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February 26, 2009

**VIA FEDERAL EXPRESS &
ELECTRONIC MAIL**

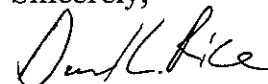
Public Utility Commission of Oregon
ATTN: Filing Center
550 Capitol Street NE, Suite 215
Post Office Box 2148
Salem, Oregon 97308-2148

Subject: Docket DR 26/UC 600

Dear Sir/Madam:

Attached for filing are an original and one copy of the Motion for Leave to Amend Complaint on behalf of the Northwest Public Communications Council in the above-referenced docket. If you have any questions, please contact the undersigned.

Sincerely,


David L. Rice, P.C.

cc w/enc.: Mr. Lawrence Reichman

1
2 BEFORE THE PUBLIC UTILITY COMMISSION
3 OF OREGON
4

5 The Northwest Public Communications
6 Council,

7 Complainant,

8 v.

9 Qwest Corporation,

10 Respondent.

DOCKET NO. DR 26/UC 600

MOTION FOR LEAVE TO AMEND
COMPLAINT

11 The Northwest Public Communications Council ("NPCC")¹ moves to amend its
12 pending refund complaint ("Complaint") against Qwest to seek refunds for CustomNet
13 overcharges. The NPCC's claim for CustomNet overcharges is now ripe, given that the OPUC
14 (the "Commission") in November 2007 approved new CustomNet rates in Docket UT-125 ("Rate
15 Case") that are substantially lower than the rates Qwest had been charging NPCC's members
16 illegally for years.

17 NPCC also moves to add its members as additional named complainants in
18 response to Qwest's allegation that NPCC lacks standing to pursue this case. Qwest's allegation
19 is meritless, but NPCC still wishes to name the members as complainants because the law allows
20 it to do so and to remove the distraction of that spurious defense from this case. The
21 Commission thus should approve this amendment and allow this case to proceed.
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23
24 ¹ The NPCC was formerly known as the Northwest Payphone Association ("NWPA"), and some Commission
25 orders relevant to this case refer to NPCC as the NWPA. NPCC is a trade association of payphone service providers
26 ("PSPs"). NPCC's members purchase Basic Public Access Lines ("PAL"), which are access lines that connect
payphones to the public switched network, and CustomNet, a fraud protection service, from Qwest. When NPCC
refers to its "members" in this proceeding, it means those members listed in its amended complaint attached as
Exhibit A to this motion.

1 **I. BACKGROUND**

2 NPCC presented detailed background of this case in prior filings and now
3 provides the following brief overview.²

4 NPCC originally filed this Complaint on May 14, 2001. The original Complaint
5 seeks refunds of PAL rates that Qwest charged NPCC's members in excess of the legal amount
6 under Section 276 and the FCC's new services test.³ Section 276 prohibits Qwest from charging
7 NPCC's members discriminatory payphone services and features rates, and the FCC's new
8 services test requires those rates to be cost-based, among other things. NPCC did not name its
9 members as individual complainants because it was unnecessary.

10 In the Complaint, NPCC asked the Commission to base the amount of the refund
11 on PAL rates established in a separate proceeding referred to as the Rate Case, which the
12 Commission established in 1995 to examine all of Qwest's rates. *See* OPUC Docket UT-125.
13 The Rate Case was still ongoing at the time that the NPCC filed its Complaint. NPCC filed the
14 Complaint out of an abundance of caution knowing that the Refund Case could not be resolved
15 until final rates had been set in the Rate Case. However, because the Commission had ordered
16 interim PAL rate reductions, the NPCC wanted to file early to eliminate any possible defense
17 based on the statute of limitations.

18 The Complaint did not request refunds for CustomNet because the Commission in
19 2001 had not yet ordered any reduction of CustomNet rates.⁴ Indeed, a Commission order late in

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21 ² *See* NPCC's Motion to Lift Order Holding Case In Abeyance, OPUC Docket No. DR-26 (filed January 16, 2009)
and NPCC's Motion for Summary Judgment, OPUC Docket No. DR-26 (filed November 30, 2004).

