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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

The Northwest Public Communications Council, Unidentified PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.

Plaintiffs, v.

Oregon Public Utilities Commission, an agency of the State of Oregon, Ray Baum, Susan Ackerman and John Savage, in their capacity as Commissioners and Qwest Corporation,

Defendants.

**CV '10 - 685 HA**

Case No.: CV \_\_\_\_\_

**COMPLAINT  
FOR DECLARATORY RELIEF**

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For their Complaint, Plaintiffs allege against defendants the Oregon Public Utilities Commission (the "PUC"), Ray Baum ("Baum"), Susan Ackerman ("Ackerman"), John Savage ("Savage") and Qwest Corporation ("Qwest"). Balm, Ackerman and Savage are sued solely in their capacities as Commissioners of the PUC. Balm, Ackerman and Savage are collectively referred to herein as the "Commissioner Defendants".

#### NATURE OF THE ACTION

This complaint seeks a review and reversal of a determination on May 4, 2009 by the PUC that Plaintiffs' claims for refunds based on overcharges of CustomNet payphone service tariffs are time barred by the two-year statute limitations contained in 47 U.S.C. §415 and that CustomNet payphone services are not integrally related to the provision of PAL payphone services.

#### JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under 28 U.S.C. §1331 because the claims asserted in this Complaint involve federal questions arising under the laws of the United States. To the extent that any of the claims herein depend upon state law, this Court has supplemental jurisdiction over those claims as well pursuant to 28 U.S.C. §1367.

2. Venue is proper in this District pursuant to 28 U.S.C. §1391 because substantial parts of the claims asserted herein arose in this District, the defendants reside in this District and/or operate and have ongoing and continuous business contacts in this District and many of the prospective witnesses to the acts alleged herein reside in this District.

#### PARTIES

3. Plaintiff, Northwest Public Communications Council ("NPCC"), is a regional trade association representing companies and individuals who provide payphone services (as

herein as “Payphone Services”). The companies and persons who provide Payphone Services are referred to as “PSPs” and each individually is a “PSP”.

4. NPCC is comprised of member PSPs operating in Idaho, Montana, Oregon and Washington, including all the other Plaintiffs who are each PSPs (such Plaintiffs are referred to herein as the “PSP Plaintiffs”).

5. The PSP Plaintiffs and other NPCC PSP members provide Payphone Services that compete with the Payphone Services provided by local exchange carriers (as defined in 47 U.S.C. §153(26)) (collectively “LECs” and individually a “LEC”) in the areas in which the PSPs operate.

6. NPCC PSP members purchase public access lines (“PAL”) (this is also known as the dial tone) and related telephone exchange services (as defined in 47 U.S.C. §153(47)) and exchange access services (as defined in 47 U.S.C. §153(16)) from LECs to provide their own Payphone Services to the public. Most, if not all, of NPCC’s PSP members purchase “smart” and “basic” PAL service from Qwest to connect their payphones to the local telecommunications network and, through that local network, the national and international telephone networks.

7. Defendant, the Public Utilities Commission (the “PUC”), an agency and instrumentality of the State of Oregon is charged with regulating, among other things, the telecommunications industry in the State of Oregon.

8. Defendant Ray Baum is a Commissioner of the PUC and, upon information and belief, resides in the District.

9. Defendant Susan Ackerman is a Commissioner of the PUC and, upon information and belief, resides in the District.

10. Defendant John Savage is a Commissioner of the PUC and, upon information and belief, resides in the District.

11. Upon information and belief, defendant Qwest is a Colorado corporation with its principal place of business located in Denver, Colorado and with offices in Oregon. Qwest is a successor or assign of U.S. WEST Communications, Inc. (a/k/a U.S. WEST Communications Company) and is a "Bell operating company" ("BOC") as that term is defined in 47 U.S.C. §153(4).

12. The BOCs along with independent LECs who had regulated monopolies in the provision of telephone exchange services and exchange access prior to deregulation of the telecommunications industry in 1984 are referred to as "Incumbent LECs" and individually as an "Incumbent LEC".

13. Qwest is the largest LEC in the 14 Western States in which Qwest acts as a LEC (the "Qwest Service Area").

14. Plaintiff Central Telephone, Inc. is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

15. Plaintiff, Communication Management Services, LLC, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

16. Plaintiff, Phonetel Technologies, Inc., is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

17. Plaintiff, Evercom Systems, Inc., is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

18. Plaintiff, Interwest Tel, LLC, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

19. Plaintiff, Interwest Telecom Services Corporation, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

20. Plaintiff, NSC Communications Public Services, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

21. Plaintiff, National Payphone Services, LLC, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

22. Plaintiff, Pacific Northwest Payphones, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

23. Plaintiff, Partners in Communication, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

24. Plaintiff, T & C Management, LLC, is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

25. Plaintiff, Corban Technologies, Inc., is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

26. Plaintiff, Valley Pay Phones, Inc., is a PSP providing Payphone Services in the State of Oregon and elsewhere in the Qwest Service Area.

27. Under the Telecommunications Act of 1996 (the "1996 Act"), the non discrimination and non subsidization requirements with which BOCs had to comply with respect to Payphone Services are contained in 47 U.S.C. §276. These requirements became effective upon adoption by the FCC of rules and regulations implementing the foregoing requirements.

28. The regulations 47 U.S.C. §276 required the FCC to develop had to contain nonstructural safeguards at least as strong as those developed as part of the "Computer III Inquiry (CC Docket No. 90-623) proceeding" (the "Computer III Inquiry").

29. The Computer III Inquiry was a regulatory response to the increasing integration of computer data processing with telecommunications. In response, the FCC developed a new regulatory framework that created two definitional categories, basic service and enhanced service.

30. Basic service was limited to the common carrier offering of transmission capacity for the movement of information. Data processing, computer memory or storage and switching techniques can be components of basic service if they are used solely to facilitate the movement of information. These services continued to be regulated under the Act. Such services are referred to as "Basic Services".

31. Enhanced service was any offering over the telecommunications network which is more than a basic transmission service. Enhanced services refer to services offered over common carrier transmission facilities which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; provide the subscriber additional, different or restructured information; or involve subscriber interaction with stored information. Such services are referred to as "Enhanced Services" and are unregulated.

32. As part of the Computer III Inquiry, the FCC adopted the "new services test". That test was codified in 1986 in Amendment of Sections 64.702 of the Commissions Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, Report and Order, 104 FCC 2d 958 (1986).

33. The new services test is a cost-based test that establishes the direct cost of providing the new service based on forward looking costs as a price floor. LECs then add a reasonable amount of overhead to derive the overall price of the new service. See Amendment

of Part 69 of the Commission's Rules Relating to the Creation of Access Charge Supplements for Open Network Architecture, CC Docket number 89-79, Report and Order & Order on Further Reconsideration & Supplemental Notice of Proposed Rulemaking, 6 FCC Rcd 4524 (1991).

34. Qwest, as a BOC, is subject to all the special restrictions on Incumbent LECs and BOCs in the provision of local telephone exchange services and exchange access.

35. Pursuant to the mandate contained in 47 U.S.C. §276 that BOCs not, directly or indirectly, subsidize either their Payphone Services or their exchange services, or prefer or discriminate in favor of their own Payphone Services as against the Payphone Services provided by the independent PSPs, including the PSP Plaintiffs, the FCC adopted rules that required Incumbent LECs, such as Qwest, to set their tariffs for Payphone Services according to the FCC's well established new services test ("NST"). NST compliant tariffs governing the provision of interstate Basic Service for PSPs, including Payphone Services provided by Incumbent LECs (such tariffs are referred to herein as "Payphone Interstate Tariffs") were to be filed with the FCC on or before January 15, 1997 and were to be effective on or before April 15, 1997.

36. Tariffs governing the provision of intrastate Basic Service for Payphone Services, including Payphone Services provided by Incumbent LECs (such tariffs are referred to herein as "Payphone Intrastate Tariffs"), were to be filed with the public utility commissions in all the states (the "State Commissions") in which the Incumbent LECs, including Qwest, operated. Such proposed Payphone Intrastate Tariffs that were compliant with the NST were to be filed on or before January 15, 1997 with the appropriate State Commission. The State Commissions

were to review such Tariffs to determine NST compliance and approve such Payphone Intrastate Tariffs such that they would be effective on or before April 15, 1997.

37. New tariffs for unbundled services, such as fraud protection (CustomNet is a species of fraud protection) were to be filed with both the state commissions and the FCC unless such tariffs had been previously filed with State Commissions, in which case, if such tariffs were reviewed and approved for NST compliance by the State Commission, there was no need for further filing.

38. Any Payphone Interstate or Intrastate Tariff that was not NST compliant and was higher than the NST compliant Payphone Interstate or Intrastate Tariff was in violation of 47 U.S.C. §276 and unlawful.

39. To ensure that BOCs moved expeditiously to file NST compliant intrastate and interstate Basic Service Tariffs for Payphone Services, the FCC ruled that until NST compliant Payphone Intrastate and Interstate Tariffs were filed, reviewed, approved and made effective by the FCC or the State Commission, as the case may be, BOCs could not receive dial around compensation ("DAC").

40. DAC is compensation payable to the owner of a pay phone with respect to calls made from such pay phone that are made using 800 numbers, credit cards and similar techniques other than depositing coins in the pay phone. Prior to the breakup of AT&T in 1984, AT&T paid to its BOC subsidiaries such commissions. Historically, PSPs that were not BOCs had not been compensated for calls made from their payphones using credit cards or 800 numbers.

41. In 1996, the BOCs were the largest owners of payphones and as such were entitled to receive hundreds of millions of dollars in dial-around commissions annually from interexchange carriers such as AT&T and Sprint.



42. The regulations governing Payphone Services established by the FCC were developed in the course of the FCC proceeding conducted by the Common Carrier Bureau (now the Wire Bureau) captioned *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128 (the "Implementation Proceeding"). Regional Bell operating companies (themselves either BOCs or the parent company of BOCs (collectively "RBOCs" and each individually a "RBOC"), including Qwest, were active participants in the Implementation Proceeding and represented all BOCs in the Implementation Proceeding.

43. In the Implementation Proceeding, the Common Carrier Bureau developed and refined the regulations ultimately issued in a series of orders. On September 20, 1996, the FCC issued the Payphone Order (the "First Payphone Order") that established the regulatory framework for providing Basic Services to unregulated Payphones Services.

44. On November 8, 1996, the FCC reconsidered the First Payphone Order and issued another order clarifying and expanding the First Payphone Order (the "Reconsideration Order"). The Reconsideration Order made absolutely clear that a BOC or RBOC would not be entitled to receive DAC with respect to any long distance call, whether intrastate or interstate, originating from any state in which NST compliant Payphone Intrastate Tariffs had not been reviewed for NST compliance, approved as NST compliant and made effective. It was equally clear that in order for any Payphone Intrastate Tariff to become effective, the State Commission had to review either a previously filed Tariff or any newly filed Tariff and specifically find that such Tariff was NST compliant and ordered that it be effective.

45. Since Payphone Interstate Tariffs had to be filed with the FCC, the FCC could ensure that the necessary review of such Tariffs was made and NST compliance determined and the NST compliant Payphone Interstate Tariffs made effective on or before April 15, 1997.

