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4 **BEFORE THE PUBLIC UTILITY COMMISSION OF OREGON**

5 **UT 125**

6 In the Matter of:

7 **QWEST CORPORATION, fka U.S. WEST**
8 **COMMUNICATIONS, INC.**

NORTHWEST PUBLIC
COMMUNICATION
COUNCIL'S MOTIONS FOR AN
ORDER TO SHOW CAUSE OR,
IN THE ALTERNATIVE, TO
CLARIFY ORDER NO. 07-497

10
11 **MOTIONS**

12 Pursuant to ORS 756.040, Northwest Public Communication Council ("NPCC")
13 moves the Public Utility Commission (the "Commission") to issue an order requiring Qwest
14 Corporation ("Qwest") to show cause why it is not in violation of Orders Nos. 96-107, 00-
15 190, 00-191, 06-515, and 07-497, the Telecommunication Act of 1996, and state law.

16 In the alternative, pursuant to ORS 756.568, NPCC moves the Commission to clarify
17 Order No. 07-497 by amending it to expressly require Qwest to issue refunds for any excess
18 revenue it collected under rates that failed to comply with Orders Nos. 96-107, 00-190, 00-
19 191, 06-515, and 07-497, the Telecommunication Act of 1996, and state law, less any
20 refunds previously paid.¹

21 **INTRODUCTION**

22 The Commission opened this docket in 1995 to set rates for Qwest's
23 telecommunication services, including the company's public access lines ("PAL") and fraud
24 protection services ("CustomNet"). The Commission established the final rates for PAL and
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26 ¹ NPCC conferred by telephone with counsel for Qwest regarding these motions on
January 25, 2017. Qwest opposes the motions.

1 CustomNet in 2007. Before 2007, during the pendency of this docket, Qwest charged and
2 collected PAL and CustomNet interim rates that were not final and were subject to refund.
3 The rates Qwest charged and collected for PAL and CustomNet services beginning in 1996
4 were substantially higher than the final rates the Commission adopted in 2007. To NPCC’s
5 knowledge, however, Qwest has never issued complete refunds to its customers for the
6 overpayments they made between 1996 and at least 2003 or otherwise.

7 The Commission is vested with the responsibility to “protect * * * customers, and the
8 public generally, from unjust and unreasonable exactions and practices.” ORS 756.040(1).
9 Consistent with this responsibility, and pursuant to its authority in ORS 756.040(2), NPCC
10 respectfully requests the Commission to issue an order directing Qwest to show cause why it
11 is not in violation of the Commission’s orders in this docket, the Telecommunications Act of
12 1996, and state law. In the alternative, pursuant to ORS 756.568, the Commission should
13 clarify Order No. 07-497 by amending it to expressly require Qwest to issue refunds for any
14 excess revenue it collected under rates that failed to comply with Orders Nos. 96-107, 00-
15 190, 00-191, 06-515, and 07-497, the Telecommunication Act of 1996, and state law, less
16 any refunds previously paid.

17 BACKGROUND

18 This motion concerns rates Qwest charged for payphone services during the rate-
19 setting portion of this docket. NPCC represents a group of independent payphone service
20 providers (“PSPs”). Some of the PSPs use Qwest’s PAL and CumstonNet services and pay
21 Qwest rates determined by the Commission. The following background: (1) summarizes the
22 federal regulatory framework for rates for payphone services, § I; (2) summarizes the
23 procedural history of this docket, § II; (3) summarizes a 2013 FCC order relevant to this
24 docket, § III; and (4) summarizes ancillary proceedings before the Commission, § IV.

1 **I. The Telecommunications Act of 1996 and the New Services Test.**

2 **A. The Telecommunications Act of 1996.**

3 “Since the mid-1980s, independent payphone providers have competed with Bell
4 Operating Companies [‘BOCs’] in the consumer payphone market. At first, Bell Operating
5 Companies had a built-in advantage. In addition to operating some payphones, Bell
6 Operating Companies owned the local phone lines that provide service to all payphones. An
7 independent payphone provider was thus ‘both a competitor and a customer’ of the local Bell
8 Operating Company.” *Nw. Pub. Commc’ns Council v. Qwest Corp.*, 279 Or. App. 626, 629
9 (2016) (quoting *Ill. Pub. Telecommunications Ass’n. v. Fed. Commc’ns Comm’n*, 752 F.3d
10 1018, 1020 (D.C. Cir. 2014)).

11 In 1996, Congress passed the Telecommunications Act (“TCA”), the first major
12 overhaul of telecommunications law in more than 60 years. Among its provisions, Section
13 276 of the TCA prohibits BOCs, such as Qwest, from discriminating against independent
14 PSPs by subsidizing their payphone services from their local exchange services. 47 U.S.C.
15 § 276(a). Congress included this section “to promote more competitive market conditions”
16 for payphone services. *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1080 (9th Cir.
17 2006). The TCA required the Federal Communications Commission (“FCC”) to develop
18 regulations to effectuate Section 276. 47 U.S.C. § 276(b).

19 Section 276 expressly preempts state law: “To the extent that any State requirements
20 are inconsistent with the [FCC’s] regulations, the Commission’s regulations on such matters
21 shall preempt such State requirements.” *Id.* § 276(c).

22 **B. The New Services Test.**

23 In 1996, the FCC issued two initial orders (the “Payphone Orders”) to carry out the
24 TCA’s instructions. *In re Implementation of the Pay Telephone Reclassification and*
25 *Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC
26 Rcd. 20,541 (Sept. 20, 1996) (“First Payphone Order”); *In re Implementation of the Pay*

1 *Telephone Reclassification and Compensation Provisions of the Telecommunications Act of*
2 *1996, Order on Reconsideration, 11 FCC Rcd. 21,233 (Nov. 8, 1996) (“Order on Recons.”).*
3 In the Payphone Orders, the FCC “directed the state regulatory commissions to review the
4 tariffs for compliance with Section 276 based on a pricing standard known as the ‘new
5 services test.’”² *Ill. Pub. Telecommunications Ass’n v. Fed. Communc’ns Comm’n, 572 F.3d*
6 *1018, 1021 (D.D.C. 2014).*

7 The new services test (“NST”) requires local exchange carriers such as Qwest to set
8 rates for payphone services based on the actual cost of providing the service plus a
9 reasonable amount for overhead. *Davel Communications, 460 F.3d at 1081; Order on*
10 *Recons. ¶ 163.* The FCC required the carriers to submit NST-compliant intrastate rates to
11 state utility commissions, which were required to review the rates for NST-compliance and
12 approve the rates as NST compliant. *Id.* The FCC further required carriers to file the new
13 tariffs for both payphone services and unbundled network features by January 15, 1997, with
14 an effective date of April 15, 1997. *Order on Recons. ¶ 163.*

15 C. The Waiver Order.

16 In early April 1997, just before the BOCs’ new NST-compliant rates were required to
17 go into effect, the FCC found that the BOCs were “not in full compliance with the [FCC’s]
18 federal tariffing requirements for unbundled features and functions under the” Payphone
19 Orders. *In the Matter of Implementation of the Pay Telephone Reclassification and*
20 *Compensation Provision of the Telecommunications Act of 1996, Order, DA 97-678, 13 FCC*
21 *Rcd. 1778 (April 4, 1997) (the “Clarification Order”).* The FCC issued the Clarification
22 Order to clarify that both interstate and intrastate rates for unbundled features and functions
23 must be NST-compliant. *Clarification Order ¶ 2 (“Tariffs for payphone services, including*
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25 ² The new services test in final form had already been in use by the FCC for other
26 telecommunications services for five years. *See Amendment of Part 69 of the Commission’s*
Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture,
CC Docket No. 89-79, Report and Order & Order on Further Reconsideration &
Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991).