22 ³ The new services test requires Qwest to set payphone features and services rates that are based on direct and
23 overhead costs, among other things. *See In the Matter of the Implementation of the Pay Telephone Reclassification
And Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order,
24 11 FCC Rcd. 20541, ¶¶ 146-147 (1996), and Order on Reconsideration, 11 FCC Rcd. 21233, ¶¶ 131, 163 (1996),
25 *aff'd in part and remanded in part sub nom. Illinois Pubic Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C.
Cir. 1997), *clarified on rehearing* 123 F.3d 693 (D.C. Cir. 1997) *cert. den. sub nom. Virginia State Corp. Comm'n.*
26 *v. FCC*, 523 U.S. 1046 (1998); Order, DA 97-678, 12 FCC Rcd. 20997, ¶¶ 2, 30-33, 35 (Com. Car. Bur. released
April 4, 1997); Order, DA 97-805, 12 FCC Rcd. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997).

⁴ A rate reduction being a prerequisite to a refund claim under the FCC's orders and rules.

1 2001 erroneously held that the new services test did not apply to CustomNet, so NPCC's claim
2 for CustomNet refunds was not ripe until many years later.⁵

3 In response to the Complaint, the Commission established this proceeding (the
4 "Refund Case"). Very little happened in the Refund Case while the Commission resolved the
5 parties' rate dispute in the Rate Case. On September 14, 2001, this Commission issued an order
6 in the Rate Case that essentially rejected NPCC's claims that Qwest violated Section 276 and the
7 new services test.⁶ Then, in 2004, the Court of Appeals reversed the Commission's Rate Case
8 order and held that both PAL and CustomNet were subject to the new services test and Section
9 276, which revived NPCC's claims in both the Rate Case and by extension the Refund Case.
10 *Northwest Public Comm's Council v. PUC*, 100 P.3d 776 (2004).⁷

11 In response to the Court of Appeals order, both NPCC and Qwest filed cross
12 motions for summary judgment on liability with the Commission in 2005. NPCC also
13 established in the briefing of that motion that the interests of NPCC's members are aligned with
14 NPCC. The ALJ did not grant those motions and instead issued an order in 2005 holding the
15 Refund Case in abeyance because the ALJ wanted additional advice from the FCC regarding the
16 new services test.⁸ To obtain that advice, in November 2005 the OPUC Commissioners sent a
17 letter to the FCC requesting "prompt Commission action in CC Docket 96-128" that would
18 "allow states, including Oregon, to determine whether incumbent local exchange carriers are
19 bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*)." *Letter of*
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21
22 ⁵ Order No. 01-810, Docket UT-125/Phase II at 56 (Sept. 14, 2001)(*OPUC Final Order*). "We next address the
argument about whether CustomNet is subject to the new services test. We conclude that it is not." *Id.*

23 ⁶ See *OPUC Final Order* at 56.

24 ⁷ The Court remanded the case to the OPUC for a final determination of how Qwest should comply with the new
services test, specifically noting that "[t]he PUC must reconsider its order in light of the New Services Order and
25 other relevant FCC orders." *Id.* at 779.

26 ⁸ See Ruling, Disposition: Proceeding Held In Abeyance, OPUC Docket No. DR 26/UC 600 (March 23, 2005); See
Order, Disposition: ALJ Ruling Affirmed, Order No. 05-208, OPUC Docket No. DR 26/UC 600 (May 3, 2005).

1 *Oregon Public Utility Commissioner Lee Beyer to FCC Chairman Kevin Martin* (Nov. 23,
2 2005).

3 The parties continued to prosecute the Rate Case over the years and began
4 working on a partial settlement, which was ultimately successful. On November 17, 2007, the
5 Commission approved a settlement between NPCC, Qwest and the Commission Staff
6 establishing for the first time that Qwest's CustomNet and PAL rates complied with the new
7 services test. The rates finally approved in 2007 were vastly lower than the rates they replaced.
8 The lowered rates confirmed that Qwest had overcharged NPCC for years, in violation of federal
9 law.