46. However, no similar assurance could be made with respect to the Payphone Intrastate Tariff being reviewed by the various State Commissions. If the State Commission did not conduct the necessary review and find NST compliance by the April 15, 1997 deadline, the BOC or RBOC would not be able to collect DAC for calls initiated within that state.

47. On its own motion, the FCC issued an order dated April 4, 1997 (the "Clarification Order") providing a 45 day waiver period for RBOCs to file NST compliant tariffs with the FCC with respect to interstate unbundled features and functions because many LECs had not realized that such tariffs had to comply with the new services test.

48. In or about April 1996, the RBOC Coalition, a coalition of all the RBOCs, including Qwest, involved in the Implementation Proceeding, informed the FCC that they had not realized until the Clarification Order that the NST applied not only to newly filed tariffs but also to previously filed intrastate tariffs, including for unbundled services such as CustomNet, that had been approved by State Commissions. This was first reflected in a letter from the RBOC Coalition to the FCC dated April 10, 1997.

49. As the April 15, 1997 deadline approached for all Payphone Intrastate and Interstate Tariffs to be NST compliant and effective and payment of DAC to begin, the RBOCs claimed that they did not realize that previously filed intrastate tariffs would also have to be NST compliant. In order to review the existing tariffs for NST compliance and to file new tariffs if the existing tariffs were found to be non-compliant, the RBOCs sought a 45 day waiver to conduct this review and where necessary file new tariffs that were NST compliant.

50. The RBOCs were also concerned that the State Commissions would not complete their review of applicable Payphone Intrastate Tariffs to determine NST compliance and make such NST compliant Tariffs effective by either the April 15, 1997 deadline or within 15 days of the filing of new NST compliant Intrastate Payphone Tariffs.

51. Concerned about not meeting the April 15, 1997 deadline, the coalition of RBOCs, including Qwest, requested a waiver by letter dated April 10, 1997 (the "Waiver Request Letter"). In the Waiver Request Letter, the RBOCs requested that they be allowed (1) a 45 day waiver period to review previously filed tariffs for NST compliance and where such reviewed tariffs were found not to be NST compliant, file new tariffs that were NST compliant, and (2) to collect DAC effective April 15, 1997 notwithstanding that NST compliant Payphone Intrastate Tariffs had not been reviewed by a State Commission for NST compliant, approved as compliant and made effective by either April 15, 1997 or within 15 days of any new NST compliant Payphone Intrastate Tariffs they filed.

52. The RBOCs specifically acknowledged that "previously-tariffed intrastate payphone services" had "to meet the FCC's "new services test". They claimed that it was not until the Clarification Order "that we [the RBOCs] learned otherwise", i.e. that such tariffs had to be NST compliant.

53. To assure that there would be no subsidization, discriminatory effect or preference as a result of this proposal, the RBOCs, including Qwest, agreed to refund to any PSP the differential between the NST compliant Payphone Intrastate Tariffs as ultimately determined and the higher rates paid by the PSPs based on non NST compliant Payphone Intrastate Tariffs in effect prior to the effective date of the NST compliant Payphone Intrastate Tariffs.

54. In making the refund promise, the RBOCs, including Qwest, acknowledged that they were waiving their right to assert the “filed rate doctrine” as a defense to making any such refund. They specifically pointed out that neither the State Commissions nor the FCC could impose this obligation on the RBOCS but they were voluntarily promising to make these refunds if they were allowed to receive the DAC effective April 15, 1997 notwithstanding that the Payphone Intrastate Tariffs in question had not been made effective by the State Commissions nor found to be NST compliant by the State Commissions. A copy of the Waiver Request Letter is attached as Exhibit 1.

55. In the Waiver Request Letter, in addition to promising to review all previously filed intrastate tariffs to assure that they were NST compliant and where such tariffs were not NST compliant, file new tariffs that were NST compliant, the RBOCs undertook to file, ex parte, a list of tariffs that might have to be revised by April 15, 1997.

56. In response to, and based upon, the representations, waivers and promises contained in the Waiver Request Letter, the FCC through the Common Carrier Bureau issued an order dated April 15, 1997 (the “Waiver Order”) containing a conditional waiver of the requirement that RBOCs could only collect DAC effective April 15, 1997 on calls if intrastate NST compliant Payphone Intrastate Tariffs were approved by the appropriate State Commission and in effect. All other conditions contained in the various orders issued by the FCC with respect to compliance with Section 276<sup>1</sup> had to be complied with in order for the DAC to be paid. The Waiver Order basically granted the relief requested in exchange for the promises

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<sup>1</sup> The First Payphone Order, the Order on Reconsideration, the Clarification Order and the Waiver Order were issued by the FCC through the Common Carrier Bureau in the Implementation Proceeding to implement 47 U.S.C. §276. These Orders are collectively referred to as the “Payphone Orders”.

made by the RBOCs, including Qwest, in the Waiver Request Letter. A copy of the Waiver Order is attached as Exhibit 2.

57. The Waiver Order in paragraph 2 specifically stated that the obligation to have in place NST compliant interstate and intrastate tariffs by April 15, 1997 was not altered. The waiver granted only related to the RBOCs ability to collect DAC. No waiver was granted to permit non compliance with Section 276 of the Act.

58. One of the Waiver Order conditions RBOCs had to satisfy to receive DAC was to refund to PSPs, including PSP Plaintiffs, the difference, if any, by which RBOC Payphone Intrastate Tariffs in effect prior to the effective date of NST compliant Payphone Intrastate Tariffs exceeded the NST compliant Payphone Intrastate Tariffs.

59. The refund requirement in the Waiver Order was created for the benefit of PSPs including PSP Plaintiffs, so that they were made whole for any discriminatory or subsidized Payphone Intrastate Tariffs that put them at a competitive disadvantage to Payphone Services offered by BOCs.

60. American Public Communications Council ("APCC") was a participant in the proceedings which resulted in the issuance of the various Payphone Orders, including the Waiver Order. NPCC was a member of APCC. The PSP Plaintiffs were all members of NPCC at the relevant time and some were also members of APCC.

61. In reliance on the representations, waivers and promises contained in the Waiver Request Letter and the issuance of the Waiver Order, APCC took no action to appeal or seek reconsideration of the Waiver Order.

62. Under the Waiver Order, and by taking advantage of the reliance of Plaintiffs on the representations, promises and waivers the RBOCs, including Qwest, made in the Waiver

Request Letter, upon information and belief, Qwest began to collect millions of dollars of DAC on intrastate and interstate calls beginning April 15, 1997.

63. Qwest received the foregoing DAC even though all its Payphone Intrastate and Interstate Tariffs were not in compliance with the Act and particularly Section 276 of the Act and the FCC orders and interpretations issued thereunder, including the Payphone Orders.

64. At the time the 1996 Act was adopted, in Oregon, Qwest was operating under an alternate form of regulation (“AFOR”).

65. Under the terms of the AFOR under which Qwest was operating, Qwest was required to submit new proposed rates for all its telecommunications services including all tariffs related to Payphone Services. If the proposed rates went into effect before final approval by the PUC, they were to be interim subject to refund under applicable Oregon Law.

66. The PUC had initiated an investigation to determine the justness and reasonableness of the new rates Qwest had filed in 1995. The investigation constituted the initiation of a rate case in which all of Qwest’s rates were being reviewed (the “Oregon Rate Case”).

67. Upon the initiation of the Oregon Rate Case, under Oregon law, the Qwest telephone tariffs proposed as part of the Oregon Rate Case, to the extent they went into effect, became interim rates subject to refund.

68. Effective May 1, 1996, the PUC terminated AFOR for Qwest in the course of the Oregon Rate Case. The tariffs issued pursuant to the terminated AFOR or in replacement thereof were deemed interim rates subject to refund under Oregon law. The permanent rates would be determined in the course of the Oregon Rate Case.

69. The Rate Case was determining the justness and reasonableness of the Qwest rates in effect on and after May 1, 1996.

70. As a result of the termination of the AFOR and the initiation of the Oregon Rate Case, as of May 1, 1996, all of Qwest's then existing Payphone Intrastate Tariffs became interim tariffs subject to refund under Oregon law.

71. The Oregon Rate Case was bifurcated into the revenue requirement phase of the case, which would be resolved first, and the design phase of the case in which the final rates would be determined.

72. NPCC, as representative of its member PSP members, including the PSP Plaintiffs, intervened in the Rate Case in September 1996 when the PUC informed NPCC that any issues related to NST compliance of Payphone Service tariffs would be addressed and resolved in the Rate Case.

73. Other than the obligation to ensure that the Payphone Intrastate Tariffs submitted by Qwest were NST compliant Payphone Intrastate Tariffs and otherwise complied with the Payphone Orders, the refund, revenue requirement and revenue design issues in the Oregon Rate Case related solely to Oregon regulatory issues and were governed solely by Oregon law and not federal law or the Payphone Orders.

74. On or about May 20, 1997, Qwest certified to the Interexchange Carriers that all its interstate and intrastate Payphone Service tariffs, including those for unbundled features such as CustomNet were NST compliant. These certifications were made after Qwest had reviewed all previously filed Payphone Intrastate Tariffs to check for NST compliance. To the extent any were found not to be NST compliant Qwest had represented that new NST compliant tariffs

would be filed to replace the non compliant tariff. Similar representations were made during the course of the Oregon Rate Case.

75. The Revenue Requirements phase of the Oregon Rate Case was terminated in an order dated May 19, 1997 which, among other things, determined both the total amount of the refund Qwest would be required to pay for the period May 1, 1996 and April 30, 1997 and that the refund would be determined by the difference between the final effective tariffs determined pursuant to the Oregon Rate Case and the higher interim tariffs.

76. Qwest appealed the PUC orders and sought and received a stay of the appealed orders.

77. After a lengthy appeal process, the PUC staff (the "Staff") and Qwest reached a stipulated settlement that, with modifications, the PUC adopted settling the Revenue Requirements phase of the Oregon Rate Case. As part of the settlement, the mechanism to calculate the refund, i.e. the difference between the final effective rate and the higher interim rate, was retained.

78. The final effective tariffs were to be developed as part of the Rate Design phase of the Oregon Rate Case.

79. As a result of the settlement, the total amount of the refund was reduced from \$102 million annually to \$53 million annually for a total of more than \$272 million in the Revenue Requirements phase of the Oregon Rate Case. The settlement resulted in the issuance of a refund and an effective interim reduction in tariffs going forward with respect to the PAL Payphone Intrastate Tariffs.



80. The settlement reduced future PAL Payphone Intrastate Tariffs through the issuance of temporary bill credits. No refunds or temporary bill credits were issued with respect to CustomNet Payphone Intrastate Tariffs.

81. In making this interim rate reduction, the PUC did not make any determination with respect to whether Qwest's Payphone Intrastate Tariffs were NST compliant.

82. Although no NST compliance determination had been made, as a result of this interim rate reduction, in an abundance of caution, in May 2001 NPCC filed a claim for refund before the PUC for PAL overcharges made by Qwest in a case captioned *In The Matter of Qwest Corporation fka US West Communications, Inc.*, Docket No. UT 125 (the "Oregon Refund Case").