1 unbundled features and functions filed with the states, pursuant to the Payphone
2 Reclassification Proceeding, must be cost-based, consistent with Section 276,
3 nondiscriminatory, and consistent with Computer III tariffing guidelines.”). In response to
4 the Clarification Order, the BOCs, including Qwest, requested a waiver of the April 15, 1997
5 effective date for NST-compliance so that they could submit new NST-compliant rates along
6 with the required cost data.³

7 On April 15, 1997, the FCC granted the BOCs “a limited waiver until May 19, 1997
8 to file intrastate tariffs for payphone services consistent with the ‘new services’ test[.]” *In re*
9 *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the*
10 *Telecommunications Act of 1996*, Order, DA 97-805, 12 FCC Rcd. 21,370 ¶ 2 (Apr. 15,
11 1997) (“Waiver Order”). Under the Waiver Order, carriers were granted a short extension of
12 time until May 19, 1997 within which to file NST-compliant rates for payphone services. *Id.*
13 ¶ 25. In exchange for this waiver, the FCC required carriers to reimburse their ratepayers for
14 the difference between the rates they charged after April 15, 1997 and until the carriers filed
15 compliant rates pursuant to the waiver’s extension: A carrier “who seeks to rely on the
16 waiver granted in the instant Order must reimburse its customers or provide credit from April
17 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the
18 existing tariffed rates.” *Id.*

19 **D. The Wisconsin Order.**

20 In 2000, the Common Carrier Bureau (“CCB”), a division of the FCC that issued the
21 original payphone regulations, issued an order reviewing the rates for payphone services
22 submitted by four carriers in Wisconsin. *In re Wis. Pub. Serv. Comm’n*, Order, DA No. 00-
23 347, 15 FCC Rcd. 9978 (March 2, 2000). A coalition of carriers, including Qwest, applied to
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25 ³ This waiver request also requested that the BOCs be allowed to collect, beginning
26 April 15, 1997, the new compensation the FCC required be paid to all payphone owners
generally referred to as dial around compensation (“DAC”). As the largest owners of
payphones in the U.S., the BOCs collectively stood to collect tens if not hundreds of millions
of dollars of DAC annually.

1 the FCC for withdrawal or a stay of the CCB’s order. The coalition argued that the FCC
2 lacked the authority to set requirements for intrastate payphone rates; that payphone services
3 should not be subject to the NST at all; and that, even if they were, certain cost determination
4 requirements should be altered. In 2002, the FCC issued a Memorandum Opinion and Order
5 rejecting the coalitions’ arguments and clarifying the Payphone Orders. *In re Wis. Pub. Serv.*
6 *Comm’n Order*, Mem. Op. & Order, 17 FCC Rcd. 2051 (2002) (Jan. 31, 2002) (“Wisconsin
7 Order”).

8 The Wisconsin Order contained three important rulings. First, the FCC ruled that it
9 had the authority to establish requirements for intrastate payphone rates for BOCs.⁴ *Id.* ¶ 42.
10 Second, it clarified that BOCs’ rates for payphone services must comply with the NST. *Id.*
11 ¶¶ 46, 68. The Wisconsin Order made clear that “the BOC *may not* charge more for
12 payphone line service than is necessary to recover from PSPs all monthly recurring direct and
13 overhead costs incurred by BOCs in providing payphone lines.” *Id.* ¶ 60 (emphasis added).
14 Third, it established guidelines for calculating various rates and charges under the NST. *Id.*
15 ¶¶ 45-65, 68. In particular, the FCC required BOCs to calculate intrastate payphone rates
16 “using a forward-looking, direct cost methodology.” *Id.* ¶ 68.

17 Collectively, Section 276 of the TCA, the Payphone Orders, the Clarification Order,
18 the Waiver Order, and the Wisconsin Order established that rates for payphone services, both
19 intrastate and interstate, must comply with the NST, beginning no later than April 15, 1997.
20 To comply with the NST, a BOCs’ rates must include only actual costs plus a reasonable
21 amount of overhead and those amounts must be determined using a forward-looking, direct
22 cost methodology.

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⁴ The FCC clarified that its authority did not reach the rates for payphone services
provided by all local exchange carriers. Rather, it ruled that Section 276 only reached BOCs.
Qwest is a BOC.

1 **II. Procedural History.**

2 **A. Termination of the Alternative Form of Regulation.**

3 In 1991, the Commission adopted an alternative form of regulation (“AFOR”) for
4 U.S. West Communications, Inc. (henceforth, “Qwest”).⁵ Qwest’s rates for each of its
5 services, including PAL and CustomNet, were determined under the AFOR. The AFOR
6 provided Qwest with pricing flexibility for certain services and the ability to earn a broad
7 range of rates of return. Order No. 96-107 at 1. As part of the AFOR, the Commission
8 required Qwest to adhere to technical service quality standards. *Id.* In the event that Qwest
9 failed to meet these standards, the Commission was authorized to terminate the AFOR before
10 its expiration. *Id.*

11 Due to service quality problems, the Commission terminated the AFOR effective
12 May 1, 1996. *Id.* at 3. Upon termination, the Commission ordered that all of Qwest’s rates
13 were made interim and subject to refund: Qwest’s “rates for services [after May 1, 1996]
14 shall be considered interim rates subject to refund with interest, at a rate of 11.2 percent.” *Id.*
15 Commission staff explained that the rates would remain interim “pending the outcome of the
16 company’s current rate filing, UT 125.” *Id.*, Appendix A at 5.

17 **B. Qwest submits PAL rates.**

18 On January 15, 1997, Qwest submitted an advice to the Commission setting forth
19 rates for PAL. Qwest’s submission contained two separate PAL rates: Basic PAL and Smart
20 PAL.⁶ Advice No. 1668. For the Basic PAL rates, Qwest submitted the same existing rates
21 that it had been using under the AFOR (and which the Commission had made interim subject
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23 ⁵ In 2000, U.S. West merged with Qwest Corporation. For the sake of simplicity, all
24 references to U.S. West Communications or Qwest in this motion will be to “Qwest.”

25 ⁶ In the Payphone Orders, the FCC required the BOCs to offer “Smart PAL.” First
26 Payphone Order ¶ 146. This service allows a “dumb” payphone to use central office
capabilities of the type afforded to payphones owned by the BOCs. Until the First Payphone
Order, PSPs had used smart phones to connect to the Basic PAL service which provided,
through the phone, the features Qwest and BOCs could provide to dumb phones through the
central office. First Payphone Order ¶ 143 & n.490.

1 to refund in Order 96-107 terminating the AFOR). For the Smart PAL rates, Qwest proposed
2 rates developed “using the existing price/cost relationship of the basic Pal.” *Id.* at 2.

3 Qwest did not submit new CustomNet rates on January 15, 1997 or at any time until
4 the Commission began Phase 2, as discussed below.

5 **C. Phase 1 and Orders 00-190 and 00-191.**

6 In 1995, in anticipation of the termination of AFOR, the Commission opened this
7 docket to, in part, establish final rates for all Qwest’s telecommunications services, including
8 Qwest’s PAL and CustomNet rates. The Commission bifurcated the case into two phases:
9 the revenue requirement phase (“Phase 1”) and the rate design phase (“Phase 2”). The
10 Commission began by determining Qwest’s revenue requirement in Phase 1. Until Phase 2
11 was completed, Qwest rates were “interim rates subject to refund with interest.”⁷ Order No.
12 00-190 at 1 n.1.

13 The Commission resolved Phase 1 in Orders 00-190 and 00-191. Those Orders,
14 among others things, adopted a modified settlement stipulation reached between Qwest and
15 Commission staff. *See* Order No. 00-190, Appendix A (“Modified Stipulation”). Pursuant to
16 Orders Nos. 00-190 and 00-191, the Commission ordered Qwest to refund between \$222.7
17 million and \$272.8 million to its ratepayers.⁸ Order No. 00-190 at 3, 20, Appendix A at § 1.
18 The Commission also ordered Qwest to reduce its revenues by \$63 million per year going
19 forward. Order No. 00-190 at 4, Appendix A at ¶ 2. The refund was distributed among
20 ratepayers, including PSPs, based on an interim rate design implemented by the Commission
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22 ⁷ An appealed interim rate does not become final until “the reviewing court upholds
23 the Commission’s order.” *In the Matter of the Application of Portland General Electric
Company*, PUC Docket Nos. DR 10, UE 88, & UM 989, Order 08-487 at 8 (Sept. 9, 2008).