10 Now that the Refund Case is moving forward again, NPCC seeks to amend its
11 Complaint to add claims for CustomNet and to include the NPCC members as complainants.
12 NPCC has attached a proposed amended complaint to this motion as Exhibit A and asks that the
13 Commission permit NPCC to file a version of the complaint that is substantially the same as the
14 attached version.⁹

15 **II. OREGON LAW ALLOWS NPCC TO AMEND ITS COMPLAINT TO INCLUDE**
16 **THE CUSTOMNET CLAIM.**

17 The Commission and Oregon courts have a low threshold for amending
18 complaints with new claims. "In administrative proceedings, pleadings are liberally construed
19 and easily amended." Order, *In the Matter of the Revised Tariff Schedules Applicable to Electric*
20 *Service Filed By PacifiCorp*, 2000 Ore. PUC LEXIS 275 at *4 (emphasis added). "The
21 complaint may, at any time before the completion of taking of evidence, be amended by order of
22 the commission." ORS §756.500; *see also, Reeves v. Reeves*, 203 Or. App. 80, 84, 125 P3d 755
23 (2005) (stating, "[l]eave to amend a complaint should be freely given 'when justice so
24 _____
25 _____

26 ⁹ Some revisions may need to be made to reflect party names correctly before filing of the amended complaint.

1 requires.""). A new claim in the amended complaint relates back to the date of the original filing
2 when the new claims "arose out of the conduct, transaction, or occurrence set forth or attempted
3 to be set forth in the original pleading." ORCP 23C (emphasis added); *Campbell v. Ford*
4 *Industries, Inc.*, 274 Or. 243, 254-247, 546 P.2d 141 (1976).
5

6 NPCC's motion meets this low threshold for amending complaints. First, the
7 CustomNet claim without question arises out of the same conduct, transaction, or occurrence set
8 forth in the original Complaint. Both CustomNet and PAL involve application of the same law
9 (Section 276, the new services test and related FCC orders), involve the same parties (NPCC
10 members and Qwest) and concern the same behavior by Qwest (illegally high rates). NPCC (and
11 its members) seek the same relief from Qwest for both CustomNet and PAL, which is a refund of
12 the excessive charges. Both CustomNet and PAL charges will appear on the same physical
13 Qwest bills sent to NPCC members that will be at issue in this case and will likely be produced
14 during discovery, so no Qwest will suffer no additional burden.

15 The CustomNet claim is just an outgrowth of the original case, which is brought
16 about by the fact that the CustomNet claims became ripe to assert in 2007. *See Reeves*, 203 Or.
17 App. at 84 (allowing for the moving party to add a new claim when the moving party "did not
18 attempt to switch from a groundless equitable claim to an entirely different legal one. Instead, he
19 added a theory of recovery to his already existing claims."). As explained above, when NPCC
20 filed the original Complaint and for years thereafter, the Commission did not accept that
21 CustomNet was subject to the new services test and Section 276, which were the basis for
22 NPCC's claim for refunds in the Complaint.¹⁰ The Rate Case was still ongoing, which meant
23 that the Commission had not set a CustomNet rate for Qwest. This has changed. The
24

25 _____
26 ¹⁰ *See OPUC Final Order* at 56.

1 Commission approved new CustomNet rates for Qwest in November 2007, as part of the
2 settlement between the parties.

3 Second, NPCC has kept Qwest and this Commission well informed of its
4 intention to amend the Complaint to include CustomNet once the Rate Case was resolved.
5 The NPCC specifically stated in its 2005 Reply to Qwest's Motion for Summary Judgment
6 that:

7 NPCC's complaint actually does not address CustomNet because the issue of
8 whether Qwest owes refunds for CustomNet is not ripe for determination. The
9 issue will not be ripe until the PUC determines in Docket UT-125 whether
CustomNet rates must meet the NST [new services test] and, if so, what the NST-
compliant rate for CustomNet should be. *See NPCC v. PUC*, 100 P.3d at 783.

10 NPCC has further been urging this Commission and Qwest in the Rate Case to acknowledge that
11 CustomNet is subject to the new services test and Section 276.¹¹

12 There is no prejudice or disadvantage to Qwest in allowing this amendment.
13 Until a month ago, the Refund Case had been held in abeyance since 2005 by Commission
14 Order, pending the conclusion of the Rate Case. It would have been improper for NPCC to
15 attempt to amend its Complaint while the case was held in abeyance and prior to the end of the
16 Rate Case. The Parties have not completed presentation of evidence, as NPCC's motion for
17 summary judgment on liability explained.¹² In fact, there has been no evidence presented in this
18 case at all other than the material attached to the motions for summary judgment.

