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November 16, 2009

Public Utility Commission of Oregon

Attn: Filing Center

550 Capitol St. NE, Ste. 215

PO Box 2148

Salem, OR 97308-2148

To: Hon. Allan Arlow

Public Utility Commission of Oregon

**RE: NORTHWEST PUBLIC COMMUNICATIONS COUNCIL V. QWEST CORP.
 Docket DR 26/UC600
 First Amended Complaint of NPCC et al**

Dear Judge Arlow,

Please find enclosed the First Amended Complaint in slightly revised form to comply with the original proposed draft that was filed with the NPCC motion for leave to amend.

Sincerely,

/s/

Frank G. Patrick

Attorney at Law

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

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

Alex M. Duarte (email; US Mail) alex.duarte@qwest.com

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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

FIRST 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 Randy Linderman,
10 2373 NW 185TH AVE #310 HILLSBORO OR 97124. The Payphone Service Providers’
11 contact information appears in **Exhibit A**.

12 **B. QWEST**

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

17 **II. JURISDICTION**

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

21 **III. APPLICABLE STATUTES AND RULES**

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

26 **IV. BACKGROUND REGARDING SECTION 276**

1 **AND THE FCC WAIVER ORDER**

2 6. Section 276 of the Telecommunications Act of 1996 prohibited Regional Bell
3 Operating Companies (“RBOCs”) like Qwest from discriminating in favor of their payphone
4 services:

5 (a) Nondiscrimination safeguards. After the effective date of the rules prescribed
6 pursuant to subsection (b) of this section, any Bell operating company that
7 provides payphone service—

- 8 (1) shall not subsidize its payphone service directly or indirectly from its
9 telephone exchange service operations or its exchange access operations; and
10 (2) *shall not prefer or discriminate* in favor of its payphone service.

11 47 U.S.C. § 276(a) (emphasis added).

12 7. Section 276 further required the FCC to “prescribe a set of non-structural
13 safeguards for Bell operating company payphone service . . . which safeguards shall, at a
14 minimum, include the nonstructural safeguards equal to those adopted in the Computer
15 Inquiry-III (CC Docket No. 90-623) proceeding.” 47 U.S.C. § 276(b)(1)(C).

16 8. In response, the FCC released a series of orders implementing Section 276. The
17 FCC set specific requirements for all Payphone Services tariffs, which must be:

- 18 a. cost based;
19 b. consistent with the requirements of Section 276;
20 c. nondiscriminatory; and
21 d. consistent with *Computer III* tariffing guidelines.

22 *Id.* Order on Reconsideration, 11 FCC Rcd. 21,233 at ¶ 163 (1997) (“Order on
23 Reconsideration”). The “Computer III tariffing guidelines” incorporate the “new services test.”
24 *Id.* at n. 492.

25 9. Under the new services test, Qwest must calculate its payphone services rates in
26 a manner that does not “recover more than the direct costs of the service, plus ‘a just and
reasonable portion of the carrier’s overhead costs.’” *In the Matter of Wisconsin Public Service*

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. Qwest must pay refunds to its customers when rates exceed
15 the new services test. The FCC clarified this duty in an order waiving the original Payphone
16 Services tariff filing deadline. Initially, the FCC ordered RBOCs to file their new tariffs with
17 state commissions by April 15, 1997. *Waiver Order* at ¶ 19. The “RBOC Coalition,” including
18 Qwest, requested a delay in the filing requirement so that it could begin to collect dial around
19 compensation, which the FCC would have otherwise prohibited given that the RBOC
20 Coalition’s Payphone Services rates did not comply with the new services test. *Id.* at ¶ 13. The
21 FCC responded by granting a 45 day waiver of the filing deadline. *Id.* at ¶ 21. However, the
22 FCC noted that a RBOC “who seeks to rely on the waiver granted in [the Waiver Order] must
23 also reimburse their customers or provide credit, from April 15, 1997, in situations where the
24 newly tariffed rates are lower than the existing tariffed rates.” *Id.* at ¶ 20.² Qwest relied on the

25 _____
26 ² During the proceeding, RBOC Coalition “concede[d] that the Commission’s payphone orders,
as clarified by the *Bureau Waiver Order*, mandate that payphone services a LEC tariffs at the

1 waiver by accepting dial around compensation without having new-services-test compliant rates
2 on file.