83. NPCC did not make a claim for CustomNet refunds because the PUC had not made an interim reduction in such rates and no determination had been made with respect to NST compliance for such rates.

84. Actual NST compliance could only be determined by the FCC or a State Commission. In the State of Oregon, the PUC would have to review and approve the Qwest Payphone Intrastate Tariffs. Only when the PUC approved such Tariffs and made them effective was NST compliance determined.

85. Despite the interim rate reduction, Qwest continued to assert that its Payphone Intrastate Tariffs were NST compliant and non discriminatory, did not favor Qwest Payphone Services and were reasonable and just. In September 2001, the Rate Design phase of the Oregon Rate Case was concluded by the issuance of an order establishing specific tariffs for all categories of Qwest services, including Payphone Intrastate Tariffs for PAL and Customnet.

NPCC appealed this order on the ground that the Payphone Intrastate Tariffs were not NST compliant and in violation of the Act.

86. As part of the September order terminating the Rate Design phase of the Oregon Rate Case, and in reliance on orders previously issued in the Oregon Rate Case and related orders, the PUC determined that refunds to be payable pursuant to the Oregon Rate Case would be equal to the difference between the final effective tariffs established Rate Design phase of the Oregon Rate Case and the higher interim tariffs that had been in effect since May 1, 1996.

87. Although Plaintiffs came to believe that the Payphone Intrastate Tariffs filed in 1997 were not NST compliant and were discriminatory, unjust and unreasonable, no claim for liability could be asserted against the Qwest until NST compliance was determined by the appropriate State Commission or the FCC and the Payphone Intrastate Tariffs approved and made effective. Only if the Payphone Intrastate Tariffs in effect prior to the effective date of NST compliant Payphone Intrastate Tariffs are higher than the NST compliant Payphone Intrastate Tariffs is there liability for violation of 47 U.S.C. §276.

88. By Order No. 01-810 dated September 21, 2001 (the "PUC Order"), the PUC issued the final Payphone Service Tariffs as part of the determination of all Qwest's final telecommunications tariffs in the design phase of the Oregon Rate Case. The PUC determined that Qwest's proposed PAL Payphone Intrastate Tariffs were NST compliant. As a result of this finding, the PUC determined that the interim rates then in effect and which had been in effect since May 1, 1996 were unjust and unreasonable. The adoption of these final tariffs resulted in refunds of PAL Payphone Intrastate Tariffs based on the difference between the new final rate and the higher interim rate.

89. The PUC Order determined that the Qwest proposed CustomNet Payphone Intrastate Tariffs, which were identical to the interim CustomNet Payphone Intrastate Tariffs, were did not have to be NST compliant as the new services test did not apply to them. As a consequence the proposed CustomNet Payphone Intrastate Tariff were found to be just and reasonable and no change in the rates or refunds were ordered for such tariffs.

90. NPCC appealed the determination of PAL and CustomNet Payphone Intrastate Tariffs as too high and not NST compliant.

91. By order dated November 10, 2004, the Oregon Court of Appeals ruled that the Payphone Intrastate Tariffs approved by the PUC in the rate design phase of the Oregon Rate Case were not NST compliant and reversed the decision of the PUC and remanded the case to have rates established in accordance with the new services test and other standards set forth in the Payphone Orders and in accordance with 47 U.S.C. §276.

92. With respect to PAL Payphone Intrastate Tariffs, the Oregon Court of Appeals ruled that the PUC included costs not permitted under the new services test and thus were not developed in compliance with the new services test. With respect to CustomNet Payphone Intrastate Tariffs, the Oregon Court of Appeals ruled that the PUC had failed to review sufficient cost data to determine NST compliance.

93. Only after the reversal of the PUC original order did Qwest for the first time submit cost data associated with the Payphone Intrastate Tariffs in Oregon. Prior to the reversal, Qwest had consistently maintained that its filed Payphone Intrastate Tariffs in Oregon were compliant with the Payphone Orders.

94. Qwest submitted new proposed Payphone Intrastate Tariffs for Oregon in or about 2006. By stipulated order, the PUC entered a Final Order dated November 15, 2007 approving the proposed Payphone Intrastate Tariffs as NST compliant (the "Stipulated Order").

95. Although the Stipulated Order was by stipulation of the parties, the PUC independently determined that Qwest's Payphone Intrastate Tariffs encompassed within the Stipulated Order were NST compliant, approved them and made them effective.

96. Under the Stipulated Order, the PAL Payphone Intrastate Tariffs were reduced dramatically, almost three times lower than the tariffs the PUC had approved but were reversed by the Oregon Court of Appeals. These tariffs were the proper tariffs that were supposed to have been in place since May 1, 1996.

97. Under the Stipulated Order, the CustomNet Payphone Intrastate Tariffs were reduced dramatically, almost 20 times lower than the tariffs the PUC had approved but were reversed by the Oregon Court of Appeals. These tariffs were the proper tariffs that were supposed to have been in place since May 1, 1996.

98. No earlier than November 15, 2007 in Oregon, Plaintiffs' claims based on charging Payphone Intrastate Tariffs that were higher than NST compliant tariffs arose.

99. NPCC sought to prosecute its claims for refund in the Oregon Refund Case. However, the administrative law judge handling the Oregon Refund Case issued an order dated March 23, 2005 holding in abeyance any further proceedings until the FCC ruled on the interpretation of the Waiver Order in the Implementation Proceeding.

100. In May 2009, NPCC moved to add the PSP Plaintiffs as parties defendant and to amend its complaint in the Oregon Refund Case to add a refund claim for CustomNet tariffs. The PUC on the motion for leave to amend denied NPCC's motion to amend to the extent it

sought to add a claim for CustomNet refund on the ground that NPCC's CustomNet claim was (1) time barred by 47 U.S.C. §415 in reliance on the decision in *Davel Communications v. Qwest*, 460 F.3d 1075 (9<sup>th</sup> Cir. 2006), and (2) there was no definitive interpretation from the FCC that CustomNet was integrally related to PAL services. In reaching this decision, no evidence was taken with respect to any factual element on which a statute of limitations determination would be based. A copy of the Order No. 09-155 and decision dismissing the claim is attached as Exhibit 3.

101. The PUC decision was based solely on its incorrect interpretation of federal law.

102. New counsel for NPCC and the PSP Plaintiffs sought to assert the refund CustomNet claim before the PUC on behalf of the newly appearing PSP Plaintiffs, but the PUC declined to permit the new parties to raise the issue relying on the PUC decision in Order No. 09-155. A copy of Order No. 10-027 denying the amended complaints of the PSP Plaintiffs and NPCC asserting the CustomNet refund claims is attached hereto as Exhibit 4.

AS AND FOR PLAINTIFFS' FIRST CLAIM

103. Plaintiffs repeat and reallege ¶¶1-102 with the same force and effect as though fully set forth at length herein.

104. Qwest had on file in Oregon CustomNet tariffs at all relevant times prior to and after May 1, 1996.

105. At all relevant times from May 19, 1997 forward, Qwest maintained that its on file CustomNet Payphone Intrastate Tariffs complied with all federal requirements.

106. Prior to the adoption of the Stipulated Order, at no time had the PUC determined that CustomNet tariffs Qwest had charged prior to the date of that Order were unjust or unreasonable.

107. Prior to the adoption of the Stipulated Order, the PUC had taken the position that Qwest's CustomNet tariffs did not have to be NST compliant.

108. Plaintiffs' claims for refund for overcharges of CustomNet tariffs under the Act did not arise prior to the expiration of a reasonable time for Qwest to calculate and pay the additional refunds that became payable after the adoption of the Stipulated Order and the expiration of the time to move to reconsider such Order or appeal such Order.

AS AND FOR PLAINTIFFS' SECOND CLAIM

109. Plaintiffs repeat and reallege ¶¶1-108 with the same force and effect as though fully set forth at length herein.

110. If Plaintiffs' claims arose prior to the time described in ¶108, the statute of limitations set forth in 47 U.S.C. §415 was tolled until the expiration of a reasonable time for Qwest to calculate and pay the additional refunds that became payable after the adoption of the Stipulated Order and the expiration of the time to move to reconsider such Order or appeal such Order.

AS AND FOR PLAINTIFFS' THIRD CLAIM

111. Plaintiffs repeat and reallege ¶¶1-110 with the same force and effect as though fully set forth at length herein.

112. The PUC's decision was made under color of State law, by the Commissioner Defendants acting in their official capacity as Commissioners on the PUC.

113. The PUC decision violates federal law, and deprives plaintiffs of rights, privileges and immunities secured by the laws of the United States.

PRAYER FOR RELIEF

Wherefore, Plaintiffs demand judgment as follows:

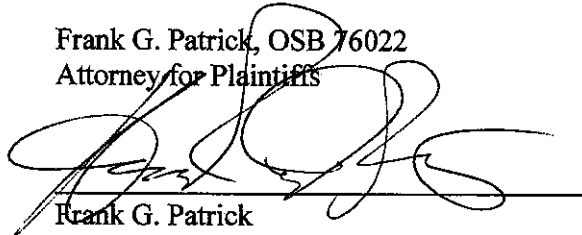
COMPLAINT FOR DECLARATORY RELIEF

On Plaintiffs' First, Second and Third Claims,

1. Declaring that Plaintiff's CustomNet claims are not time barred;
2. Declaring that the FCC has determined that fraud protection is integrally related to the provision of PAL services and the provision of PAL services without offering fraud protection such as CustomNet would be discriminatory against independent PSPs.
3. Granting Plaintiffs such other and further relief as to the Court may seem just and proper.

Dated: June 15, 2010

Frank G. Patrick, OSB 76022  
Attorney for Plaintiffs



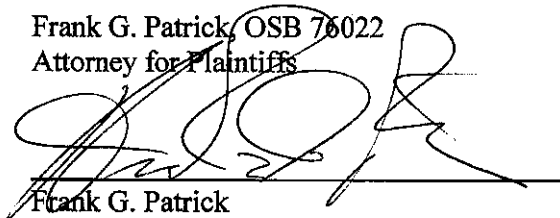
Frank G. Patrick

JURY DEMAND

Demand is hereby made pursuant to Fed. R. Civ. Proc. 38 for a trial by jury on all issues so triable on this Complaint.

Dated: June 15, 2010

Frank G. Patrick, OSB 76022  
Attorney for Plaintiffs



Frank G. Patrick

ST  
WMD

**Franklin G. Patrick**  
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Attorney for Plaintiffs

FILED 10 JUN 18 15:50 USDC-ORP

**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

The Northwest Public Communications Council, Unidentified PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.

Case No.: 3:10 CV 00685 ST

**COMPLAINT EXHIBITS  
ATTACHED**

*Ex 1*

Plaintiffs, v.

Qwest Corporation, Oregon Public Utilities Commission and Ray Baum, Susan Ackerman and John Savage, in their capacity as Commissioners

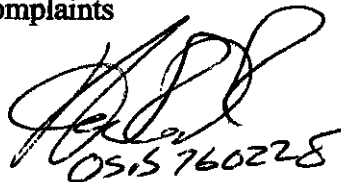
Defendants.