19 NPCC's request to amend the complaint to include the CustomNet claim is within
20 the statute of limitations because the claim accrued in November 2007, at the time of the Final
21 Order approving the CustomNet rates. Yet Oregon law would permit the amendment even if the
22 statute of limitations had passed because the "important operative facts" regarding the
23 CustomNet claim are already in the original complaint, and there is no prejudice to Qwest:

24 _____
25 ¹¹ *See, e.g.*, "The OPUC failed to follow federal law when it held that the federal test does not apply to CustomNet." NPCC Court of Appeals Brief (filed March 19, 2003), appealing final orders in Docket DR-25.

26 ¹² *See e.g.*, NPCC's Motion for Summary Judgment, OPUC Docket No. DR-26 (filed November 30, 2004).

1 "[W]e find that although the original complaint alleged some facts 'in addition' to
2 those alleged in the amended complaint, the important operative facts upon which
3 plaintiff relies in the amended complaint were also alleged, either directly or by
4 clear implication, in the original complaint, at least to the extent necessary to alert
5 defendants to plaintiff's claim so as to afford an opportunity to investigate and do
6 whatever was necessary for protection; that, as a result, defendants were not
7 prejudiced by the amended complaint; and that, as a further result, the amended
8 complaint should be permitted to 'relate back.'"

9 *Campbell*, 274 Or. at 254, 546 P.2d 141 (emphasis added). For these reasons, the
10 Commission should permit the addition of the CustomNet claim.

11 **III. OREGON LAW PERMITS NPCC MEMBERS TO JOIN AS ADDITIONAL PARTY**
12 **COMPLAINANTS.**

13 ORCP 30 permits the addition of plaintiffs to a complaint "if they assert any right
14 to relief jointly, severally, or in the alternative in respect to or arising out of the same transaction,
15 occurrence, or series of transactions or occurrences and if any question of law or fact common to
16 all these persons will arise in the action." That is the case here, where the law and facts are
17 identical to both NPCC and its members, as explained throughout this motion. The addition of
18 the members to this case would not change the claim asserted, the discovery process or the
19 amount being sought from Qwest. The NPCC members seek from Qwest the same relief that
20 NPCC now seeks on its members behalf. There is no imaginable prejudice or disadvantage to
21 Qwest.

22 Even if this amendment raised statute of limitations issues (which is not the case),
23 under ORCP 23, Oregon courts permit a complaint to be amended to substitute in a proper party
24 as the party plaintiff even if the statute of limitations has run, thus allowing the substitute
25 plaintiff to bring an original action against defendant. *Oak Grove Parr, Inc. v. McCutcheon*
26 *Constr. Co.*, 275 Or. 381, 550 P.2d 1382 (1976); *Parker v. May*, 70 Or. App. 715, 690 P.2d 1125
(1984), *rev den* 299 Or. 31 (1985); *Sizemore v. Swift*, 79 Or. App. 352, 719 P.2d 500 (1986).
NPCC does not seek the substitution of itself for its members, but this shows that courts liberally

1 allow the addition of new plaintiffs where there is no prejudice and the same law and facts are
2 involved.

3 For example, the substitution of a plaintiff after the statute of limitations has
4 expired is permitted if the amended complaint seeks the same claim and amount of damages
5 based on the conduct, transaction, or occurrence alleged in the original complaint, and the
6 defendant is not prejudiced by the amendment. ORCP 23C ("Whenever the claim or defense
7 asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or
8 attempted to be set forth in the original pleading, the amendment relates back to the date of the
9 original pleading"); *Oak Grove Parr*, 275 Or. at 385-386 (permitting the substitution of a
10 different company as the proper plaintiff in a mechanic's lien claim); *Parker*, 70 Or. App. at 720
11 (permitting the substitution of a son as the proper plaintiff in place of his father in a personal
12 injury claim); *Sizemore*, 79 Or. App. At 357 (permitting the substitution of a son as the proper
13 plaintiff in place of his father's personal representative in an estate claim).

14 In the end, Qwest can have no legitimate objection to the inclusion of the NPCC
15 members as named complainants. The amendment should be allowed.

16 **IV. CONCLUSION**

17 In this proceeding, NPCC has long asserted its interest in seeking refunds for
18 CustomNet charges from Qwest but could not pursue that claim until the Commission approved
19 lower rates under the new service test in the Rate Case. NPCC waited to amend its Complaint
20 until its CustomNet claim was ripe, which is now the case. There is no prejudice to Qwest,
21 because Qwest has known of NPCC's intentions regarding CustomNet for years and no discovery
22 has occurred in this case.