24 ⁸ Based on the interim rate design reflected in the temporary bill credits required in
25 Order No. 00-190, Qwest paid refunds to PAL ratepayers on all PAL rates that had been in
26 effect since May 1, 1996. The interim rate design for PAL was identical to the non-NST-
compliant rates later adopted, in Order No. 01-810, which were overturned on appeal. Thus,
even though the PSPs received a refund pursuant to 00-190, that refund failed to account for
the full difference between the interim rates Qwest charged and the final, lawful rates the
Commission set in Order No. 07-497.

1 in the form of temporary bill credits. Order No. 06-515 at 7-8. Pending the establishment of
2 permanent rates in Phase 2, the Commission ordered Qwest to issue its ratepayers bill credits
3 to accomplish the ordered revenue reduction of \$63 million per year. Order No. 00-190 at 4,
4 Appendix A ¶ 2(b).

5 Order No. 00-190 and the incorporated Modified Stipulation provided that final,
6 permanent rates for Qwest’s ratepayers would be determined in Phase 2. *Id.* Appendix A
7 ¶ 2(a). The Modified Stipulation recognized, however, that an appeal of Orders Nos. 00-190
8 and 00-191, or a subsequent order implementing those orders, could alter Qwest’s obligation
9 to provide refunds and make rate reductions. *Id.* Appendix A ¶ 5. Accordingly, the
10 Commission and Qwest stipulated that if Qwest’s refund obligation increased, Qwest was
11 entitled to a credit for those refunds already paid:

12 The parties further recognize that [Qwest’s] obligation to
13 refund monies to customers and to reduce its ongoing rates
14 may be modified on appeal, either by issuing a judgment
15 incorporating or requiring different refunds or rate reductions,
16 or by the Court of Appeals refusing to dismiss the Appellate
17 Litigation. In the event that an order implementing the terms
18 of this Stipulation is reversed or modified on appeal, the parties
agree that [Qwest] will be entitled to a credit for refunds and
rate reductions made under Paragraphs 1 and 2 of this
Stipulation against any such increased refund and/or rate
reduction obligation imposed by a judgment reversing or
modifying the order adopting the terms of this Stipulation or
any subsequent order.

19 *Id.* The stipulation also allowed Qwest to reserve its rights “to seek recovery of any
20 overpayments * * * in the event that [Qwest’s] refund and/or rate reduction obligation is
21 reduced” on appeal. *Id.*

22 **D. Phase 2 and Order 01-810.**

23 The Commission issued Order 01-810 to complete Phase 2 and set Qwest’s
24 permanent rates. The principal issue addressed in Order 01-810 was “how to apportion the
25 \$64.2 million reduction in revenues agreed to in the stipulation that the Commission adopted
26 in Order No. 00-190.” Order No. 01-810 at 4. Qwest proposed rate schedules to meet the

1 revenue reductions, including rates for PAL and CustomNet, in Advice No. 1844. *Id.* at 48.
2 Qwest’s proposed PAL rates significantly decreased the Smart PAL rates it proposed on
3 January 15, 1997, other PAL rates for PAL services introduced after January 15, 1997, and
4 all other PAL rates that had been in effect since the AFOR was terminated effective May 1,
5 1996. *Id.* at 48 & n.19, 20, 21.

6 NPCC objected to Qwest’s rate proposal.⁹ *Id.* at 49. NPCC argued that Qwest’s PAL
7 and CustomNet rates had to be set according to the TCA and the NST, as set forth in the
8 Payphone Orders. *Id.* Qwest’s proposed PAL rates did not comply with the NST, NPCC
9 argued, because Qwest had failed to submit documentation sufficient to determine Qwest’s
10 direct costs for PAL lines. *Id.* at 50, 53. NPCC also argued that CustomNet was subject to
11 the NST. *Id.* at 50-51.

12 The Commission rejected NPCC’s arguments and adopted Qwest’s proposed rates for
13 PAL and CustomNet. *Id.* at 56. The Commission concluded that Qwest’s proposed PAL
14 rates were consistent with the NST. *Id.* at 55. The Commission also concluded that
15 CustomNet was not subject to the NST. *Id.* at 56. In particular, in accepting Qwest’s
16 proposed PAL rates, the Commission relied on an approximation of Qwest’s direct costs and
17 permitted Qwest to charge rates that were 26 percent to 91 percent above its direct costs as
18 overhead. *Id.* at 55.

19 **E. Appeal of Order No. 01-810 and Court of Appeals Decision.**

20 NPCC promptly requested reconsideration and, when the Commission denied that
21 request (Order No. 02-009), appealed the PAL and CustomNet rates to the Marion County
22 Circuit Court. The Circuit Court affirmed the Commission. NPCC then appealed to the
23 Court of Appeals. The Court of Appeals reversed the Circuit Court and ordered it to remand
24 the case to the Commission for reconsideration in light of the TCA and the FCC’s orders.
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⁹ At the time, NPCC was known as Northwest Payphone Association (“NWPA”).

1 *Nw. Pub. Commc'ns Council v. Pub. Util. Comm'n*, 196 Or. App. 94, 100 (2004) (“*NPCC v.*
2 *PUC*”).

3 The Court of Appeals’ decision drew a distinction between the manner in which the
4 Commission established overall telecommunication rates under state law and the requirement
5 to determine rates for payphone services under federal law. In setting Qwest’s rates in UT
6 125, the Court of Appeals observed that the Commission “followed the traditional procedure
7 for reviewing a regulated utility’s rate schedule. In the first phase of the proceeding [Phase
8 1], it established the rate of return that Qwest was entitled to receive on its property that is
9 used or useful for providing regulated services in Oregon (Qwest’s rate base). In the second
10 phase [Phase 2], the PUC evaluated the rates that Qwest proposed for its various services and
11 made appropriate adjustments so that, as a package, they would provide it the opportunity to
12 earn that return.” *Id.* at 96. Under this state-law based procedure, “the rates for one service
13 may be greater than Qwest’s costs while the rates for another may be less,” permitting some
14 services to “subsidize” others. *Id.* at 96-97.

15 In contrast, under the TCA, the Court of Appeals noted that the Commission must
16 “focus on a [telecommunication company’s] cost of providing the specific payphone service
17 at issue rather than on its total rate of return[.]” *Id.* at 97-98. The Court of Appeals observed
18 that the TCA “is designed to replace a state-regulated monopoly system with a federally
19 facilitated, competitive market.” *Id.* at 98 (quoting *New England Public Communications v.*
20 *Fed. Commc'ns Comm'n*, 334 F.3d 69, 77 (D.C. Cir. 2003)).

21 The Court of Appeals concluded that the TCA and FCC orders implementing the
22 TCA, including the Payphone Orders and the Wisconsin Order, were binding on the
23 Commission. *Id.* at 100 (“The District of Columbia Circuit Court of Appeals treats the
24 FCC’s orders under section 276 as binding on every state, and so do we.”). Consequently,
25 the Court of Appeals held that the Commission “must reconsider its order in light of” the
26 Payphone Orders and the Wisconsin Order. *Id.*

1 In a detailed concurrence, Judge Wollheim explained his view of the requirements of
2 federal law. In particular, he made clear that the Commission could not determine PAL rates
3 by “including contributions to other Qwest services and a market-driven return for Qwest,”
4 *Id.* at 107 (Wollheim, J. concurring), as it had under the state-law “traditional procedure.”