Exhibit 1 RBOC Waiver Request Letter April 10, 1997.

Exhibit 2 FCC Waiver Order April 15, 1997

Exhibit 3 PUC Order 09-155 Dismissing Claim

Exhibit 4 PUC Order 10-027 Denying Amended Complaints





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JEFFREY A. LAMMEN  
AUSTIN C. SCHLICK

April 10, 1997

Ex Parte Filing

Mary Beth Richards  
Deputy Bureau Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W., Room 500  
Washington, D.C. 20554

In re Implementation of the Pay Telephone  
Reclassification and Compensation Provisions  
of the Telecommunications Act of 1996,  
CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the RBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to new services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be

EXHIBIT 1  
PAGE 1 OF 3

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April 10, 1997

Ex Parte Filing

Mary Beth Richards  
Deputy Bureau Chief  
Common Carrier Bureau  
Federal Communications Commission  
1919 K Street, N.W., Room 500  
Washington, D.C. 20554

In re Implementation of the Pay Telephone  
Reclassification and Compensation Provisions  
of the Telecommunications Act of 1996,  
CC Docket No. 96-128

Dear Mary Beth:

I am writing on behalf of the FBOC Payphone Coalition to request a limited waiver of the Commission's intrastate tariffing requirements for basic payphone lines and unbundled features and functions, as set forth in the Commission's Orders in the above-captioned docket. I am also authorized to state that Ameritech joins in this request.

As we discussed yesterday, and as I explained in my Letter of April 3, 1997, none of us understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's "new services" test. It was our good faith belief that the "new services" test applied only to pay services tariffed at the federal level. It was not until the Bureau issued its "Clarification of State Tariffing Requirements" as part of its Order of April 4, 1997, that we learned otherwise.

In most States, ensuring that previously tariffed payphone services meet the "new services" test, although an onerous process, should not be too problematic. We are gathering the relevant cost information and will be prepared to certify that those tariffs satisfy the costing standards of the "new services" test. In some States, however, there may be a discrepancy between the existing state tariff rate and the "new services" test; as a result, new tariff rates may have to be filed. For example, it appears that, in a few States, the existing state tariff rate for the COCOT line used by independent PSPs may be

EXHIBIT 1  
PAGE 2 OF 3

KELLOGG, HUBER, HANSEN, TODD & EVANS, PLLC.

Nary Beth Richards  
April 10, 1997  
Page 3

(consistent with state regulations) to provide a credit or other compensation to purchasers back to April 15, 1997.

The requested waiver is appropriate both because special circumstances warrant a deviation from the general rule and because the waiver will serve the public interest. Because the Federal "new services" test has not previously been applied to existing state services -- and because the I&Cs did not understand the Commission to be requiring such an application of the test until the Commission issued its clarification order just a few days ago -- special circumstances exist to grant a limited waiver of brief duration to address this responsibility. In addition, granting the waiver in this limited circumstance will not undermine, and is consistent with, the Commission's overall policies in TC Docket No. 96-128 to reclassify LSC payphone assets and ensure fair PSD compensation for all calls originated from payphones. And competing PSDs will suffer no disadvantage. Indeed, the voluntary reimbursement mechanism discussed above -- which ensures that PSDs are compensated if rates go down, but does not require them to pay retroactive additional compensation if rates go up -- will ensure that no purchaser of payphone services is placed at a disadvantage due to the limited waiver.

Accordingly, we request a limited waiver, as outlined above, of the Commission's intrastate carrying requirements for basic payphone lines and unbundled features and functions.

We appreciate your urgent consideration of this matter. Copies of this letter have been served by hand on the APCC, AT&T, NCI and Sprint.

Yours sincerely,

*Michael R. Kellogg*  
Michael R. Kellogg

cc: Dan Abeyta  
Thomas Bosaberg  
Craig Brown  
Michelle Carey  
Michael Carowitz  
James Caserly  
James Colchary  
Rose M. Crellin  
Dan Gonzales

Christopher Heumann  
Radhika Karmakar  
Regina Kasey  
Linda Kinney  
Carol Matvey  
A. Richard Metzger  
John B. Muleta  
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FILED 10 JUN 18 15 50 USDC ORP

**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

The Northwest Public Communications Council, Unidentified PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.

Case No.: 3:10 CV 00685 ST

**COMPLAINT EXHIBITS  
ATTACHED**

*Ex 2*

Plaintiffs, v.

Qwest Corporation, Oregon Public Utilities Commission and Ray Baum, Susan Ackerman and John Savage, in their capacity as Commissioners

Defendants.

Exhibit 1 RBOC Waiver Request Letter April 10, 1997.

Exhibit 2 FCC Waiver Order April 15, 1997

Exhibit 3 PUC Order 09-155 Dismissing Claim

Exhibit 4 PUC Order 10-027 Denying Amended Complaints

PAGE 1 COMPLAINT EXHIBITS

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

DA 97-805

In the Matter of	)	
	)	
Implementation of the	)	CC Docket No. 96-128
Pay Telephone Reclassification	)	
and Compensation Provisions of the	)	
Telecommunications Act of 1996	)	

**ORDER**

Adopted: April 15, 1997

Released: April 15, 1997

By the Chief, Common Carrier Bureau:

**I. INTRODUCTION**

In this Order, the Common Carrier Bureau ("Bureau") grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding, CC Docket No. 96-128.<sup>1</sup> Local exchange carriers ("LECs") must comply with this requirement, among others, before they are eligible to receive the compensation from interexchange carriers ("IXCs") that is mandated in that proceeding.<sup>2</sup>

Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines,<sup>3</sup> we grant all LECs a limited waiver until May 19,

<sup>1</sup> For purposes of this Order, the term "intrastate tariff" refers to a tariff filed in the state jurisdiction and the term "interstate tariff" refers to a tariff filed in the federal jurisdiction. Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Report and Order, FCC 96-388 (rel. Sept. 20, 1996) ("Payphone Order"); Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996) ("Order on Reconsideration"), appeal docketed sub nom. Illinois Public Telecommunications Assn. v. FCC and United States, Case No. 96-1394 (D.C. Cir., filed Oct. 17, 1996) (both orders together "Payphone Reclassification Proceeding").

<sup>2</sup> Order on Reconsideration at paras. 131-132.

<sup>3</sup> Id. at para. 163.

1997 to file intrastate tariffs for payphone services consistent with the "new services" test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein.<sup>4</sup> This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order,<sup>5</sup> including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration.<sup>6</sup> Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

The Bureau takes this action, in response to a request by the RBOC Coalition<sup>7</sup> and Ameritech, pursuant to the authority delegated to it by the Commission in the Order on Reconsideration to determine whether a LEC has met the requirements of the Payphone Reclassification Proceeding prior to receiving compensation.<sup>8</sup> The instant Order advances the twin goals of Section 276 of the Act by promoting both competition among payphone service providers ("PSPs") and the widespread deployment of payphone services to the benefit of the general public.<sup>9</sup>

<sup>4</sup> Id. This Order does not waive any of the other federal guidelines for intrastate payphone service tariffs. See para. 10, below.

<sup>5</sup> Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, Order, DA 97-678 (Com. Car. Bur., rel. Apr. 4, 1997) ("Bureau Waiver Order").

<sup>6</sup> Order on Reconsideration at paras. 131-132. The Bureau Waiver Order modified these requirements slightly by granting all LECs a limited waiver of the deadline for filing the federal tariffs for unbundled features and functions, to the extent necessary, to enable LECs to file the required federal tariffs within 45 days after the April 4, 1997 release date of that order, with a scheduled effective date no later than 15 days after the date of filing. The Bureau also waived the requirement, for a period of 60 days from the release date of Bureau Waiver Order, that these interstate tariffs for unbundled features and functions be effective before the LECs are eligible to receive payphone compensation. Bureau Waiver Order at paras. 20-23.

<sup>7</sup> The RBOC Coalition consists of all of the Bell Operating Companies ("BOCs") except Ameritech. This Order uses the term "RBOC Coalition" to refer to the petitioners requesting the waiver, which includes Ameritech.

<sup>8</sup> Order on Reconsideration at para. 132. See also id. at para. 163. These delegations of authority to the Bureau are consistent with Section 0.91 of the Commission's rules, 47 C.F.R. § 0.91.

<sup>9</sup> 47 U.S.C. § 276(b)(1).

## II. BACKGROUND

In the Payphone Reclassification Proceeding, the Commission noted that Telecommunications Act of 1996 fundamentally changed telecommunications regulation. It stated that the 1996 Act erects a "pro-competitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition."<sup>10</sup> To that end, the Commission advanced the twin goals of Section 276 of the Act of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public. . .".<sup>11</sup> It sought to eliminate those regulatory constraints that inhibit the ability both to enter and exit the payphone marketplace, and to compete for the right to provide services to customers through payphones. At the same time, the Commission recognized that a transition period is necessary to eliminate the effects of some long-standing barriers to full competition in the payphone market. For this reason, it concluded that it would continue, for a limited time, to regulate certain aspects of the payphone market, but only until such time as the market evolves to erase these sources of market distortions.<sup>12</sup>

In the Payphone Order, the Commission concluded that, consistent with Section 276 of the Act, PSPs are to be compensated for "each and every completed intrastate and interstate call" originated by their payphones.<sup>13</sup> For the first year of the compensation provided by the Payphone Order, the Commission required those IXCs with annual toll revenues in excess of \$100 million to pay PSPs proportionate shares, based on their respective market shares, of interim, flat-rated compensation in the amount of \$45.85 per payphone per month.<sup>14</sup> This monthly amount is to compensate each payphone for an average of 131 access code calls and subscriber 800 calls. The Commission concluded that LEC PSPs would be eligible to receive this compensation by April 15, 1997, once the LEC, among other things, terminated certain subsidies flowing to its payphone operations.<sup>15</sup>

<sup>10</sup> S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess. 1 (1996).

<sup>11</sup> 47 U.S.C. § 276(b)(1).

<sup>12</sup> Payphone Order at paras. 11-19.

<sup>13</sup> Id. at paras. 48-76.

<sup>14</sup> Id. at paras. 119-126.

<sup>15</sup> Order on Reconsideration at para. 131.

In the Order on Reconsideration, the Commission concluded that to be eligible to receive compensation, a LEC must be able to certify the following:

1) it has an effective cost accounting manual ("CAM") filing; 2) it has an effective interstate CCL tariff reflecting a reduction for deregulated payphone costs and reflecting additional multiline subscriber line charge ("SLC") revenue; 3) it has effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate subsidies; 4) it has deregulated and reclassified or transferred the value of payphone customer premises equipment ("CPE") and related costs as required in the Report and Order; 5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones); and 6) it has in effect intrastate and interstate tariffs for unbundled functionalities associated with those lines.<sup>16</sup>

In addition, the Commission clarified "that the requirements of the Report and Order apply to inmate payphones that were deregulated in an earlier order."<sup>17</sup>

The Commission also applied additional requirements to those LECs that are BOCs:

In addition to the requirements for all other LECs, BOCs must also have approved [comparably efficient interconnection ("CEI")] plans for basic payphone services and unbundled functionalities prior to receiving compensation. Similarly, prior to the approval of its [CEI] plan, a BOC may not negotiate with location providers on the location provider's selecting and contracting with the carriers that carry interLATA calls from their payphones.<sup>18</sup>

In the Order on Reconsideration, the Commission concluded that where LECs have already filed intrastate tariffs for payphone services, states may, after considering the requirements of the Order on Reconsideration, the Payphone Order, and Section 276, conclude: (1) that existing tariffs are consistent with the requirements of the Payphone Order, as revised in the Order on Reconsideration, and (2) that in such case no further filings are required.<sup>19</sup>

<sup>16</sup> Id.