23 Similarly, there is no prejudice to Qwest in including the NPCC members as
24 named complainants. It will not expand this case and in fact may narrow its scope to Qwest's
25 benefit by clarifying the specific members that seek relief from it. The Commission should
26 therefore grant this motion.

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Respectfully submitted this 26th day of February, 2009.

MILLER NASH LLP

D. Rice For Brooks Harlow

Brooks E. Harlow
OSB No. 03042
David L. Rice

Attorneys for the Northwest Public
Communications Council

1 I hereby certify that I served the foregoing MOTION FOR LEAVE TO AMEND

2 COMPLAINT on:

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

8 by the following indicated method or methods:

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

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

16 DATED this 26th day of February, 2009

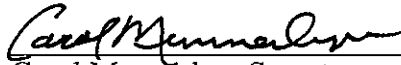
17 
18 _____
19 Carol Munnerlyn, Secretary

EXHIBIT A

PROPOSED AMENDED COMPLAINT

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BEFORE THE PUBLIC UTILITY COMMISSION
OF OREGON

THE NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL, ET AL.

Complainants,

v.

QWEST CORPORATION,

Defendant.

Docket No. DR 26/UC 600

AMENDED COMPLAINT OF THE
NORTHWEST PUBLIC
COMMUNICATIONS COUNCIL, ET AL.
FOR REFUNDS OF PAYPHONE
SERVICES OVERCHARGES

The Northwest Public Communications Council (“NPCC”) and the payphone service provider members of the NPCC listed in Exhibit A (“Payphone Service Providers,” referred to collectively with NPCC as the “Complainants”)¹ request the OPUC (“Commission”) to issue an order directing Qwest Corporation (“Qwest” or “Defendant”) to pay refunds for payphone services overcharges that Qwest has collected from the Payphone Service Providers since April 15th, 1997. The Complainants allege as follows:

I. THE PARTIES

A. THE COMPLAINANTS

1. The NPCC is a regional trade association representing competitive payphone service providers in Idaho, Montana, Oregon and Washington. The NPCC’s purpose is to advance the interests of non-LEC payphone providers. The Payphone Service Providers, which are NPCC members, purchase or have purchased Payphone Services from Qwest in Oregon. Payphone Services include: (1) Public Access Lines (“PAL”) that enable the Payphone Service

¹ The NPCC was formerly known as the Northwest Payphone Association. The Complainants are identified in Exhibit A to this Complaint.

1 Providers to connect their payphones to the telephone network for placement of local and long
2 distance telephone calls and (2) a service variously called Fraud Protection, CustomNet, Selective
3 Class of Call Screening, or Originating Line Screening (“CustomNet”), which prevents the billing
4 of certain calls, such as operator-assisted long distance calls, to the payphone from which the call
5 is placed. CustomNet is an important payphone service because, in its absence, the Payphone
6 Service Providers are exposed to billing for calls fraudulently placed from payphones. This
7 Complaint refers to the foregoing services (PAL and CustomNet) collectively as the “Payphone
8 Services.”

9 2. The NPCC’s address and telephone number are NPCC, c/o Bret Kragerud, Cost
10 Tel Communications, 23815 156th Avenue, Kent, Washington 98042, tel: (253) 630-5989, fax:
11 (253) 639-1625, costtel@ncfweb.net. The Payphone Service Providers’ contact information
12 appears in Exhibit A.

13 **B. QWEST**

14 3. Qwest is the incumbent local exchange carrier for most of Oregon. Qwest’s
15 main corporate office in Oregon is at 421 SW Oak Street, Portland, Oregon 97204,
16 (503) 242-7454. Qwest was formerly known as US WEST Communications, Inc. and will be
17 referred to as Qwest throughout this Complaint.

18 **II. JURISDICTION**

19 4. The Commission has jurisdiction over this Complaint under ORS 756.500,
20 756.040, 756.160 through 756.200, OAR 860-013-0015, and FCC Orders in Docket
21 Nos. CC 96-128 and CC 91-35.

22 **III. APPLICABLE STATUTES AND RULES**

23 5. The statutes and rules at issue are 47 U.S.C. §§ 276 and 47 C.F.R. § 61.49,
24 including related FCC and OPUC orders. ORS 756.040, 756.515, 757.020, 757.310, 757.325,
25 757.330, 759.260, 759.275 and 759.280 and other Oregon statutes involving discrimination may
26 also be at issue, which will be established during the course of this proceeding.

