act or would relieve the PUC of further exercise.  
10

11 The point of the Motion to Reconsider is the very Complaint which would be the basis  
12 of the Motions for Summary Judgment the subject of the 3/11/2010 Briefing Schedule. It  
13 makes no sense to maintain the briefing schedule when the Complaint itself is in dispute.

14 This motion is based on the attached memorandum of law and the declaration of Frank  
15 G. Patrick filed herewith, the file materials and expressly the pending Motion to Reconsider,  
16 ORCP 14 & 15D, OAR 860-014-0010, 860-013-0050. The purpose of this motion is to save  
17 the parties and the Commission from wasting resources and is in the interest of judicial  
18 economy. It is clear that the parties have been litigating the very issues in US District Court  
19 that will have great bearing on the proceedings of the PUC.  
20

21 **ORDER REQUESTED**

22 1. That the time be extended for the:

23 a. Reply of Complainant to the Response be extended until the US District  
24 Court decides Qwest's Motion to Dismiss and if that motion of Qwest is denied then the  
25 Complainants pending motion for Summary Judgment;

26 b. That the Commission strike the 3/11/2010 briefing schedule

Page 2 MOTION TO ENLARGE TIME

1 until such time as the parties advise the PUC of the disposition at the US District Court.

2 2. That the Parties will inform the Commission of the status after the ruling on the  
3 Motion at the hearing on May 14, 2010 to establish a new briefing schedule if necessary.

4

5 DATED: April 27, 2010

/S/

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FRANK G. PATRICK, OSB 76022  
Attorney for Plaintiff

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CERTIFICATE OF SERVICE

I, the undersigned below, hereby certify that I served the foregoing MOTION TO STRIKE CURRENT BRIEFING SCHEDULE, TO ENLARGE TIME TO REPLY AND BRIEF, SUPPORTING MEMORANDUM AND DECLARATION OF COUNSEL for Complainants on:

Lawrence Reichman  
Perkins Coie  
1120 N.W. Couch Street, 10<sup>th</sup> Floor  
Portland, Oregon 97209-4128  
[reicl@perkinscoie.com](mailto:reicl@perkinscoie.com)

Jason W. Jones  
Department of Justice  
1162 Court Street NE  
Salem, Oregon 97301  
[Jason.w.jones@state.or.us](mailto:Jason.w.jones@state.or.us)

Alex M. Duarte  
Qwest Corporation  
421 SW Oak St., Suite 810  
Portland, Oregon 97204  
[alex.duarte@qwest.com](mailto:alex.duarte@qwest.com)

by the following indicated method or methods:

  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, and deposited with the United States Postal Service at Portland, Oregon, and by electronic mail on the date set forth below;

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

           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 April 27, 2010

/s/  
\_\_\_\_\_  
FRANK G. PATRICK, OSB 76022  
Attorney for Complainants and NPCC

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

20 v.

21 QWEST CORPORATION,

22 Defendant..

23 TO: Oregon Public Utility Commission

24 AND TO: All Parties

DOCKET NO. DR 26/UC 600

MEMORANDUM IN SUPPORT  
MOTION TO STRIKE CURRENT  
BRIEFING SCHEDULE

TO ENLARGE TIME

TO REPLY AND FURTHER BRIEF

25 **Memorandum**

26 The purpose of the motion is to save the parties and the Commission from wasting  
resources and is in the interest of judicial economy. It is clear that the parties have been  
litigating the very issues in US District Court that will have great bearing on the proceedings of  
the PUC.