5 **F. Remand and Order 06-515.**

6 Upon remand from the Court of Appeals to the Commission, Qwest filed a brief in
7 UT 125 seeking “to ‘rebalance’ rates to offset the anticipated reduction in payphone service
8 rates.” Order No. 06-515 at 3. Qwest argued that

9 [T]he Court of Appeal[s’] remand order and ORS 756.568
10 authorize the Commission to reopen this case and to adjust
11 other rates to offset the alleged revenue reduction that results
12 from approving lower rates for payphone services. [Qwest]
13 further maintains that the Commission must rebalance rates in
14 order to provide the Company with the opportunity to recover
15 its authorized revenue requirement and to avoid “impermissible
16 single-issue ratemaking” that would occur if the Commission
17 were to adjust only Qwest’s rates for payphone services.

18 *Id.* The Commission’s staff opposed Qwest’s request. *Id.* at 3-4.

19 The Commission rejected Qwest’s request. The Commission ruled that the Modified
20 Stipulation, entered with Order No. 00-190, provided that Qwest could not rebalance its
21 rates: The terms of paragraph 5 “limit Qwest to a credit for refunds and rate reductions made
22 pursuant to the Stipulation, and do not authorize Qwest to increase customer rates to offset
23 additional revenue reductions resulting from the Court of Appeals’ decision.” *Id.* at 6-7.

24 In making this ruling, Commission specifically held that paragraph 5 of the Modified
25 Stipulation applied to appeals of Order No. 01-810, not just Order No. 00-190. The
26 Commission explained that the 5th and 6th sentences of paragraph 5 “clearly encompass not
only an appeal of Order No. 00-190 adopting the Stipulation, but also an appeal of any
subsequent Commission order implementing the terms of the Stipulation.” *Id.* at 6 (emphasis
omitted).

1 The Commission further noted that paragraph 5 provided that Qwest bear the risk that
2 an appeal like *NPCC v. PUC* could result in additional refunds. “Under the terms of the
3 [Modified Stipulation],” the Commission explained, “Qwest specifically agreed to accept the
4 risk that subsequent appeals of the Commission’s order implementing the Stipulation might
5 result in a situation where Qwest was required to make refunds or rate reductions in addition
6 to those set forth in the Stipulation. The language of the agreement demonstrates that the
7 Company was fully cognizant of the potential consequences of its decision when it executed
8 the Stipulation.” *Id.* at 11.

9 Meanwhile, in the interim between the FCC’s adoption of the Wisconsin Order and
10 the Oregon Court of Appeals decision in *NPCC v. PUC*, Qwest voluntarily lowered its PAL
11 rates in March 2003 and CustomNet rates in August 2003. “While NPCC’s appeal was
12 pending, Qwest filed Advice Nos. 1935 and 1946. Those filings became effective on March
13 17 and August 28, 2003, respectively, and significantly reduced Qwest’s PAL rates.” *Id.* at 2
14 n.4.

15 **G. The Commission sets final, NST-complaint PAL and CustomNet rates in**
16 **Order No. 07-497.**

17 Following the remand from the Court of Appeals, Qwest, NPCC, and Commission
18 staff entered into discussions to determine final rates for PAL and CustomNet. As a result of
19 those discussions, the parties entered a stipulation agreeing that the PAL and CustomNet
20 rates that Qwest submitted in 2003 complied with Section 276 and the NST. Orders Nos. 06-
21 515 at 2 n.4; 07-497 at 2. The Commission reviewed the rates and, after taking evidence and
22 testimony, determined that they complied with the NST. Order No. 07-497 at 3.

23 Accordingly, the Commission adopted the parties’ stipulation, establishing final, NST-
24 compliant rates for PAL and CustomNet on November 15, 2007. *Id.* at 4.

1 **III. The FCC Refund Order.**

2 In addition to Oregon, several other state utility commissions applied the NST to rates
3 for payphone services. As in Oregon, the application of the NST to those rates often led state
4 commissions to reduce the rates. PSPs in a number of states sought to compel BOCs to
5 refund overpayments. In 2013, the FCC consolidated several of these cases and issued an
6 order setting forth a framework for refunds. *In the matter of Implementation of the Pay*
7 *Telephone Reclassification and Compensation Provisions of the Telecommunications Act of*
8 *1996*, CC Docket No. 96-128, 28 FCC Rcd. 2615 (Feb. 20, 2013) (“Refund Order”). The
9 Refund Order resolved several questions regarding the BOCs’ obligation to refund PSPs for
10 overpayments.

11 First, the FCC ruled that state public utility commissions had the authority to order
12 BOCs to issue refunds to PSPs for non-NST-compliant rates: “a state commission may order
13 refunds for any time period after April 15, 1997 if it concludes that a BOC was charging
14 PSPs a rate that was not NST-compliant, as a number of states have.” 28 FCC Rcd. at 2617.

15 Second, the FCC stated that state commissions, not the FCC or federal courts, were
16 responsible for deciding whether to order refunds. The FCC noted it had “charged the states
17 with the responsibility to ensure that BOC intrastate payphone line rates comply with the
18 NST and provided the states with general guidance regarding compliance.” 28 FCC Rcd. at
19 2633. Just as the states were responsible for determining whether payphone line rates were
20 NST-compliant, the “issue of refunds was properly administered by the states.” *Id.* at 2634.

21 Third, the FCC held that a state commission had independent authority, separate and
22 apart from the Waiver Order, to order refunds for non-NST-complaint rates. A BOC “that
23 filed tariffs after May 19, 1997, or that simply relied on existing rates or filed cost studies for
24 existing rates, would have been in violation of [the FCC’s] orders,” the FCC explained. *Id.* at
25 2638. In such an instance, a “state commission may well find refunds to be appropriate
26 pursuant to section 276 [of the TCA], Commission regulations, and relevant state laws if the

1 rates in such cases were challenged under state regulatory procedures and found to be non-
2 compliant.” *Id.*

3 The FCC observed that some state utility commissions had appropriately ordered
4 refunds for non-NST-compliant rates. For example, the Indiana Utility Regulatory
5 Commission ordered refunds. The Indiana commission, like Oregon’s Commission, found
6 that the telecommunication companies’ “payphone tariffs should only be approved on an
7 interim basis, retroactive to April 15, 1997, and subject to refund pending further review.”
8 *Id.* Once the Indiana Commission completed its review, it ordered the telecommunication
9 companies “to lower their payphone rates and ordered refunds retroactive to April 15, 1997.”
10 *Id.* South Carolina’s commission also ordered telecommunication companies to lower their
11 rates and ordered refunds back to April 15, 1997. *Id.* Several other state commissions
12 declined to order refunds based on state-law reasons. *Id.* at 2639-40. The FCC concluded
13 that state commissions should determine refunds “based on the specific facts of the case
14 before them” and noted that state commissions “may well find that refunds are appropriate.”
15 *Id.* at 2638, 2640.

16 **IV. Ancillary Proceedings in Docket DR 26 / UC 600.**

17 In May 2001, NPCC filed a complaint with Oregon’s Commission seeking, among
18 other relief, to compel Qwest to issue refunds to PSPs for overpayments resulting from
19 Qwest’s failure to timely charge NST-compliant rates. NPCC argued that Qwest was
20 required to issue refunds pursuant to the Waiver Order. In 2011, the Commission granted
21 Qwest’s motion for summary judgment, ruling that Qwest had not relied on the Waiver Order
22 and, thus, was not subject to its refund requirement. NPCC appealed and the Oregon Court
23 of Appeals affirmed the Commission. *Nw. Pub. Commc’ns Council v. Qwest Corp.*, 279 Or.
24 App. 626, 647 (2016) (“*NPCC v. Qwest*”). The Court of Appeals concluded that Qwest did
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1 not rely on the Wavier Order and was not, therefore, subject to its refund requirement. *Id.* at
2 644-45.¹⁰

3 The Court of Appeals was clear, however, that the Commission could compel Qwest
4 to issue refunds under other sources of law. Following a close reading, the Court of Appeals
5 stated that under the Refund Order, “a state commission could order a refund based on
6 sources of authority other than the Waiver Order.” *Id.* at 642. The Court of Appeals noted
7 that “under the circumstances presented here, ‘a state commission may well find refunds to
8 be appropriate pursuant’ to sources of authority other than the Waiver Order[.]” *Id.* at 644-
9 45 (quoting Refund Order ¶ 45; alterations omitted).