<sup>17</sup> Id. citing Petition for Declaratory Ruling by the Inmate Calling Services Providers Task Force, Declaratory Ruling, 11 FCC Rcd 7362 (1996) ("Inmate Services Order"); Petitions for Waiver and Partial Reconsideration or Stay of Inmate-Only Payphones Declaratory Ruling, Order, 11 FCC Rcd 8013 (Com. Car. Bur. 1996) ("Inmate Services Waiver Order").

<sup>18</sup> Order on Reconsideration at para. 132.

<sup>19</sup> Id. at para. 163.



### III. LIMITED WAIVER PERTAINING TO STATE TARIFFING REQUIREMENTS

#### A. Background

The Commission concluded in the Order on Reconsideration that LECs are required to tariff basic payphone lines (smart, dumb, and inmate) at the state level only.<sup>20</sup> Unbundled features and functions provided to others and taken by a LEC's payphone operations, however, must be tarified in both the intrastate and interstate jurisdictions.<sup>21</sup> In addition, in the Payphone Order, the Commission required that, pursuant to the mandate of Section 276(b)(1)(B), incumbent LECs must remove from their intrastate rates any charges that recover the costs of payphones. The Payphone Order required that states determine the intrastate rate elements that must be removed to eliminate any intrastate subsidies. These revised rates must be effective no later than April 15, 1997.<sup>22</sup>

In the recent Bureau Waiver Order, we emphasized that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, before the LECs' payphone operations are eligible to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines,<sup>23</sup> and (2) that the states ensure that payphone costs for unregulated equipment and subsidies be removed from the intrastate local exchange service and exchange access service rates.<sup>24</sup> We stated in the Bureau Waiver Order that LEC intrastate tariffs must comply with these requirements by April 15, 1997 in order for the payphone operations of the LECs to be eligible to receive payphone compensation. The Bureau Waiver Order also clarified the unbundled features and functions subject to the requirements of the Payphone Proceeding.<sup>25</sup>

<sup>20</sup> Id. at paras. 162-165. The Commission provided guidelines pursuant to which the states are to review the state tariffs subject to the Payphone Reclassification Proceeding. Id. at para. 163.

<sup>21</sup> Id. at paras. 162-165.

<sup>22</sup> Payphone Order at para. 186.

<sup>23</sup> Order on Reconsideration at para. 163. As stated in the Order on Reconsideration, the intrastate tariffs are subject to the new services test. Order on Reconsideration at para. 163, n. 492.

<sup>24</sup> Payphone Order at para. 186.

<sup>25</sup> Bureau Waiver Order at paras. 15-19.

We noted in the Bureau Waiver Order that the guidelines for state review of intrastate tariffs are essentially the same as those included in the Payphone Order for federal tariffs.<sup>26</sup> On reconsideration, the Commission stated that although it had the authority under Section 276 to require federal tariffs for payphone services, it delegated some of the tariffing requirements to the state jurisdiction. The Order on Reconsideration required that state tariffs for payphone services meet the requirements outlined above.<sup>27</sup> The Order on Reconsideration provides that states that are unable to review these tariffs may require the LECs to file the tariffs with the Commission.<sup>28</sup>

The Bureau Waiver Order also clarified that, for purposes of meeting all of the requirements necessary to receive payphone compensation, the question of whether a LEC has effective intrastate tariffs is to be considered on a state-by-state basis. Under this approach, assuming the LEC has complied with all of the other compliance list requirements,<sup>29</sup> if a LEC has effective intrastate tariffs in State X and has filed tariffs in State Y that are not yet in effect, then the LEC PSP will be able to receive payphone compensation for its payphones in State X but not in State Y. The intrastate tariffs for payphone services, including unbundled features, and the state tariffs removing payphone equipment costs and subsidies must be in effect for a LEC to receive compensation in a particular state.

B. Request for Waiver and Comments

On April 10, 1997, the RBOC Coalition, joined by Ameritech, requested that the Commission grant a limited waiver to extend for 45 days the requirement that a LEC's intrastate tariffs for payphone services comply with the federal guidelines set forth in paragraph 163 of the Order on Reconsideration, specifically that those tariffs satisfy the "new services"<sup>30</sup> test.<sup>31</sup> It

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<sup>26</sup> Id. at para. 32.

<sup>27</sup> See para. 6, above.

<sup>28</sup> Order on Reconsideration at para. 163.

<sup>29</sup> See id. at paras. 131-132.

<sup>30</sup> The Order on Reconsideration states that "[t]he new services test required in the Report and Order is described at 47 C.F.R. Section 61.49(g)(2). See also Amendments 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, 6 FCC Rcd 4524, 4531(1991) at paras. 38-44." Order on Reconsideration at para. 163, n. 492.

<sup>31</sup> Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 10, 1997) ("RBOC Request"); Ex Parte Letter of Michael Kellogg, Counsel, RBOC Coalition to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("RBOC Clarification Letter").

requests that this 45-day period correspond to the same period of time that the Commission granted in its April 4, 1997 Bureau Waiver Order for limited waiver of the LECs' federal tariffs.<sup>32</sup> The RBOC Coalition states that it is not seeking a waiver of the requirement that all of the BOCs have effective intrastate tariffs by April 15, 1997 for basic payphone lines and unbundled features and functions.<sup>33</sup>

In support of its request, the RBOC Coalition argues that none of the BOCs "understood the payphone orders to require existing, previously-tariffed intrastate payphone services, such as the COCOT line, to meet the Commission's new services test."<sup>34</sup> It further argues that, in some states, there may be a discrepancy between the existing state tariff rates and state tariffs that comply with the new services test, which would require the LEC to file new tariff rates.<sup>35</sup> In most states, however, the RBOC Coalition states, "ensuring that previously tariffed payphone services meet the new services test . . . should not be too problematic."<sup>36</sup> The RBOC Coalition argues that this 45-day period would allow the LECs to file new intrastate tariffs in the states where it is necessary without delaying its eligibility to receive compensation.<sup>37</sup> It also states that special circumstances exist for a waiver in that the federal new services test had not previously been applied to existing state services, and that the LECs did not understand until the release of the Bureau Waiver Order that the Commission meant to require application of this test to those services.<sup>38</sup> The RBOC Coalition also states that "[e]ach LEC will undertake to file with the Commission a written ex parte document, by April 15, 1997, attempting to identify those tariff rates that may have to be revised."<sup>39</sup> In addition, the RBOCs state that they voluntarily commit "to reimburse or provide credit to those purchasing the services back to April 15, 1997" . . . "to the extent that the new tariff rates are lower than the existing ones."<sup>40</sup>

<sup>32</sup> RBOC Request at 1.

<sup>33</sup> RBOC Clarification Letter at 1.

<sup>34</sup> Id. at 1.

<sup>35</sup> Id.

<sup>36</sup> Id.

<sup>37</sup> Id. at 2.

<sup>38</sup> Id. at 3.

<sup>39</sup> Id.

<sup>40</sup> Id.

In ex parte documents filed in response to the submission of the RBOC Coalition, AT&T and MCI each argue that there is no basis for the BOCs' claim that they did not understand that basic intrastate payphone tariffs had to comply with the Commission's "new services" test.<sup>41</sup> In addition, Sprint filed an ex parte document stating that "[w]hether or not the RBOCs exercised good faith in ignoring the plain language of paragraph 163 of the Reconsideration Order . . . is beside the point[.]" because the RBOCs should not be entitled to receive compensation unless they are in compliance with all of the requirements of Section 276 and the Commission's rules.<sup>42</sup> Both MCI and Sprint oppose the RBOC Coalition's request for a waiver.<sup>43</sup> AT&T states, however, that it takes no position on the merits of the RBOC Coalition's request for a waiver, "provided that all necessary cost-based tariffs are in place within the waiver period established by the Bureau's April 4, 1997 Order."<sup>44</sup>

More specifically, AT&T contends that the Commission should reiterate that a LEC is not eligible for payphone compensation "until it has provided proof of state action verifying the LEC's compliance with Section 276[.]" particularly with regard to the elimination of intrastate payphone subsidies.<sup>45</sup> AT&T states that the available evidence, namely the "wide and unexplained gap between the reasonably expected rate impacts of the removal of LEC payphone equipment from their regulated accounts and recent actual intrastate rate reductions," suggest that LECs have not removed intrastate payphone subsidies.<sup>46</sup> MCI argues that while there will be no harm to the BOCs if they are required to have effective intrastate tariffs before they receive compensation, the IXCs that are required to pay the compensation will be harmed because the BOCs will be receiving the compensation provided by the Payphone Reclassification Proceeding

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<sup>41</sup> Ex Parte Letter of E.E. Estey, Government Affairs Vice President, AT&T to William Caton, Acting Secretary, FCC (April 11, 1997) ("AT&T Letter"); Ex Parte Letter of Mary Sisak, Senior Counsel, MCI to Mary Beth Richards, Deputy Chief Common Carrier Bureau, FCC (April 11, 1997) ("MCI Letter").

<sup>42</sup> Ex Parte Letter of Richard Juhnke, General Attorney, Sprint to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("Sprint Letter").

<sup>43</sup> MCI Letter at 1; Sprint Letter at 1.

<sup>44</sup> AT&T Letter at 1.

<sup>45</sup> Id. at 3. AT&T further contends that "[s]pecifically, the Commission should make it clear that no LEC is entitled to receive payphone compensation in any state until (1) it provides evidence that its state commission has actually considered these matters and (2) the state has affirmatively determined that all payphone subsidies have been eliminated from intrastate rates." Id. (emphasis in the original).

<sup>46</sup> Id.

while they are still recovering payphone costs through tariffed services.<sup>47</sup> MCI also argues that the request of the RBOC Coalition would be properly treated as an untimely petition for reconsideration of the Commission's payphone orders.<sup>48</sup> Sprint contends that the practical effect of granting the relief requested by the RBOC Coalition would be to allow the BOCs to receive compensation before they have in effect cost-based rates at the state level for their payphone services.<sup>49</sup> Sprint contends further that it is inconceivable that this "premature imposition of [the compensation] burden on IXCs and their customers could be squared with the public interest . . .".<sup>50</sup> On the other hand, Sprint states that it would not object to allowing the LECs to defer the effective date of the reductions in their interstate common carrier line reductions in those states where they have yet to fulfill all of the requirements for compensation.<sup>51</sup>

The American Public Communications Council ("APCC"), a trade association of independent PSPs, contends in an ex parte filing that there was no ambiguity in the Payphone Reclassification Proceeding that existing payphone service tariffs are subject to the "new services" test.<sup>52</sup> APCC further contends that allowing the LECs to collect compensation before "complying with a key condition for any competitive telecommunications market -- cost-based interconnection with bottleneck facilities -- would be contrary to the basic purposes of the Act and the [Payphone Reclassification Proceeding]."<sup>53</sup> APCC proposes, instead, that the LECs should be allowed "to defer the effective date of . . . detariffing requirements for a 90-day period to allow them to bring their state payphone services tariffs into compliance with the [Payphone Reclassification Proceeding], provided that the LEC refiles all its state-tariffed services offered to PSPs, so as to ensure state commissions an opportunity to review all payphone interconnection services under the required uniform pricing standard."<sup>54</sup> APCC argues that the Commission "must simply order all

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<sup>47</sup> MCI Letter at 1.