27 **I. STATUS OF US DISTRICT COURT PROCEEDINGS**

28 There is already scheduled for hearing at the US District Court Portland Division, A  
29 Motion to Dismiss under FRCP 12(b)(6) which is referenced by the Qwest Response (filed with  
30 Page 1 MEMORANDUM IN SUPPORT OF MOTION TO ENLARGE TIME

1 the PUC 4/19/2010) to Complainants pending Consolidated Motions to Reconsider and Vacate  
2 the Commission's Order No. 10-027 Denying the Complainants' Amended Complaints AND to  
3 Stay Proceedings Pending Direction From the United States District Court in Portland, Oregon  
4 (Filed with the PUC 4/2/2010). If that motion is denied, Plaintiff herein has already filed a  
5 motion for summary judgment that will be fully briefed and decided before the U.S. District  
6 Court. Qwest references the hearing in US District Court in its **Attachment A**, to its Response  
7 to the Complainants Pending Consolidated Motion to Reconsider.  
8

9           Regardless with which party herein the US District court agrees, it will change how the  
10 PUC is to be involved in the ultimate determination of the rights of the parties. It only makes  
11 sense that the PUC should await the determination by the US District Court on the issue of  
12 Subject Matter Jurisdiction which is the very basis on which any appeal of action by the PUC  
13 will be based. If that tribunal exercises its jurisdiction, or determines that the PUC lacks subject  
14 matter jurisdiction to hear Plaintiffs' claims under the Communications Act, as appears to be the  
15 law in the Ninth Circuit, (See discussion below of *AT&T Corporation v. Coeur D'Alene Tribe*,  
16 No. 99-35088 (9th Cir. 03/19/2002) then the PUC will have either no further involvement in the  
17 dispute or a dramatically different involvement. Either way the likelihood of an appeal of the  
18 actions of the PUC will be either reduced or eliminated entirely by simply waiting. That  
19 likelihood of the PUC's lack of ability to resolve the issues short of appeals was the point of the  
20 original abatement of this case under Samuel J. Petrillo ALJ, Order dated March 23, 2005 and  
21 Confirmed by the Commission in Order 05-208. The reasons for abating the action, allowing the  
22 jurisdiction of the FCC shared with the US District Court, specified in the Act to resolve the  
23 issues is more timely now.  
24

25           There is no question that the Communications Act as amended by the 1996  
26 Telecommunications Act, hereinafter the Act, 47 USC 276, and related enforcement sections  
Page 2 MEMORANDUM IN SUPPORT OF MOTION TO ENLARGE TIME

1 202, 206, and 207 et seq clearly confer concurrent jurisdiction of disputes and damages arising  
2 out the Complainants claim for violations of the Act and for damages, on the FCC and the US  
3 District Court. The initiating complaint references §276, and the FCC orders which  
4 implemented that Act. It is equally clear that there is no mention of any jurisdictional grant in  
5 the Oregon PUC nor any state for violations of §§ 276 of the Act.

6 Complainants herein have asserted that the PUC only has authority to “order” the relief of  
7 which it Complains. Under the Act it has set the rates but it has no jurisdiction to enforce its  
8 orders as Complainants originally believed. The jurisdiction of the PUC is exceptionally limited  
9 under Oregon law and as to the Refunds sought in DR 26/UC 600 is now exhausted, since Qwest  
10 has failed to comply with those orders. That jurisdiction has been preempted by the Act for any  
11 interpretation of the FCC orders or the Act itself or the reducing to judgment the claims for the  
12 Refunds of the Overcharges under ¶276 of the Act. Under OAR 860-013-0050(4) “Objections to  
13 the Commission's jurisdiction or that a pleading does not state facts sufficient to constitute  
14 grounds for relief are never waived.” This motion is an attempt to avoid yet further challenges to  
15 the actions of the PUC by Qwest in its transparent attempt to re-engage the PUC after it has  
16 ALREADY ordered Qwest to pay the refunds due under UT 125 and this case.