10 ARGUMENT

11 Section 276 of the TCA, the FCC’s orders, and the Oregon Court of Appeals decision
12 in *NPCC v. PUC* provide that from April 15, 1997 forward BOC rates for payphone services
13 must comply with the NST. Nonetheless, between April 15, 1997 and at least August 28,
14 2003, Qwest charged and collected rates from PSPs that failed to comply with the NST.
15 Those rates significantly exceeded the rates that the Commission determined to be NST-
16 compliant in Order No. 07-497. As such, between April 15, 1997 and at least August 28,
17 2003, Qwest significantly overcharged and the PSPs significantly overpaid for PAL and
18 CustomNet. To NPCC’s knowledge, Qwest has never fully refunded the PSPs their
19 overpayments.

20 Pursuant to Orders Nos. 96-107 (which made all Qwest’s rates interim subject to
21 refund from May 1, 1996), 00-190 (adopting the Modified Stipulation in which Qwest
22 recognized its potential to be obligated to pay additional refunds), 06-515 (providing that the
23 Modified Stipulation applied to Order No. 01-810), and 07-497 (establishing final, NST-
24 compliant PAL and CustomNet rates), Qwest was obligated to refund the difference between
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26 ¹⁰ NPCC has a motion pending before the Court of Appeals for reconsideration of
this decision.

1 the unlawful, interim rates it charged to its PSP ratepayers beginning effective May 1, 1996
2 and the final, NST-compliant rates approved by the Commission. The Commission should
3 order Qwest to show cause why it is not in violation of Orders Nos. 96-107, 00-190, 00-191,
4 06-515, and 07-497, the Telecommunication Act of 1996, and state law.

5 The Commission has the responsibility and authority to protect ratepayers from
6 Qwest's unlawful, unjust, and unreasonable rates. The Commission is vested with the
7 responsibility to "protect * * * customers, and the public generally, from unjust and
8 unreasonable exactions and practices." ORS 756.040(1). To carry out that responsibility, the
9 Commission has the implied power to compel telecommunications utilities to issue refunds.
10 Therefore, in the alternative to issuing an order to show cause, the Commission should clarify
11 Order No. 07-497 by amending it to expressly require Qwest to issue refunds for any excess
12 revenue it collected under rates that failed to comply with Orders Nos. 96-107, 00-190, 00-
13 191, 06-515, and 07-497, the Telecommunication Act of 1996, and state law, less any
14 refunds previously paid.

15 **I. Between 1996 and 2003, Qwest charged and collected unlawful rates for PAL**
16 **and CustomNet.**

17 **A. Qwest charged and collected unlawful PAL rates.**

18 Effective May 1, 1996, the Commission made all Qwest's rates interim subject to
19 refund. Order No. 96-107 at 4. On January 15, 1997, Qwest submitted Advice No. 1668,
20 which set forth PAL rates for its new Smart PAL service to become effective on April 15,
21 1997 and otherwise reconfirmed its existing PAL rates. Those rates remained in effect until
22 December 31, 2001. Order No. 01-810 at 64. The rates submitted in Advice 1668 were
23 neither final nor NST compliant. Advice No. 1668 makes no reference to the NST or to
24 Qwest's actual costs and overhead for providing PAL. Furthermore, the submission included
25 data estimating the "annual revenue impact," Advice No. 1668 at 1, of the rates, a factor
26 Judge Wollheim made clear was impermissible. *NPCC v. PUC*, 196 Or. App. at 107

1 (Wollheim, J. concurring) (“including * * * a market-driven return for Qwest in the rates is
2 impermissible”). And, the Advice indicates that the “recurring rates for the Smart Pal line
3 were developed using the existing price/cost relationship of the basic Pal,” rather than the
4 actual cost plus overhead formulation required by the NST. Advice No. 1668 at 2. Thus, the
5 rates in Advice 1668 were unlawful because a “BOC may not charge more for payphone line
6 service than is necessary to recover from PSPs all monthly recurring direct and overhead
7 costs incurred by BOCs in providing payphone lines.” Wisconsin Order ¶ 60.

8 Following Order No. 01-810, Qwest submitted new PAL rates, effective January 1,
9 2002. Advice No. 1849 S1. Those rates were consistent with Order No. 01-810 and
10 represented a “significant reduction[.]” of Qwest’s previous rates. Order No. 01-810 at 48.
11 NPCC appealed those rates and, in *NPCC v. PUC*, the Court of Appeals reversed the
12 Commission’s ruling on Qwest’s PAL rates, finding that the Commission had failed to apply
13 the FCC’s orders. 196 Or. App. at 99-100. Thus, the rates Qwest began charging on January
14 1, 2002, like its previous rates, were unlawful. Qwest charged those rates until it voluntarily
15 “significantly reduced” its PAL rates effective on March 17, 2003. Order No. 06-515 at 2
16 n.4.

17 **B. Qwest charged and collected unlawful CustomNet rates.**

18 The FCC’s orders require BOCs such as Qwest “to set payphone service rates and
19 ‘unbundled features’ rates, including rates for fraud protection [*i.e.*, CustomNet], according
20 to the FCC’s ‘new services test[.]’” *Davel Commc’ns, Inc. v. Qwest Corp.*, 460 F.3d 1075,
21 1081 (9th Cir. 2006); Wisconsin Order ¶ 64 (The Payphone Orders required “payphone line
22 services to be priced at cost-based rates in accordance with the new services test.”). Qwest
23 did not submit new CustomNet rates on January 15, 1997 in Advice 1668. As such, until
24 December 31, 2001, Qwest’s CustomNet rates remained the same rates provided for in the
25 AFOR. Because Qwest merely relied on existing rates for CustomNet, and made no attempt
26 to establish that the rates were NST-compliant, those rates were unlawful. A BOC “that

1 simply relied on existing rates * * * would have been in violation of [the FCC's] orders.”
2 Refund Order at 2638.

3 Qwest submitted new CustomNet rates that were the same as its old rates, effective
4 January 1, 2002, following Order No. 01-810. In that Order, Qwest contended, and the
5 Commission agreed, that Qwest was not required to file NST-compliant rates for CustomNet.
6 Thus, Qwest again made no showing that its CustomNet rates beginning on January 1, 2002
7 were NST-complaint. The Court of Appeals overturned the Commission's ruling with
8 respect to CustomNet and ordered the Commission to reconsider its ruling in light of the
9 FCC's orders. *NPCC v. PUC*, 196 Or. App. at 99-100; *Id.* at 108 (Wollheim, J. concurring)
10 (“To permit Qwest to supply a needed payphone service at a rate above that level is
11 inconsistent with that purpose and may be inconsistent with the FCC's orders.”). Because
12 the FCC's orders required rates for CustomNet to comply with the NST, *Davel Commc'ns*,
13 460 F.3d at 1081, Qwest's CustomNet rates beginning on January 1, 2002 were also
14 unlawful. Qwest continued to charge the same rates for CustomNet until August 28, 2003.
15 Order No. 06-515 at 2 n.4.

16 Federal law and *NPCC v. PUC* provide, in sum, that Qwest's PAL and CustomNet
17 rates in effect from April 15, 1997 until at least August 28, 2003 were unlawful. Those
18 unlawful rates were significantly higher than the rates the Commission ultimately determined
19 were NST-compliant in 2007.¹¹ Accordingly, Qwest significantly overcharged and
20 overcollected rates from PSPs from May 1, 1996 until at least August 28, 2003.