<sup>48</sup> Id. at 2.

<sup>49</sup> Sprint Letter at 2.

<sup>50</sup> Id.

<sup>51</sup> Id. at 3.

<sup>52</sup> Ex Parte Letter of Albert Kramer, Counsel, APCC to Mary Beth Richards, Deputy Chief, Common Carrier Bureau, FCC (April 11, 1997) ("APCC Letter").

<sup>53</sup> Id. at 2.

<sup>54</sup> Id. at 3 (emphasis in the original).

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tariffs to be refiled.<sup>55</sup>

C. Waiver

Upon reviewing the contentions of the RBOC Coalition and the language it cites from the two orders in the Payphone Reclassification Proceeding, we conclude that while the individual BOCs may not be in full compliance with the intrastate tariffing requirements of the Payphone Reclassification Proceeding, they have made a good faith effort to comply with the requirements. The RBOC Coalition concedes that the Commission's payphone orders, as clarified by the Bureau Waiver Order, mandate that the 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.<sup>56</sup> In addition, the RBOC Coalition states that it will take whatever action is necessary to comply with the Commission's orders in order to be eligible to receive payphone compensation at the earliest possible date.<sup>57</sup> Therefore, we adopt this Order, which contains a limited waiver of the federal guidelines for intrastate tariffs, specifically the requirement that LECs have filed intrastate payphone service tariffs as required by the Order on Reconsideration and the Bureau Waiver Order that satisfy the new services test, and that effective intrastate payphone service tariffs comply with the "new services" test of the federal guidelines for the purpose of allowing a LEC to be eligible to receive payphone compensation, as discussed below. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration, the Bureau Waiver Order and this Order become effective. Because other LECs may also have failed to file the intrastate tariffs for payphone services that comply with the "new services" test of the federal guidelines, we apply this limited waiver to all LECs, with the limitations set forth herein.

Consistent with our conclusions above and in the interests of bringing LECs into compliance with the requirements of the Payphone Reclassification Proceeding, we waive for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with the "new services" test of the federal guidelines, as set forth in paragraph 163 of the Order on Reconsideration and clarified in the Bureau Waiver Order. Pursuant to the instant Order, LECs must file intrastate tariffs for payphone services, as required by the Payphone Reclassification Proceeding consistent with all the requirements set forth in the Order on Reconsideration, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order. Any LEC that files these intrastate tariffs for payphone services within 45 days of the release date of the Bureau Waiver Order will be eligible to receive the payphone compensation

<sup>55</sup> Id. (emphasis in the original).

<sup>56</sup> RBOC Request at 1-3.

<sup>57</sup> Id.

provided by the Payphone Reclassification Proceeding as of April 15, 1997, as long as that LEC has complied with all of the other requirements set forth in paragraph 131 (and paragraph 132 for the BOCs) of the Order on Reconsideration, subject to the clarifications and limited waiver in the Bureau Waiver Order.<sup>58</sup> Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. This waiver permits the LEC to file intrastate tariffs that are consistent with the "new services" test of the federal guidelines set forth in the Order on Reconsideration, as clarified by the Bureau Waiver Order.<sup>59</sup> The existing intrastate payphone service tariffs will continue in effect until the intrastate tariffs filed pursuant to this Order become effective.<sup>60</sup>

The RBOC Coalition and Ameritech have committed, once the new intrastate tariffs are effective, to reimburse or provide credit to its customers for these payphone services from April 15, 1997, if newly tariffed rates, when effective, are lower than the existing rates. This action will help to mitigate any delay in having in effect intrastate tariffs that comply with the guidelines required by the Order on Reconsideration, including the concern raised by MCI that the subsidies from payphone services will not have been removed before the LECs receive payphone compensation.<sup>61</sup> A LEC who seeks to rely on the waiver granted in the instant Order must also reimburse their customers or provide credit, from April 15, 1997, in situations where the newly tariffed rates are lower than the existing tariffed rates. We note, in response to the arguments raised by the IXCs, that because this Order does not waive the requirement that subsidies be removed from local exchange service and exchange access services, the "harm" to the IXCs resulting from the delayed removal of subsidies from some intrastate payphone service tariffs will be limited.

We conclude that the waiver we grant here, which is for a limited duration to address a specific compliance issue, is consistent with, and does not undermine, the rules adopted by the Commission in the Payphone Reclassification Proceeding. Therefore, we reject the various alternatives to granting a waiver that were suggested by APCC and the IXCs. More specifically, we conclude that APCC's proposal to require the refiling of all intrastate payphone service tariffs would

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<sup>58</sup> Because the industry has elected to bill for and pay out compensation on a quarterly basis, the actual payment for compensation that begins to accrue on April 15, 1997 will not be made until after the requisite intrastate tariffs are filed.

<sup>59</sup> Bureau Waiver Order at paras. 29-33.

<sup>60</sup> The states must act on the tariffs filed pursuant to this Order within a reasonable period of time. The Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the Payphone Reclassification Proceeding, including the intrastate tariffing of payphone services, have been met. 47 U.S.C. § 276.

<sup>61</sup> Order on Reconsideration at para. 163.

unduly delay, and possibly undermine, the Commission's efforts to implement Section 276 and the congressional goals of "promot[ing] competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public. . .".<sup>62</sup> In response to Sprint's proposal that we delay the effective date of the LECs' interstate carrier common line reductions, we conclude that the better approach would be to evaluate requests for such treatment by individual LECs on a case-by-case basis. In addition, we decline to treat the request of the RBOC Coalition as an untimely petition for reconsideration of the Commission's rules, because the RBOC Coalition does not seek reconsideration of the rules adopted in the Payphone Reclassification Proceeding, but instead seeks additional time, in a specific, limited circumstance, to comply with those rules.

In response to AT&T's arguments that a LEC must show proof that its intrastate tariffs have removed payphone subsidies consistent with Section 276, we note the Commission concluded that "[t]o receive compensation a LEC must be able to certify"<sup>63</sup> that it has satisfied each of the individual prerequisites to receiving the compensation mandated by the Payphone Reclassification Proceeding.<sup>64</sup> The Commission did not require that the LECs file such a certification with it. Nothing in the Commission's orders, however, prohibits the IXCs obligated to pay compensation from requiring that their LEC payees provide such a certification for each prerequisite. Such an approach is consistent with the Commission's statement that "we leave the details associated with the administration of this compensation mechanism to the parties to determine for themselves through mutual agreement."<sup>65</sup>

Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule<sup>66</sup> and such deviation serves the public interest.<sup>67</sup> Because the LECs are required to file, and the states are required to review, intrastate tariffs for payphone services consistent with federal guidelines, which, in some cases, may not have been previously filed in this manner at the intrastate level, we find that special circumstances exist in this case to grant a limited waiver of brief duration to address this responsibility. In addition, for the reasons stated above, our grant of a waiver in this limited circumstance, does not undermine, and is

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<sup>62</sup> 47 U.S.C. § 276(b)(1).

<sup>63</sup> Order on Reconsideration at para. 131 (emphasis added).

<sup>64</sup> See para. 6, above.

<sup>65</sup> Order on Reconsideration at para. 115.

<sup>66</sup> Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

<sup>67</sup> WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).



consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated by payphones. Moreover, the states' review of the intrastate tariffs that are the subject of this limited waiver will enable them to determine whether these tariffs have been filed in accordance with the Commission's rules, including the "new services" test. Accordingly, we grant a limited waiver for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with the "new services" test of the federal guidelines, as set forth in paragraph 163 of the Order on Reconsideration, subject to the terms discussed herein. This Order does not waive any of the other requirements set forth in paragraphs 131-132 of the Order on Reconsideration.<sup>68</sup>

#### IV. CONCLUSION

In this Order, the Bureau grants a limited waiver of the Commission's requirement that effective intrastate tariffs for payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the "new services" test, as set forth in the Payphone Reclassification Proceeding. LECs must comply with this requirement, among others, before they are eligible to receive the compensation from IXCs that is mandated in that proceeding.

Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the "new services" test of the federal guidelines required by the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration. Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation.

#### V. ORDERING CLAUSES

Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 5(c), 201-205, 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 155(c), 201-205, 276, and

<sup>68</sup> Id.

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Sections 0.91 and 0.291 of the Commission's rules, 47 C.F.R. §§ 0.91 and 0.291, that limited waiver of the Commission's requirements to be eligible to receive the compensation provided by the Payphone Reclassification Proceeding, CC Docket No. 96-128, IS GRANTED to the extent stated herein.

IT IS FURTHER ORDERED that this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Regina M. Keeney  
Chief, Common Carrier Bureau

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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

Case No.: 3:10 CV 00685 ST

The Northwest Public Communications Council, Unidentified PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.

**COMPLAINT EXHIBITS  
ATTACHED**

Ex 3

Plaintiffs, v.

Qwest Corporation, Oregon Public Utilities Commission and Ray Baum, Susan Ackerman and John Savage, in their capacity as Commissioners

Defendants.

Exhibit 1 RBOC Waiver Request Letter April 10, 1997.

Exhibit 2 FCC Waiver Order April 15, 1997

Exhibit 3 PUC Order 09-155 Dismissing Claim

Exhibit 4 PUC Order 10-027 Denying Amended Complaints

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ENTERED 05/04/09

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC  
COMMUNICATIONS COUNCIL,

Complainant,

v.

QWEST CORPORATION,

Defendant.

ORDER

**DISPOSITION: MOTION FOR LEAVE TO AMEND COMPLAINT  
DENIED IN PART AND GRANTED IN PART**

**I. INTRODUCTION**

In this order, we deny the Motion of the Northwest Public Communications Council (NPCC) to amend its complaint by adding new claims against Qwest Corporation (Qwest) for refunds relating to the provision of "CustomNet" fraud prevention services. We find that granting the request to add the new claims would have (1) joined claims not sufficiently related to the subject matter of the initial complaint--Public Access Line (PAL) service--to relate back to it; and (2) violated the statute of limitation provisions applicable to the new claims that NPCC proposes to add to this proceeding.

We grant the motion to amend the complaint by adding 13 new plaintiffs. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint, and the amendment serves to clarify the true parties with a pecuniary interest in and knowledge of the transactions that are the subject of the complaint. Therefore, Qwest is not prejudiced by their inclusion as parties-plaintiff.