3 11. 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 12. 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 13. 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 14. 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 taken up in Qwest's rate case, Docket No. UT-125. On information and belief, the Commission
23

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

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

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

23 17. Following a hearing, the Commission entered Order No. 01-810 on September 14,
24 2001 approving Qwest's proposed Payphone Services rates with minor changes and largely
25 rejecting NPCC's arguments that Qwest's proposed Payphone Services rates did not comply
26 with the new services test or Section 276. The NPCC appealed the OPUC's Order No. 01-810.

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

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

13 20. On March 31, 2006, Qwest filed new, proposed Payphone Services rates in
14 OPUC Docket No. UT-125.

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

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

23 23. NPCC filed the original Complaint in this docket on May 14, 2001. This docket
24 has been held in abeyance for several years while Docket UT-125 proceeded, until the abeyance
25 order was lifted on February 5, 2009.

26 24. In sum, Qwest charged its Payphone Services customers illegally high rates for

1 years. Now that rates have been set under Docket UT-125, the Commission should direct
2 Qwest to refund the amount by which Qwest's rates exceeded the legal rates.

3 **V. THE PURPOSE OF THIS AMENDMENT**

4 25. The purpose of this Amendment is to join the Payphone Service Providers as
5 named Complainants and to update and conform the Complaint to the evidence developed in the
6 Docket UT-125 proceeding and the developments in the law that have occurred since NPCC
7 filed the original complaint in May of 2001.

8 **VI. COUNT ONE - SECTION 276 REQUIRES QWEST TO REFUND UNLAWFUL**
9 **RATES FOR PAYPHONE SERVICES TO THE COMPLAINANTS**

10 26. The Complainants reallege paragraphs 1 through 26 above.

11 27. As explained above, Section 276 of the Telecommunications Act of 1996 states
12 that Qwest "(1) shall not subsidize its payphone service directly or indirectly from its telephone
13 exchange service operations or its exchange access operations; and (2) *shall not prefer or*
14 *discriminate* in favor of its payphone service." 47 U.S.C. § 276(a)(*emphasis added*).

15 28. Qwest violated Section 276 by both preferring and discriminating in favor of its
16 own Payphone Services division. It is *res judicata* that Qwest's rate-setting methodology did
17 not comply with Section 276, as established by the Oregon Court of Appeals Order. Qwest
18 lowered its rates once the Oregon Court of Appeals Order forced Qwest to comply with
19 Section 276.

20 29. Qwest must refund to the Payphone Service Providers the amount by which
21 Qwest's Payphone Services rates exceeded the legal rates.

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

24 30. The Complainants reallege paragraphs 1-26 above.

25 31. As explained above, Qwest, as a member of the RBOC Coalition, asked for a
26 waiver from the FCC to continue charging Payphone Services rates in excess of the new
services test while collecting dial-around compensation. Qwest relied on the waiver by

1 accepting dial around compensation without having new-services-test compliant rates on file. It
2 is *res judicata* that Qwest's rate-setting methodology did not comply with the new services test.
3 *See Northwest Public Comm's Council v. PUC*, 100 P.3d at 778.

4 32. Qwest must refund the unlawful rate charges to the Payphone Service Providers.

5 **VIII. RELIEF REQUESTED**

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

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

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

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

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

21
22 DATED this 16th day of November, 2009.

23 /s/
FRANK G. PATRICK, OSB 76022
24 Attorney for Complainants Individually and
for The Northwest Public Communications Council
25
26

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

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

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

Interwest Tel, LLC
Bob Santos, Manager
2850 Kyle Road
Kennewick, WA 99338

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

NSC Communications Public Services
Corporation
6920 Koll Center Prkwy

Pleasanton, CA

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

Pacific Northwest Payphones
Randy Linderman, Pres.
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 and Donald E. Truman
13252 Garden Grove Blvd., Suite 205
Garden Grove, CA 92843

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

Northwest Public Communications Council
c/o Randy Linderman
2373 NW 185TH AVE #310
Hillsboro, OR 97124.
en Grove, CA 92843

1 I hereby certify that I served the foregoing FIRST AMENDED COMPLAINT OF
2 THE 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 Jason W. Jones
10 Assistant Attorney General
11 Regulated Utility & Business Section
12 1162 Court St. NE
13 Salem, OR 97301-4096
14 Jason.w.jones@state.or.us

15 Alex M. Duarte
16 Corporate Counsel
17 421 SW Oak St., Suite 810
18 Portland, OR 97204
19 alex.duarte@qwest.com

20 by the following indicated method or methods:

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

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

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

DATED this 16th day of November, 2009

23 /s/
24 Frank G. Patrick, OSB 76022