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22 _____
23 ¹¹ The Commission's orders establish that the final, NST-compliant rates that the
24 Commission adopted in Order No. 07-497 (which were identical to the rates Qwest
25 voluntarily submitted in 2003, Order No. 06-515 at 2 n.4) were significantly lower than the
26 rates Qwest charged before 2003. In Order No. 06-515, the Commission stated that the rates
Qwest submitted in 2003 “significantly reduced” the rates in effect as a result of Order 01-
810. Indeed, the rates adopted by the Commission in Order No. 07-497 were as much as 20
times lower than the rates in effect before 2003. See Letter from L. Reichman to Hearings
Division, Attachment A (March 31, 2006) (listing rate reductions). Qwest's PAL and
CustomNet rates in effect before Order No. 01-810 were even higher. In Order No. 01-810,
the Commission noted that the rates Qwest proposed (and the Commission adopted in Order

1 **II. The Commission should order Qwest to show cause why it is not in violation of**
2 **Orders Nos. 96-107, 00-190, 00-191, 06-515, and 07-497, the Telecommunication**
3 **Act of 1996, and state law.**

4 The Commission made all of Qwest’s rates interim from May 1, 1996 until the
5 Commission set final rates in this docket. Order No. 96-107. From April 15, 1997 until at
6 least August 28, 2003, Qwest charged interim rates that unlawfully failed to comply the NST.
7 To comply with the Commission’s orders, Qwest was obligated to refund any overcharges it
8 made on PSPs from May 1, 1996 (when Qwest’s rates became interim and subject to refund)
9 until the Commission set final, NST-compliant rates in Order No. 07-497. As explained
10 below, there are two reasons: (1) In the Modified Stipulation adopted in Order No. 00-190,
11 Qwest expressly agreed that it could be responsible for paying additional refunds in the event
12 that an appeal of an order implementing the Stipulation lowered Qwest’s rates and increased
13 its refund obligation. In 2004, the Oregon Court of Appeals overturned the rates the
14 Commission set in Order No. 01-810, which implemented the Stipulation. As a result of the
15 Court of Appeals’ decision, the Commission adopted new, NST-compliant PAL and
16 CustomNet rates that were significantly lower than the rates overturned on appeal. The
17 establishment of final, NST-compliant rates triggered Qwest’s obligation to pay additional
18 refunds. *See* § I.A.1, below. (2) In Order No. 96-107, the Commission made Qwest’s rates
19 interim and subject to refund from May 1, 1996. Qwest’s PAL and CustomNet rates
20 remained interim until the Commission set final rates in Order No. 07-497. Upon setting
21 final rates, Qwest was obligated to refund the difference between the interim rates and the
22 final rates to comply with Order No. 06-107. *See* § I.A.2, below.

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No. 01-810) represented a “significant reduction[.]” from Qwest’s PAL rates in effect
beginning May 1, 1996. Order No. 01-810 at 48.

1 **A. Qwest is responsible for refunding its ratepayers their overpayments.**

2 **1. Orders No. 00-190 required Qwest to issue refunds.**

3 In the Modified Stipulation to Order No. 00-190, Qwest acknowledged that it could
4 be subject to issue additional refunds if its rates were modified or overturned on appeal.
5 Order No. 00-190, Appendix A ¶ 5 (Qwest’s “obligation to refund monies to customers and
6 to reduce its ongoing rates may be modified on appeal[] * * * by issuing a judgment
7 incorporating or requiring different refunds or rate reductions[.]”). In Order No. 01-810, the
8 Commission set rates for PAL and CustomNet. On appeal, however, the Court of Appeals
9 overturned those rates and directed the Commission to reconsider PAL and CustomNet rates
10 in light of the FCC’s orders. *NPCC v. PUC*, 196 Or. App. at 100. As a result of the appeal,
11 the Commission applied the NST and adopted rates that were significantly lower than the
12 rates overturned on appeal. Orders Nos. 06-515 at 2 n.4 & 07-497. Thus, the Court of
13 Appeals’ decision and Order No. 07-497 modified Qwest’s obligation to issue refunds.
14 Accordingly, Qwest should have issued the refunds it agreed it would pay if rates were
15 lowered or additional refunds required as a result of an appeal.

16 Qwest may argue that the Modified Stipulation provides for, but does not require,
17 Qwest to issue refunds. Such an interpretation distorts the intention of paragraph 5 of the
18 Modified Stipulation. As the Commission explained in Order No. 06-515, “Qwest
19 specifically agreed to accept the risk that subsequent appeals of the Commission’s order
20 implementing the Stipulation might result in a situation where Qwest was required to make
21 refunds or rate reduction in addition to those set forth in the Stipulation. The language of the
22 agreement demonstrates that the Company was fully cognizant of the potential consequences
23 of its decision when it executed the Stipulation.” *Id.* at 11. By accepting the risk that its
24 rates might be modified on appeal, Qwest assumed the obligation to refund overpayments to
25 its ratepayers.

1 Qwest may also argue that it has already paid to the PSPs all the refunds it owes.
2 This argument is also incorrect. Those refunds do not complete Qwest's refund obligations
3 for two reasons. First, Qwest paid refunds to PSPs pursuant to Order No. 00-190 and 00-191.
4 Those refunds were allocated among ratepayers based on an interim rate design that was later
5 adopted as the final rate design in Order No. 01-810. However, the Court of Appeals
6 overturned that rate design in *NPCC v. PUC*. As such, the PSP ratepayers did not receive
7 sufficient refunds to make the interim PAL and CustomNet rates NST-compliant. In
8 paragraph 5 of the Modified Stipulation, Qwest accepted the risk that its refund obligation
9 could be modified on appeal. The Court of Appeals' decision, and the Commission's order
10 implementing that decision, increased Qwest's refund obligation. Second, Qwest paid
11 refunds shortly after the Commission issued Orders Nos. 00-190 and 00-191 in 2000. To
12 NPCC's knowledge, Qwest has never paid the PSPs any additional refunds after 2000.
13 However, Qwest continued to charge the PSPs interim PAL and CustomNet rates that were
14 not final and not NST compliant until at least 2003. To comply with its own
15 acknowledgement that its obligation to issue refunds may be modified by a subsequent
16 appeal, and with federal and state law establishing that Qwest's PAL and CustomNet rates
17 were unlawful, Qwest must issue full and complete refunds.

18 This conclusion is reinforced by Qwest's reservation of its right to demand additional
19 payments from its ratepayers in the event that an appeal reduced the size of its rate
20 reductions: In the Modified Stipulation, the company reserved the right "to seek recovery of
21 any overpayments * * * in the event that [Qwest's] refund and/or rate reduction obligation is
22 reduced" on appeal. Order No. 00-190, Appendix A, ¶ 5. Had the present circumstances
23 been reversed, and the Court of Appeals had held that Qwest was entitled to raise rather than
24 lower its rates, Qwest could have demanded additional payments from the PSPs. Qwest
25 cannot have it both ways. Any argument Qwest advances that the paragraph 5 does not
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1 require additional refunds belies Qwest’s own stipulation that, had an appeal resulted in a
2 change favorable to Qwest, it could demand additional money from its ratepayers.

3 Furthermore, Qwest’s own actions demonstrate that it knew that the Court of
4 Appeals’ decision in *NPCC v. PUC* would require it to issue additional refunds. As
5 discussed above, Qwest voluntarily reduced its PAL and CustomNet rates in 2003.
6 Following the remand from the Court of Appeals in 2004, Qwest proposed that its 2003 rates
7 were NST compliant. Qwest also requested that the Commission allow it to recover lost
8 revenues from the rate reduction by rebalancing its other ratepayers’ rates. Order No. 06-
9 515. Because Qwest had already reduced its prospective PAL and CustomNet rates, the only
10 revenues the rebalancing would recoup would be the additional refunds Qwest would be
11 obligated to pay if its proposed rates were adopted by the Commission. Thus, Qwest’s
12 request to rebalance its rates demonstrates that Qwest knew that it would be responsible for
13 additional refunds back to May 1, 1996 if the Commission adopted its 2003 PAL and
14 CustomNet rates as final, NST-compliant rates. Accordingly, Order No. 00-190 required
15 Qwest to issue additional refunds.