**II. PROCEDURAL HISTORY**

By Order No. 05-208, entered May 3, 2005, the Public Utility Commission of Oregon (Commission) affirmed a ruling of the Administrative Law Judge (ALJ) holding this proceeding in abeyance pending a decision by the Federal Communications Commission (FCC) on certain petitions for declaratory ruling in CC Docket 96-128 due to "the fact

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that the issues raised by parties in this case are currently pending before the FCC in the Consolidated Petition Proceeding.”<sup>1</sup> In affirming the ALJ’s Ruling, the Commission noted as follows:

[A] decision by this Commission interpreting the *Waiver Order* will not expedite the resolution of this dispute. Given the amounts at issue, it is virtually certain that any decision we reach will be appealed, a process that we agree may take years to conclude. After a decision by the Oregon appellate courts, it is equally certain that the losing party will petition the FCC to preempt the state court decision pursuant to Section 276(c) of the Telecommunications Act. Thus, in the end, the parties will find themselves in the same place as the petitioners in the Consolidated Petition Proceeding.<sup>2</sup>

On February 4, 2008, more than two-and-a-half years after the Commission issued its order, NPCC filed a Motion to Lift Order Holding Case in Abeyance and then, on March 18, 2008, withdrew the Motion in the belief—eventually proven to be mistaken—that the FCC would be acting in the near future.

Another year passed, and on January 14, 2009, NPCC filed a Motion to Lift Order Holding Case in Abeyance, asserting, at page 2, that it “had lost patience with the FCC,” but believed that recent cases in the Ninth and Tenth Circuit Courts of Appeal (Ninth and Tenth Circuit) were “controlling federal law that clarifies Qwest’s obligation under Section 276 of the Communications Act and should give the Commission more than a sufficient legal basis for determining the issues presented in this case.”

On January 28, 2009, Qwest filed a Response to NPCC’s Motion to Lift Order Holding Case in Abeyance. Qwest did not oppose the NPCC Motion, but took issue with NPCC’s characterization of Qwest’s positions in the case and the impact of the Ninth and Tenth circuit decisions.

A telephone prehearing conference was held in this case on Thursday, February 5, 2009. At the conference, the ALJ granted the NPCC Motion, and it was agreed that NPCC would file either a motion for leave to file an amended complaint or a stipulation agreeing to the filing of an amended complaint no later than February 26, 2009. NPCC timely filed its Motion for Leave to Amend Complaint and Amended Complaint of the Northwest Public Communications Council, *et al.* for Refunds of Payphone Services Overcharges (Motion) on February 26, 2009. On March 13, 2009, Qwest Corporation’s Response to NPCC’s Motion for Leave to Amend Complaint (Response) was filed. NPCC filed a Reply in Support of Complainant’s Motion for Leave to Amend Complaint (Reply) on March 30, 2009.

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<sup>1</sup> Order, at 1-2.

<sup>2</sup> *Id.*, at 2-3.

### III. DISCUSSION

#### A. NPCC Motion

##### 1. Parties' Positions

##### a. NPCC

NPCC, a trade association, seeks refunds for alleged overcharges by Qwest for services provided to NPCC's member companies. The original NPCC Complaint alleges that Qwest charged PAL rates in excess of amounts due under Section 276 and the FCC's new services test. The original NPCC Complaint did not provide a specific dollar amount of the alleged overcharges because, NPCC now asserts, it asked the Commission to include the disparity in rates for a fraud prevention service known as "CustomNet" established in a separate rate case proceeding then pending in Docket UT-125.<sup>3</sup>

NPCC seeks to amend its original complaint in two ways. First, it seeks inclusion of allegations relative to CustomNet charges in the complaint proceeding. NPCC claims that these separate charges arise out of the same behavior and seek the same type of relief for the same parties. "The CustomNet claim is just an outgrowth of the original case, which is brought about by the fact that the CustomNet claims became ripe to assert in 2007." The CustomNet claims could only be asserted once the rate case was concluded by the November 2007 settlement.<sup>4</sup> NPCC claims that Qwest will not be prejudiced or disadvantaged because the original case had been held in abeyance until a month ago, and "[i]t would have been improper for NPCC to attempt to amend its Complaint while the case was held in abeyance and prior to the end of the Rate Case. The Parties have not completed presentation of evidence \* \* \*. NPCC's request to amend the complaint to include the CustomNet claim is within the statute of limitations because the claim accrued in November 2007, at the time of the Final Order approving the CustomNet rates."<sup>5</sup>

Second, NPCC seeks inclusion of additional plaintiffs. NPCC asserts that Oregon Revised Code of Civil Procedure (ORCP) 30 permits the addition of the members to the case because the law and facts are identical to both NPCC and its members and would not change the claims asserted or the discovery process and thus "[t]here is no imaginable prejudice or disadvantage to Qwest \* \* \*. Even if this amendment raised statute of limitations issues \* \* \* under ORCP 23, Oregon courts permit a complaint to be amended to substitute in a proper party as the party plaintiff even if the statute of limitations has run, thus allowing the substitute plaintiff to bring an original action against defendant."<sup>6</sup>

<sup>3</sup> Motion, at 2.

<sup>4</sup> *Id.* at 4-6.

<sup>5</sup> *Id.* at 6.

<sup>6</sup> *Id.* at 7.

**b. Qwest**

Qwest, in its introductory summary, contends that the Motion should be denied because (1) the new claims would change the nature of the current case; (2) Qwest would be prejudiced by the amendment; and (3) the claims lack merit because they are barred by the two-year statute of limitations: the 13 proposed new complainants' rights accrued in 1997 and are being brought for the first time 12 years later.<sup>7</sup> Qwest also notes the failure of NPCC to distinguish between adding, versus substituting, complainants and the legal infirmities associated with the inclusion of CustomNet services in the amended complaint.<sup>8</sup>

With regard to new plaintiffs, Qwest contends that ORCP 23 does not apply to the addition of new plaintiffs because the relation back provision clearly applies to amending the complaint by adding new defendants, not plaintiffs. "It also establishes when an existing party's amended complaint relates back for statute of limitations purposes, again including when an amended complaint adds a new defendant." Qwest contends that ORCP 30—Misjoinder and nonjoinder of parties—is the appropriate section.<sup>9</sup> Even if ORCP 23 does apply, Qwest provides four factors for the Commission to consider when exercising its discretion regarding allowing an amendment: (1) the proposed amendment's nature and relationship to the existing pleadings, (2) prejudice to the opposing party, (3) timing, and (4) the merit of the proposed amendment.<sup>10</sup>

Qwest next argues that the Commission should deny the amendment to add 13 new complainants because it drastically changes the nature of the case, requiring it to defend against the claims of 13 additional parties and increasing the amount of discovery. Furthermore, "[a]dditional discovery may be required as to when each of the complainants was or should have been aware of its potential claims against Qwest\* \* \*."<sup>11</sup> Qwest also claims that it would be prejudiced because, if the case is expanded, there is a likelihood that meaningful discovery from the new parties might no longer be available because NPCC has admitted that some member companies' records may be unretrievable and does not assert that the individual complainants would suffer any prejudice if they are not added to the proceeding.<sup>12</sup>

Qwest next contends that the refund claims are barred by the two-year statute of limitations set out under 47 U.S.C. §415(b) which covers complaints against carriers for refunds and argues that the claims must be brought within two years of the claim's accrual. Since the claims are based solely upon federal requirements in an FCC order, the federal statute of limitations applies.<sup>13</sup> Where claims are based on allegations that Qwest's PAL rates effective April 15, 1997, did not comply with the new services test, the Commission has ruled that a claim accrues "when a plaintiff knows or has reason to know of the harm or injury that is the basis of the cause of action." Other providers of payphone services, some

<sup>7</sup> Response, at 1.

<sup>8</sup> *Id.*, at 2.

<sup>9</sup> *Id.*, at 3.

<sup>10</sup> *Id.*, at 4, citing *Forsi v. Hildahl*, 194 Or 667 (1974).

<sup>11</sup> *Id.*, at 4-5.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*, at 6 and cases cited therein.

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represented by NPCC's counsel, filed timely complaints, undercutting NPCC's arguments for allowing amendment in this case.<sup>14</sup> Qwest asserts that NPCC's reliance on various cited cases relate to substitution, not addition, of parties and thus does not support its argument. Furthermore, the new complainants' claims are materially different from the original claims, changing the substance of the complaint and increasing the damages. They therefore do not "relate back" to the original complaint. The claims would also be untimely in any event, being subject to the two-year statute of limitations.<sup>15</sup>

Qwest next addresses NPCC's proposed addition of claims for refunds of CustomNet Charges. Although subject to the same rate-setting standards as PAL services, Qwest contends that CustomNet is subject to significantly different procedural requirements: whereas the FCC required ILECs to file PAL rates with state commissions, it required ILECs to file CustomNet rates with the FCC itself. "[T]he only rates potentially subject to return under the FCC's Waiver Order—the basis of NPCC's current claim—are PAL rates; NPCC's claim that Qwest must also refund a portion of CustomNet charges is not based on the Waiver Order. Rather, it appears to be based directly on Section 276 of the Telecommunications Act."<sup>16</sup>

Using the first factor in the *Forsi* case, Qwest argues that the addition of a claim for refunds of CustomNet charges would substantially change the nature of the case, adding new elements of damages not at issue for the almost eight years that the case has been pending. Applying the second and third factors in *Forsi*, Qwest argues that it would be prejudiced because it would require discovery on new issues and raise the specter of unavailable information, hampering Qwest's ability to mount a defense against the new claims. Finally, Qwest claims a bar to the action by the statute of limitations.<sup>17</sup>

### c. NPCC Reply

NPCC replies that there will be no material impact upon Qwest by adding the NPCC members as named complainants because, as Qwest knows, NPCC has always acted on behalf of its members. Therefore, discovery, claims, and damages theories would be the same. Furthermore, CustomNet and PAL involve discovery of the same telephone bills and the same type of relief—refund of excessive charges—applies to both services. Qwest has not been surprised because in 2005 NPCC put Qwest on notice that it would be adding CustomNet services to the complaint.<sup>18</sup>

NPCC asserts that ORCP 23 A, buttressed by the *Forsi* case, provides that in administrative cases pleadings are liberally construed and easily amended and that based on the four factors in the *Safeport*<sup>19</sup> case, the NPCC motion should be granted.<sup>20</sup> Specifically, NPCC asserts that Qwest will not be prejudiced by the amendment. First, the addition of the

<sup>14</sup> *Id.*, at 6-8 and cases cited therein.

<sup>15</sup> *Id.*, at 8-9 and cases cited therein.

<sup>16</sup> *Id.*, at 9.

<sup>17</sup> *Id.*, at 10-11 and cases cited therein.

<sup>18</sup> Reply, at 1-2.

<sup>19</sup> *Safeport, Inc. v. Equipment Roundup & Mfg.*, 184 Or 690, 699 (2002).

<sup>20</sup> Reply, at 2.