1 *Commission, Order Directing Filings*, 17 FCC Rcd. 2051 at ¶ 23 (2002) (“New Services
2 Order”) (emphasis added); *see Order on Reconsideration* at ¶ 163; *see also* 47 C.F.R.
3 § 61.49(h); *see also* Report and Order, *In the Matter of Amendments to Part 69 of the*
4 *Commission’s Rules*, 6 FCC Rcd. 4524 at ¶ 44 (1991); *see also* 47 C.F.R. § 61.49(h). Direct
5 costs are those directly attributable to a service. Overhead costs are attributable to many
6 different services, like marketing.

7 10. Qwest must file tariffs containing rates that meet the new services test for PAL
8 with state commissions and file tariffs for “[u]nbundled features and functions provided by
9 [BOCs] to their own payphone operations or to others” like CustomNet at state commissions
10 and the FCC. *New Services Order* at ¶ 14. Qwest must file “cost-support data” along with
11 these tariffs. *Order, In the Matter of Implementation of the Pay Telephone Reclassification and*
12 *Compensation Provision of the Telecommunications Act of 1996*, DA 97-805 at ¶ 18 (1997)
13 (“Waiver Order”). Qwest bears the burden to prove that its rates comply with the new services
14 test. *New Services Order* at ¶ 56.

15 11. Qwest must pay refunds to its customers when rates exceed the new services test.
16 The FCC clarified this duty in an order waiving the original Payphone Services tariff filing
17 deadline. Initially, the FCC ordered RBOCs to file their new tariffs with state commissions by
18 April 15, 1997. *Waiver Order* at ¶ 19. The “RBOC Coalition,” including Qwest, requested a
19 delay in the filing requirement so that it could begin to collect dial around compensation, which
20 the FCC would have otherwise prohibited given that the RBOC Coalition’s Payphone Services
21 rates did not comply with the new services test. *Id.* at ¶ 13. The FCC responded by granting a
22 45 day waiver of the filing deadline. *Id.* at ¶ 21. However, the FCC noted that a RBOC “who
23 seeks to rely on the waiver granted in [the Waiver Order] must also reimburse their customers
24 or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower
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1 than the existing tariffed rates.” *Id.* at ¶ 20.² Qwest relied on the waiver by accepting dial
2 around compensation without having new-services-test compliant rates on file.

3 12. The FCC has issued many orders that contain the above-listed requirements,
4 including orders in 1996, 1997, 2000 and 2002. The D.C. Circuit Court of Appeals upheld the
5 2000 and 2002 orders, in response to an RBOC appeal. *New Eng. Pub. Comm. Council, Inc. v.*
6 *FCC*, 334 F.3d 69 (D.C. Cir. 2003). Since then, other federal appeals courts have held that
7 these requirements apply to Qwest. *See Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d
8 1075 (9th Cir. 2006); *see TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225 (10th Cir.
9 2007).

10 13. The Commission has been considering the issues raised by Section 276 as part of
11 its Docket UT-125, which is a generic case for all Qwest rates. The outcome of Docket UT-
12 125, which is *res judicata*, was that Qwest’s Payphone Services rates did not comply with the
13 new services test and Section 276, as explained below.

14 14. The background of Docket UT-125 is as follows. On the date of passage of
15 Section 276, Qwest was operating under an alternative form of regulation (“AFOR”) in Oregon.
16 The Commission terminated Qwest’s AFOR effective May 1, 1996 and commenced a rate
17 case.³ As a result, on May 1, 1996, Qwest’s then-existing Payphone Services rates became
18 interim rates subject to refund under Oregon law.⁴ The Payphone Services rates remained
19 interim for years due to protracted litigation before the Commission and Oregon Courts.

20 15. In 1995 through 1997, the Commission advised NPCC that all issues regarding
21 Qwest’s Payphone Services rates, whether under the new services test or otherwise, should be
22

23 ² During the proceeding, RBOC Coalition “concede[d] that the Commission’s payphone orders,
24 as clarified by the *Bureau Waiver Order*, mandate that payphone services a LEC tariffs at the
state level are subject to the new services test and that the requisite cost-support data must be
submitted to the individual states.” *Id.* at ¶ 18.

25 ³ OPUC Order No. 96-107.