16 **2. Order No. 96-107 required Qwest to issue refunds.**

17 Order No. 96-107 terminated the AFOR and made all of Qwest’s “rates for services
18 [after May 1, 1996] * * * interim rates subject to refund with interest, at a rate of 11.2
19 percent.”¹² *Id.* As the Commission’s staff explained, the rates were interim “pending the
20 outcome of the company’s current rate filing, UT 125.” *Id.*, Appendix A at 5. Thus, Qwest’s
21 PAL and CustomNet rates were interim and subject to refund until final rates were set in this
22 docket, UT 125.¹³ The Commission set final rates for PAL and CustomNet in Order No. 07-

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24 ¹² Order No. 00-190 reduced the rate of interest to 8.77 percent.

25 ¹³ Orders Nos. 96-183 at pp. 3-4 and 97-171 at 104 both adopted a refund
26 methodology based on the difference between the final permanent rate and any higher
interim rate. At the hearing on adoption of the Modified Stipulation both Qwest and the
Commission’s staff argued that an individual would only be entitled to a refund once
permanent rates were established and the individual had paid a higher interim rate for a
service than the permanent rate. Order No. 00-190 at 9 & 12. Order No. 00-190 at 13

1 497, effectively concluding the rate-setting phase of UT 125 and replacing the interim rates
2 with final rates.¹⁴ Because the final rates are lower than the interim rates, Qwest is “subject
3 to refund” the difference. To comply with Order No. 96-107, Qwest was required to refund
4 the difference between the final rates and the interim rates.

5 This conclusion is supported by applicable case law. In *Pacific Northwest Bell*
6 *Telephone Co. v. Katz*, 116 Or. App. 302 (1992), the Court of Appeals reviewed an order of
7 the Commission refunding \$10 million to Pacific Northwest Bell’s (“PNB”) ratepayers. In
8 that case, the Commission permitted PNB to charge and collect rates for a service on an
9 interim rate schedule. *Id.* at 306. Under those interim rates, PNB collected more revenue
10 than permitted under the Commission’s authorized revenue level for PNB. *Id.* The
11 Citizen’s Utility Board intervened to seek refunds for PNB’s ratepayers. *Id.* The
12 Commission ordered PNB to refund the over collection. *Id.* On appeal, the Court of Appeals
13 concluded that the Commission had implied authority pursuant to ORS 756.040 to compel
14 PNB to issue refunds. *Id.* at 310. The Court of Appeals also held that PNB was “not entitled
15 to retain excess revenues collected under an interim rate schedule that was not in compliance
16 with the authorized revenue level.” *Id.*

17 As in *Pacific Northwest Bell Telephone*, Qwest collected rates subject to an interim
18 rate schedule. By Order No. 96-107, those rates were expressly subject to refund with
19 interest. The FCC’s orders, *NPCC v. PUC*, and the Commission’s Order No. 07-497 setting
20 final, NST-compliant PAL and CustomNet rates establish that Qwest’s interim rates were
21 unlawful. Accordingly, like PNB, Qwest is “not to entitled to retain excess revenues
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23 specifically held that the refund methodology established in Order No. 97-171 had been
24 preserved and that methodology as set forth in Order No. 97-171 was specifically readopted
in Order No. 00-191 at p. 2.

25 ¹⁴ PAL and CustomNet rates were not final until Order No. 07-497. The rates
26 remained interim after Order No. 01-810 because NPCC filed an appeal. An appealed
interim rate does not become final until “the reviewing court upholds the Commission’s
order.” *In the Matter of the Application of Portland General Electric Company*, PUC Docket
Nos. DR 10, UE 88, & UM 989, Order No. 08-487 at 8 (Sept. 9, 2008).

1 collected under an interim rate schedule.” *See Pac. Nw. Bell Tel.*, 116 Or. App. at 310.
2 Qwest should show cause how it has complied with the TCA, state law, and the
3 Commission’s orders.

4 **B. The Commission has authority to issue an order to show cause.**

5 The Commission derives its authority from Oregon Revised Statutes Chapters 756,
6 757, 758, and 759. In ORS 756.040(1), the legislature provided that the Commission’s
7 mission is to protect utility “customers, and the public generally, from unjust and
8 unreasonable exactions and practices and to obtain for them adequate service at fair and
9 reasonable rates.” The Commission’s implementing statutes vest the Commission with
10 plenary authority to carry out this broad mission: “The commission is vested with power and
11 jurisdiction to supervise and regulate every public utility and telecommunications utility in
12 this state, and to do all things necessary and convenient in the exercise of such power and
13 jurisdiction.” ORS 756.040(2).

14 In addition to those powers expressly granted by the Commission’s statutes, it “is
15 well settled that an agency has such implied powers as are necessary to enable the agency to
16 carry out the powers expressly granted to it.” *Pac. Nw. Bell Tel.*, 116 Or. App. at 309-10.
17 The Commission’s express and implied powers are extremely broad: The Commission “has
18 been granted the power to investigate utilities and to make whatever orders it deems justified
19 or required by the results of its investigations. ORS 756.515. Thus, * * * PUC has been
20 granted the broadest authority—commensurate with that of the legislature itself—for the
21 exercise of its regulatory function.” *Id.* at 309 n.5 (quotation marks, citation, and alterations
22 omitted).

23 Consistent with the broad grant of authority, the Commission previously has issued
24 orders requiring utilities to show cause. For example, in *In re TelexFree*, Docket CP 1556,
25 Order (May 28, 2014), the Commission ordered the respondent to show cause why its
26 certificate of authority should not be cancelled. And, in *In re DPI Teleconnect, LLC*, Docket

1 CP 1235, Order at 3 (July 15, 2004), the Commission ordered DPI to “to show cause why the
2 Commission should consider a new request for a certificate of authority to provide
3 telecommunications service in Oregon as a competitive provider.” In *In re Shady Cove*
4 *Waterworks, LLC*, Docket WA 81, Ruling, (June 12, 2013), the Administrative Law Judge
5 issued an order requiring the parties show cause why the matter should not be closed. In
6 light of the Commission’s broad express and implied powers, the Commission has the
7 authority to order Qwest to show cause why it is not in violation of the law and its orders.

8 **III. In the alternative, the Commission should amend Order No. 07-497 to expressly**
9 **require Qwest to issue refunds for the excess revenue it collected pursuant to**
10 **unlawful rates.**

11 **A. Federal law and the Oregon Court of Appeals decision in *NPCC v. PUC***
12 **required Qwest to file rates for PAL and CustomNet that complied with**
13 **the NST from April 15, 1997 forward.**

14 Section 276 of the TCA “substantially modified the regulatory regime governing the
15 payphone industry by providing, in general terms, that dominant carriers may not subsidize
16 their payphone services from their other telecommunications operations and may not ‘prefer
17 or discriminate in favor of [their] payphone service[s]’ in the rates they charge to
18 competitors.” *Davel Commc'ns, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1081 (9th Cir. 2006)
19 (quoting 47 U.S.C. § 276(a)) (alterations in original). To carry out this mandate, the FCC
20 issued the Payphone Orders, the Clarification Order, the Waiver Order, and the Wisconsin
21 Order. Those orders directed BOCs such as Qwest to set rates for payphone services
22 according to the NST. *Id.*; Order of Recons. ¶ 163; Wisconsin Order ¶¶ 46, 68. The
23 Wisconsin Order, which clarified the application of the NST, made clear that a “BOC *may*
24 *not* charge more for payphone line service than is necessary to recover from PSPs all
25 monthly recurring direct and overhead costs incurred by BOCs in providing payphone lines.”
26 Wisconsin Order ¶ 60 (emphasis added). The Payphone Orders required BOCs to file NST-
compliant rates that were effective from April 15, 1997 forward: “[A]ll required tariffs, both
intrastate and interstate, * * * must be effective no later that April 15, 1997.” Order on

1 Recons. ¶ 163. A BOC “that simply relied on existing rates or filed cost studies for existing
2 rates, would have been in violation of [the FCC’s] orders.” Refund Order at 2638.