## 17 **II. JURISDICTION OF THE US DISTRICT COURT**

18 The law in the Ninth Circuit on this very issue, now before the US District Court for  
19 resolution in the hearing currently scheduled for May 14, 2010 will resolve this portion of the  
20 dispute one way or the other. The law of this Circuit is clear:

21 47 USC Sec. 207. Recovery of damages:

22 Any person claiming to be damaged by any common carrier subject to the  
23 provisions of this chapter may either make complaint to the Commission as  
24 hereinafter provided for, or may bring suit for the recovery of the damages for  
25 which such common carrier may be liable under the provisions of this chapter, in  
26



1 any district court of the United States of competent jurisdiction; but such person  
2 shall not have the right to pursue both such remedies.

3 **Ninth Circuit Case Law: Enforcement Under The Act Falls Exclusively In  
4 Federal Jurisdiction**

5 Under the Act, jurisdiction is exclusively vested concurrently with the US District  
6 Court and with the FCC. It is clear and was established in the Ninth Circuit under *AT&T*  
7 *Corporation v. Coeur D'Alene Tribe*, No. 99-35088 (9th Cir. 03/19/2002) starting at ¶44:

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

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

16 In the event that a common carrier "shall omit to do any act,  
17 matter, or thing in this chapter<sup>1</sup> required to be done," 47 U.S.C. §  
18 206 dictates that:

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

23 Section 207 of the Act then sets forth how a party may pursue  
24 remedies for claimed injuries sustained under the preceding  
25 sections. Specifically, 47 U.S.C. § 207 provides that:  
26 [a]ny person claiming to be damaged by any common carrier  
subject to the provisions of this chapter may either make complaint  
to [the FCC] . . . or may bring suit for the recovery of the damages  
for which such common carrier may be liable under the provisions  
of this chapter, in any district court of the United States of  
competent jurisdiction; but such person shall not have the right to  
pursue both such remedies.

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1 The chapter referred to is Chp. 5, of 47 USC which is coextensive from §151 to §615(b); which includes all of §§ 201, 202, 206, 207 & 276 affecting the Payphones.

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.” Emphasis Added.

18 The Ninth Circuit Court has categorically determined that claims under the Act are within  
19 the exclusive jurisdiction of the District Court and the FCC. *AT&T Corp. v. Coeur d'Alene*  
20 *Tribe*, 283 F.3d 1156 (9<sup>th</sup> Cir. 2002, amd, reprinted as amd 295 F.3d 899 (9<sup>th</sup> Cir. 2002).  
21 Plaintiffs' claims are that Qwest charged Plaintiffs unlawful Payphone tariffs that were higher  
22 than federally compliant Payphone tariffs in violation of Section 276 of the Act. As a result of  
23 such unlawful charges, Plaintiffs claim to have been damaged and are entitled to damages under  
24 the Act.

### 25 III. PUC RECOGNIZES ITS LIMITATION

26 The Oregon Supreme Court long ago determined and has not varied from the  
principle that the remedy sought by Plaintiff to be outside of the “jurisdiction” of the  
PUC to act. That court established that if the issue does not involve the determination of  
the justness and reasonableness of the tariff, the PUC lacks jurisdiction to provide  
redress. The determination of the refund of overcharges is a claim under Oregon law,

1 within the jurisdiction of the courts and not the PUC. *Oregon-Washington R. & N. Co. V.*  
2 *McColloch*, 153 Or. 32, 55 P.2d 1133 (1936), *McPherson v. Pacific Power & Light Co.*, 207  
3 Or. 433, 206 P.2d 932 (1956).

4 Oregon statutes **once but no longer, granted** the Commission limited  
5 authority to order reparations to ratepayers, but that authority has been repealed. It  
6 applied only for a claim for "reparations" (damages for rates found to be unjust and  
7 unreasonable) by customers of a railroad. *Oregon-Washington Railroad &*  
8 *Navigation Co. v. McColloch*, 153 Or 32, 49, 55 P2d 1133 (1936). "No such provision  
9 is found in the public utility statutes." *McPherson v. Pacific Power & Light Co.*, 207  
10 Or 433, 449, 452, 296 P2d 932,  
11 940, 942 (1956). None exists today.