26 ⁴ *Id.*

1 taken up in Qwest's rate case, Docket No. UT-125. On information and belief, the Commission
2 also advised Qwest to take up Payphone Services rate issues involving the new services test in
3 Docket No. UT-125. Consistent with that advice, Qwest did not file any Payphone Services
4 rates or costs between June 1, 1996 and May 19, 1997.

5 16. On May 19, 1997, the Commission entered an order holding that Qwest's
6 Payphone Services rates would remain as "interim" and subject to refund pending further
7 investigation in its Docket No. UT-125. OPUC Order No. 97-171 (May 19, 1997) (emphasis
8 added).

9 17. Throughout the UT-125 proceeding, Qwest attempted to justify its Payphone
10 Services rates using methodologies prohibited by Section 276 and the new services test. Qwest
11 refused to provide supporting cost information for its rates because "the Oregon Commission
12 rules have not incorporated the FCC's rules for new services and there is no requirement in
13 Oregon for Qwest to file cost information that utilizes the FCC new services test." *See* Qwest
14 Response to NPCC 04-040, Docket UT-125. Rather than calculating rates based on the new
15 services test, Qwest stated that "PAL rates are priced in alignment with business rates" and
16 "Message and Flat Smart PAL are priced at an equal price/cost ratio as Basic PAL to ensure no
17 pricing discrimination occurs between these services," which the new services test does not
18 permit. *See* Qwest Response to NPCC 04-039, Docket UT-125. Qwest presented a witness,
19 David L. Teitzel, to support these claims. Qwest and Mr. Teitzel made no mention of costs,
20 overhead, or any of the elements of the new services test and related tariff filing requirements.
21 Also, to the best of NPCC's knowledge, Qwest did not certify to the Commission that its
22 Payphone Services rates met the new services test and did not submit complete cost-support
23 data to the Commission on this issue.

24 18. Following a hearing, the Commission entered Order No. 01-810 on September 14,
25 2001 approving Qwest's proposed Payphone Services rates with minor changes and largely
26

1 rejecting NPCC's arguments that Qwest's proposed Payphone Services rates did not comply
2 with the new services test or Section 276. The NPCC appealed the OPUC's Order No. 01-810.

3 19. While NPCC was appealing Order No. 01-810, Qwest in March of 2003 filed
4 proposed Payphone Services rates and costs with the Commission purportedly in compliance
5 with the Commission's orders and the new services test. These rates were substantially lower
6 than the Payphone Services rates that Qwest charged the Complainants.

7 20. The Oregon Court of Appeals reversed OPUC Order No. 01-810 in an order
8 issued on November 10, 2004. *Northwest Public Comm's Council v. PUC*, 100 P.3d 776 (2004)
9 ("Oregon Court of Appeals Order"). Consistent with NPCC's arguments, the Court of Appeals
10 held that "[t]he District of Columbia Circuit Court of Appeals treats the FCC's orders under
11 section 276 as binding on every state, and so do we." *Id.* at 778. The Court reversed the
12 Commission's holding that Qwest's rates complied with relevant law and remanded the case
13 back to the Commission. The Court specifically held that "the PUC must reconsider its order in
14 light of the New Service Order and other relevant FCC orders." *Id.*

15 21. On March 31, 2006, Qwest filed new, proposed Payphone Services rates in
16 OPUC Docket No. UT-125.

17 22. After further Commission Staff investigation, Qwest, the Commission Staff, and
18 NPCC entered into a stipulation approving Qwest's 2006 proposed Payphone Services rates.
19 Pursuant to the parties' stipulation, the Commission entered a Final Order on November 15,
20 2007. The Qwest Payphone Services rates approved by the Final Order are substantially lower
21 than the rates that Qwest charged the Complainants.

22 23. The attached Final Order concludes over 11 years of continuous litigation
23 regarding Qwest's Payphone Services rates and represents the first order of the Commission
24 that has approved Qwest's Payphone Services rates that has not been overturned on appeal.
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26

1 **VII. COUNT TWO - THE FCC'S WAIVER ORDER REQUIRES QWEST TO REFUND**
2 **UNLAWFUL RATES FOR PAYPHONE SERVICES TO THE COMPLAINANTS**

3 31. The Complainants reallege paragraphs 1-26 above.