3 As explained in § I, above, between April 15, 1997 and at least August 28, 2003,
4 Qwest charged and collected rates from PSPs that failed to comply with the NST. Under the
5 FCC’s Refund Order, “a state commission may order refunds for any time period after April
6 15, 1997 if it concludes that a BOC was charging PSPs a rate that was not NST-compliant, as
7 a number of states have.” 28 FCC Rcd. at 2617.

8 **B. The Commission has the authority and responsibility to compel Qwest to**
9 **issue refunds.**

10 Oregon law firmly establishes that the Commission has the authority to compel Qwest
11 to issue refunds for unlawful overcharges. In *Gearhart v. Pub. Util. Comm’n of Oregon*, 356
12 Or. 216, 218 (2014), the Oregon Supreme Court described the Commission’s authority. That
13 case involved the Commission’s determination of rates for Portland General Electric
14 (“PGE”). In 1993, PGE retired the Trojan nuclear facility ahead of schedule. *Id.* at 222.
15 Despite its early retirement, PGE sought to recover in rates the remaining balance of its
16 capital investment in the Trojan facility. *Id.* The Commission opened a rate proceedings and
17 set PGE’s rates in 1995. *Id.* Following an appeal, in 2000, the Commission reset PGE’s
18 rates to comply with a remand order. *Id.* at 224. After another appeal, the Commission
19 reexamined the rates it set between 1995 and 2000 and the rates in effect after 2000. *Id.* at
20 226-29. In a 2008 order, the Commission ruled that the rates set between 1995 and 2000
21 were too low, but the rates set between 2000 and 2008 were too high. *Id.* at 229. The
22 Commission “ordered PGE to issue a refund to the post-2000 ratepayers to compensate for
23 the amount of th[e] difference [between the rates PGE charged and the rates the Commission
24 subsequently determined would have been just and reasonable] plus interest at PGE’s
25 authorized rate of return from 2000[.]” *Id.* Another appeal followed and the parties
26

1 requested that Supreme Court address, among other issues, “whether the PUC had authority
2 to order PGE to issue refunds to its customers.” *Id.* at 231.

3 The Supreme Court held that the Commission has authority to order refunds. The
4 Supreme Court explained that “when a PUC order issued in the exercise of its ratemaking
5 authority has been reversed and remanded after a reviewing court determines that there was a
6 legal error, the PUC can again use ratemaking principles on remand to determine the effect of
7 its error on the outcome of the proceeding.” *Id.* at 243. The Court further explained that
8 “[r]efunds are one way of correcting [legal] errors, and if the PUC could not order refunds, it
9 would be limited in its ability to protect ratepayers.” *Id.* at 244. The implied power to order
10 refunds, the Court reasoned, “is necessary to the PUC’s ability to carry out its express duty to
11 obtain ‘adequate service at fair and reasonable rates.’” *Id.* at 247 n.19 (quoting ORS
12 756.010(1)).

13 The Commission is vested with the responsibility to “protect * * * customers, and the
14 public generally, from unjust and unreasonable exactions and practices.” ORS 756.040(1).
15 Pursuant to ORS 756.568, the Commission “may at any time, upon notice to the public utility
16 or telecommunications utility and after opportunity to be heard * * * , rescind, suspend or
17 amend any order made by the commission.” As explained in detail above, § I, from April
18 15,1997 until at least August 28, 2003, Qwest charged and collected unlawful PAL and
19 CustomNet rates. Those rates were not only unlawful, they also interfered with the TCA’s
20 purpose to promote a competitive market for payphone services. To remedy Qwest’s unjust
21 and unreasonable exactions, the Commission should, pursuant to ORS 756.568, clarify Order
22 No. 07-497 to provide that Qwest must issue refunds for any excess revenue it collected
23 under rates that failed to comply with Orders Nos. 96-107, 00-190, 00-191, 06-515, and 07-
24 497, the Telecommunication Act of 1996, and state law, less refunds previously paid. *See*
25 *Pac. Nw. Bell Tel. Co.*, 116 Or. App. at 310 (affirming Commission order compelling PNB to
26 refund excessive revenues collected subject to interim rates); Refund Order at 2617 (“a state

1 commission may order refunds for any time period after April 15, 1997 if it concludes that a
2 BOC was charging PSPs a rate that was not NST-compliant”).

3 **C. Other states have ordered BOCs to refund revenue collected pursuant to**
4 **non-NST-compliant rates.**

5 In *Indiana Bell Telephone Co. v. Indiana Utility Regulatory Commission*, 855 N.E.2d
6 357 (Ind. Ct. App. 2006), the Indiana Court of Appeals affirmed the order of Indiana’s state
7 utility commission compelling refunds. In that case, the Indiana Utility Regulatory
8 Commission (“IURC”) approved rates submitted by telecommunication carriers for
9 payphone services in 1997. *Id.* at 360. In 2002, after the FCC issued the Wisconsin Order,
10 the IURC elected to review the rates it had approved in 1997. *Id.* at 361. The IURC
11 determined that the rates should be reduced and the telecommunications companies “shall
12 refund an amount equal to subscriber line charges assessed since April 15, 1997 to present.”
13 *Id.* On appeal, the Indiana Court of Appeals affirmed.

14 In 1999, the South Carolina Public Service Commission (“SCPSC”) ordered
15 BellSouth Telecommunications to issue refunds for overpayments made as a result of non-
16 NST-compliant rates. *In re: Request of BellSouth Telecommunications, Inc. for Approval of*
17 *Revisions to its General Subscriber Service Tariff*, S.C. Pub. Serv. Comm’n Docket No. 97-
18 124-C, Order No. 1999-285 (Apr. 19, 1999). In 1997, BellSouth submitted proposed rates
19 for payphone services that it contended were in compliance with the TCA. *Id.* at 5. The
20 SCPSC opened a docket to review BellSouth’s proposed rates. *Id.* While the SCPSC
21 considered the rates, it ruled that “BellSouth must either reimburse or provide credit to its
22 payphone customers from April 15, 1997, if the rates approved in this proceeding are lower
23 than BellSouth’s existing tariffed rates.” *Id.* In 1999, the SCPSC determined that
24 BellSouth’s proposed rates were too high. Consistent with its previous orders, the SCPSC
25 ordered BellSouth “to make refunds or give credits, including appropriate interest at the rate
26 of 8.75% per annum, back to April 15, 1997.” *Id.* at 25.

1 The Commission should follow the persuasive precedent set by Indiana and South
2 Carolina and clarify Order No. 07-497 by amending it to expressly require Qwest to issue
3 refunds for any excess revenue it collected under rates that failed to comply with Orders Nos.
4 96-107, 00-190, 00-191, 06-515, and 07-497, the Telecommunication Act of 1996, and state
5 law, less any refunds previously paid.

6 **CONCLUSION**

7 For the foregoing reasons, the Commission should grant NPCC's motion requesting
8 the Commission issue an order requiring Qwest to show cause why it is not in violation of
9 Orders Nos. 96-107, 00-190, 00-191, 06-515, and 07-497, the Telecommunication Act of
10 1996, and state law. In the alternative, the Commission should grant NPCC's motion
11 requesting the Commission clarify Order No. 07-497 by amending it to expressly require
12 Qwest to issue refunds for any excess revenue it collected under rates that failed to comply
13 with Orders Nos. 96-107, 00-190, 00-191, 06-515, and 07-497, the Telecommunication Act
14 of 1996, and state law, less any refunds previously paid.

15 DATED this 26th day of January, 2017.

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