12 PUC Hearings officers rely upon McPherson for the proposition that it cannot  
13 order refunds. OPUC Order No. 03-401 (July 9, 2003) (UCB 13). The Commission has  
14 recently decided that it does not have the power to award reparations or compensation to the  
15 competitive local exchange carriers (CLECs) who had paid rates to Qwest Corporation which  
16 had been in violation of Commission rules and thus invalid. The Commission had earlier  
17 ruled that Qwest had engaged in numerous major violations of OAR 860-016-0020(3).

18  
19 “ Specifically, the law that put into place the unjust discrimination statutes, see Or  
20 L 1987, ch 447, §§ 46, 49, also purposely stated the remedies for violations of  
21 those statutes, see *id.* at § 52. “For this reason, the Commission does not have the  
22 jurisdiction to award the relief that Complainants seek for Qwest’s alleged  
23 violations of ORS 759.260 and 759.275. Complainants’ claims for damages  
24 based on violations of ORS 759.260 and 759.275 are dismissed.” OPUC Order  
25 No. 06-230 (May 11, 2006), p. 3 (UM 1232: Oregon AT&T Communications v.  
26 Qwest Corp.)<sup>2</sup>

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2 In Order No. 08-487, currently on appeal, the PUC took the position that it does have authority to order refunds. However, until the Oregon Supreme Court changes the law, the principles established in McCullough and McPherson, *supra*, remain controlling law.



1 CERTIFICATE OF SERVICE

2 I, the undersigned below, hereby certify that I served the foregoing MOTION TO  
3 STRIKE CURRENT BRIEFING SCHEDULE, TO ENLARGE TIME TO REPLY AND BRIEF,  
4 SUPPORTING MEMORANDUM AND DECLARATION OF COUNSEL for Complainants on:

5 Lawrence Reichman  
6 Perkins Coie  
7 1120 N.W. Couch Street, 10<sup>th</sup> Floor  
8 Portland, Oregon 97209-4128  
9 [reicl@perkinscoie.com](mailto:reicl@perkinscoie.com)

10 Jason W. Jones  
11 Department of Justice  
12 1162 Court Street NE  
13 Salem, Oregon 97301  
14 [Jason.w.jones@state.or.us](mailto:Jason.w.jones@state.or.us)

15 Alex M. Duarte  
16 Qwest Corporation  
17 421 SW Oak St., Suite 810  
18 Portland, Oregon 97204  
19 [alex.duarte@qwest.com](mailto:alex.duarte@qwest.com)

20 by the following indicated method or methods:

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

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

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

Dated April 27, 2010

\_\_\_\_\_  
/s/  
FRANK G. PATRICK, OSB 76022  
Attorney for Complainants and NPCC

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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

DECLARATION IN SUPPORT  
MOTION TO STRIKE CURRENT  
BRIEFING SCHEDULE

TO ENLARGE TIME

TO REPLY AND FURTHER BRIEF

I Frank G. Patrick, do declare and say:

1. I am counsel for the Complainants in the pending matter.

2. I have reviewed the Response of Qwest to the Motion to Reconsider and believe that it begs the question of jurisdiction to be answered by the US District Court rather than for the PUC to continue in the manner currently scheduled. Plaintiffs' position is consistent with the

1 wisdom reflected by the Commission Order in 05-208 confirming the Ruling of the ALF Petrillio  
2 dated March 23, 2005 to abate the case.

3 3. That the "Attachment A" to the Qwest Response is correctly reflecting the status of  
4 the pleadings at the US District Court, and that today the Parties herein are closer to a  
5 Jurisdictionally sound resolution than at any time prior in the long history of this case.

6 "I hereby declare that the above statement is true to the best of my knowledge and  
7 belief, and that I understand it is made for use as evidence in a PUC (court) proceeding and is  
8 subject to penalty for perjury."  
9

10  
11 Dated: April 27, 2010

/S/

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12 FRANK G. PATRICK, OSB 76022  
13 Attorney for Complainants  
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