4 32. As explained above, Qwest, as a member of the RBOC Coalition, asked for a
5 waiver from the FCC to continue charging Payphone Services rates in excess of the new
6 services test while collecting dial-around compensation. Qwest relied on the waiver by
7 accepting dial around compensation without having new-services-test compliant rates on file. It
8 is *res judicata* that Qwest's rate-setting methodology did not comply with the new services test.
9 *See Northwest Public Comm's Council v. PUC*, 100 P.3d at 778.

10 33. Qwest must refund the unlawful rate charges to the Payphone Service Providers.

11 **VIII. RELIEF REQUESTED**

12 34. Qwest has charged the Payphone Service Providers unlawfully high rates for
13 Payphone Services since April 15, 1997, which was the deadline for having effective Payphone
14 Service tariffs on file that comply with Section 276 and the new services test. The Payphone
15 Service Providers are entitled to a refund. The Commission should order the refund to be based
16 on the final Payphone Services rates set in Docket UT-125.

17 WHEREFORE, the Complainants request this Commission (having initiated this
18 proceeding as requested in the original Complaint), at the conclusion of this proceeding, to issue
19 an order holding that:

20 (1) Qwest's Payphone Services rates exceeded the lawful
21 amount under Section 276 and the new services test since April 15, 1997;

22 (2) Qwest must refund to the Complainants the amount by
23 which Qwest's Payphone Services rates exceeded the legal rates, and

24 (3) The refund should be calculated based on the amount by
25 which the rates charged since April 15, 1997 exceeded the Payphone Services
26 rates established in the Final Order in Docket UT-125.

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DATED this _____ day of February, 2009

MILLER NASH LLP

Brooks E. Harlow, OSB No. 03042
David L. Rice

Attorneys for The Northwest Public
Communications Council

EXHIBIT A

COMPLAINANTS – LEGAL ENTITY NAME AND ADDRESS

Central Telephone, Inc.
Richard Stevens
1505 S. Grant
P.O. Box 25
Goldendale, WA 98620

Communication Management Services, LLC
Manager, Charles Jones
14250 NW Science Park Dr Ste B
Portland, OR 97229

Phonetel Technologies, Inc.
Tammy Martin, President
200 Public Square, Suite 700
Cleveland, OH

Evercom Systems Inc.
Richard Falcone, President
Dennis Reinhold, Secretary
3533 Fairview Industrial Dr. SE
Salem, OR 97302

Interwest Tel, LLC
2850 Kyle Road
Kennewick, WA 99338

Northwest Public Communications Council
c/o Bret Kragerud
Cost Tel Communications
23815 156th Avenue
Kent, Washington 98042

Interwest Telecom Services Corporation
229 S. Wenatchee Avenue
Wenatchee, WA 98801

NSC Communications Public Services
Corporation
6920 Koll Center Prkwy
Pleasanton, CA

National Payphone Services, LLC
1302 S. High School Rd.
Indianapolis, IN 46241

Pacific Northwest Payphones
1315 NW 185th Ave #215
Beaverton, OR 97006

Partners in Communication
18790 SE Semple Rd.
Clackamas, OR 97015

T & C Management, L.L.C.
for Payphone Management, Inc.
d/b/a Digital Access Communications
Ken Cheatham
Donald E. Truman
13252 Garden Grove Blvd., Suite 205
Garden Grove, CA 92843

Corban Technologies, Inc.
Gregg Marshall, President
2204 NW Birdsedale Ave. #9
Gresham, OR 97030

Valley Pay Phones, Inc.
906 Henning Way
Keizer, OR 97303

1 I hereby certify that I served the foregoing AMENDED COMPLAINT OF THE
2 NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, ET AL. FOR REFUNDS OF
3 PAYPHONE SERVICES OVERCHARGES on:

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

9 by the following indicated method or methods:

- 10 by **mailing** a full, true, and correct copy thereof in a sealed, first-class postage-
11 prepaid envelope, addressed to the attorney as shown above, the last-known office
12 address of the attorney, and deposited with the United States Postal Service at
13 Seattle, Washington, and by electronic mail on the date set forth below.
- 14 by sending full, true and correct copies thereof via **overnight courier** in sealed,
15 prepaid envelopes, addressed to the attorneys as shown above, the last-known
16 office addresses of the attorneys, on the date set forth below.

17 DATED this ___ day of February, 2009

18 _____
19 Carol Mummerlyn