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claimants will not increase Qwest's burden; there will be only one legal brief, no greater number of invoices, and the same parties will be deposed whether the motion is granted or not. Both CustomNet and PAL involve Section 276 of the Communications Act of 1996 and related case law. Both services also have identical parties, identical Qwest actions, and identical relief and evidence, because CustomNet and PAL charges are on the same bills.<sup>21</sup>

Second, NPCC claims that, even though the case is eight years old, the case is just getting started; there has been no discovery or even an answer to the original complaint and thus timeliness is not a material issue. The Complaint only became ripe in 2007, at the conclusion of the rate case, and Qwest has been on notice of NPCC's intentions. Without prejudice to the defendant, the lateness issue is moot.<sup>22</sup>

Third, NPCC contends the amendment meets the requirement that it be closely related to the original complaint because "[t]he law and facts at issue in this case are identical whether the complaint is amended or not \* \* \*."<sup>23</sup> Finally, the "colorable merit" standard has, in NPCC's view, also been met by the CustomNet overcharge allegations.<sup>24</sup>

NPCC cites ORCP 23 C permitting amendments arising out of the same conduct, transaction, or occurrence as the original complaint, in which case the amendment relates back to the original complaint. An amendment filed after the statute of limitations period has past may relate back "if the defendant would have been able to discern from the earlier pleading a potential for the additional basis of liability." NPCC claims the CustomNet claims arise from the same facts as the PAL claim and is based on the same legal theories.<sup>25</sup> NPCC also asserts that Qwest misapplies the time period by which the statute of limitations should be calculated, claiming that the time period under 28 U.S.C. §1658 (a) is four years and not two.<sup>26</sup> NPCC closes its Reply with the assertion that Qwest is concocting legal barriers to the amendment without a proper basis in law by referring to ORCP 23 and ORCP 30 which Qwest interprets as only allowing the addition of defendants, not complainants. NPCC claims that it is "just" to allow the NPCC members to become parties and to add CustomNet, when doing so creates no prejudice to Qwest and involves the same facts and law as the original complaint.<sup>27</sup>

#### IV. ANALYSIS AND OPINION

##### A. Addition of New Claims

In discussing the Commission's role in resolving the issues in the original complaint, the presiding ALJ stated:

<sup>21</sup> *Id.*, at 2-3.

<sup>22</sup> *Id.*, at 3-5 and cases cited therein.

<sup>23</sup> *Id.*, at 5.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*, at 5-6.

<sup>26</sup> *Id.*, at 6-7 and cases cited therein.

<sup>27</sup> *Id.*, at 7.

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The threshold question presented in this proceeding concerns *the scope of the refund obligation contemplated by the FCC's Payphone Orders* \* \* \*. Since the RBOCs' refund liability under the *Payphone Orders* is ultimately a question of federal law, it makes sense to allow the FCC the opportunity to provide guidance to the states concerning the proper interpretation of those orders. While this Commission could certainly opine on what the FCC intended in its *Payphone Orders*, the FCC itself is in the best position to articulate what its decisions require. \* \* \* In my view, it makes little sense to expend time and resources litigating this matter before the OPUC and state courts when it is unlikely to produce a final outcome, especially when the identical issues are pending before the FCC. \* \* \* any potential RBOC financial exposure will remain until the federal proceedings are finally resolved.<sup>28</sup>

More than four years later, the FCC has yet to issue its Order in response to the requests for a declaratory ruling. Although the ALJ's comments remain as true today as they were in 2005, NPCC now seeks to *broaden the scope* of the case to encompass a service, CustomNet, which may or may not be subject to the same set of issues and intentions regarding refund obligations as are set forth in the *Payphone Orders*. Although NPCC asserts that its claims for CustomNet service overcharges arise out of the same legal theories as for PAL services, without a definitive statement from the FCC that services such as CustomNet were within the scope of the original proceeding, we are not so certain. Indeed, by pursuing CustomNet, we run the risk of obfuscating what is already an uncertain undertaking and raising the possibility that the issuance of an FCC order would not resolve the original complaint because the amendment had added CustomNet services. Thus, we would defeat the very purpose of lifting the abeyance ruling—providing the parties with a definitive Order addressing the issues in the original complaint.

ORS 756.500(4) gives the Commission the authority to order the amendment of a complaint before the completion of taking of evidence. ORCP 23 A provides, in pertinent part, that “a party may amend the pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires.” ORCP 23 C. Relation back of amendments states, in pertinent part, “Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the original date of the pleading.”

According to NPCC, CustomNet charges were on the very same invoices from the PAL charges about which it originally complained. Nevertheless, NPCC's initial complaint was narrow and explicit. Even though CustomNet charges were ostensibly listed on the invoices and could have been challenged at the time, NPCC made no *general* allegations of overcharging by Qwest (which might therefore have encompassed CustomNet), but took pains to confine the “new services test” to PAL rates, although NPCC now claims that the same

<sup>28</sup> ALJ Ruling at 7-8 (Mar. 23, 2005) (emphasis added).

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legal theories as in the PAL case apply to CustomNet. Furthermore, based upon NPCC's representations, we find that CustomNet service purchases were severable from PAL services, that they viewed them as such and thus do not arise "out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading." The CustomNet claims which NPCC seeks to add to the case via amendment thus do not "relate back" under ORCP 23 C.

In light of our findings that the CustomNet claims do not relate back to the original complaint, we are faced with the question of the applicability of the statute of limitations in barring the amendment. Even if we were of the view that, under ORCP 23, justice should require amending the complaint, we find that the most recent relevant case law unequivocally concluded that the applicable statute of limitations of two years poses an absolute bar to the addition of CustomNet services to the instant case.<sup>29</sup>

For all of the aforementioned reasons, we decline to allow NPCC to amend the complaint by the addition of claims for CustomNet services.

#### **B. Addition of New Plaintiffs**

Litigation undertaken by a trade association on behalf of its members and seeking monetary compensation from a single defendant is a common occurrence. The defendant is aware that discovery and examination of witnesses will likely encompass not the trade association's executives or counsel, but the association's aggrieved constituent members.

In this instance, Qwest would be expected to seek discovery on the members, as they were the customers who received PAL services, paid Qwest, had correspondence relating to their knowledge and awareness of the FCC litigation and would be seeking refunds, if NPCC prevailed on the merits. Qwest was on notice that the individual companies and not their umbrella organization were the true parties in interest with respect to the funds at stake.

Furthermore, Qwest never objected to the Commission that NPCC lacked any standing to bring the complaint, even though NPCC itself would not be eligible to receive any refunds. By adding specific members to the claim, NPCC's case is not bolstered nor is Qwest's burden increased. There is only an objective acknowledgement of the already-known parties with a pecuniary interest in the outcome of the litigation. We find that the parties may be added under the four tests of the *Forsi* case: (1) the proposed amendment's nature and relationship to the existing pleadings, (2) prejudice to the opposing party, (3) timing, and (4) the merit of the proposed amendment. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint;

<sup>29</sup> *Davel Communications, Inc., v. Qwest Corporation*, 460 F.3d 1075, 1089 (9<sup>th</sup> Cir. 2006), applied the two-year statute of limitations to a claim for refund for CustomNet-like fraud protection rates. The court rejected the argument that the claim did not accrue until Qwest filed new services test-compliant rates in 2003, holding that the plaintiff's claim accrued in 1997, when Qwest was required to file compliant rates. 460 F.3d at 1092. The court found that refunds could only be claimed for the two-year period prior to filing the complaint.

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Qwest is not prejudiced because it knew or should have known that these parties were the most likely targets of its efforts at discovery and cross-examination; there is no significance in the timing of mentioning their names specifically as the parties; and the amendment serves to clarify the true parties with a pecuniary interest in and knowledge of the transactions that are the subject of the complaint. Therefore, Qwest is not prejudiced by their inclusion as parties-plaintiff.

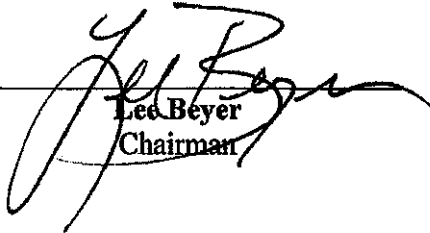
**ORDER**


IT IS ORDERED that:


1. The Motion for Leave to Amend Complaint with respect to the addition of new claims filed by the Northwest Public Communications Council is denied.
2. The Motion for Leave to Amend Complaint with respect to the addition of new plaintiffs filed by the Northwest Public Communications Council is granted.

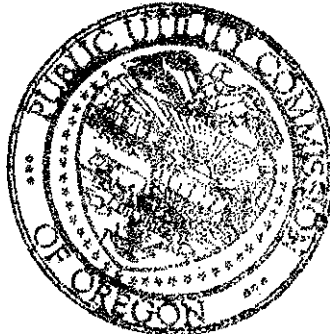
Made, entered and effective \_\_\_\_\_

MAY 04 2009

  
 \_\_\_\_\_  
**Lee Beyer**  
 Chairman

  
 \_\_\_\_\_  
**Ray Baum**  
 Commissioner

  
 \_\_\_\_\_  
**John Savage**  
 Commissioner



A party may request rehearing or reconsideration of this order pursuant to ORS 756.561. A request for rehearing or reconsideration must be filed with the Commission within 60 days of the date of service of this order. The request must comply with the requirements in OAR 860-014-0095. A copy of any such request must also be served on each party to the proceeding as provided by OAR 860-013-0070(2). A party may appeal this order by filing a petition for review with the Court of Appeals in compliance with ORS 183.480-183.484.

57 (M)

FILED 10 JUN 18 15:50 USDC-ORP

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**UNITED STATES DISTRICT COURT  
DISTRICT OF OREGON  
PORTLAND DIVISION**

Case No.: 3:10 CV 00685 ST

The Northwest Public Communications Council, Unidentified PSPs A to Z, and NPCC MEMBERS: Central Telephone, Inc; Communication Management Services, LLC; Davel Communications a/k/a Phonetel Technologies, Inc., Interwest Tel, LLC; Interwest Telecom Services Corporation; NSC Communications Public Services Corporation; National Payphone Services, LLC; Pacific Northwest Payphones; Partners in Communication; T & C Management, LLC; Corban Technologies, Inc.; and Valley Pay Phones, Inc.

**COMPLAINT EXHIBITS  
ATTACHED**

*Ex 4*

Plaintiffs, v.

Qwest Corporation, Oregon Public Utilities Commission and Ray Baum, Susan Ackerman and John Savage, in their capacity as Commissioners

Defendants.

Exhibit 1 RBOC Waiver Request Letter April 10, 1997.

Exhibit 2 FCC Waiver Order April 15, 1997

Exhibit 3 PUC Order 09-155 Dismissing Claim

Exhibit 4 PUC Order 10-027 Denying Amended Complaints

ORDER NO. 10-027  
ENTERED 02/01/10

**BEFORE THE PUBLIC UTILITY COMMISSION  
OF OREGON**

DR 26/UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS  
COUNCIL, on behalf of PSPs A to Z, and NPCC  
MEMBERS: Central Telephone, Inc.; Communication  
Management Services, LLC; Davel Communications,  
a/k/a Phonetel Technologies, Inc.; Interwest Tel, LLC;  
Interwest Telecom Services Corporation; NSC  
Communications Public Services Corporation; National  
Payphone Services, LLC; Pacific Northwest Payphones;  
Partners in Communication; T & C Management, LLC;  
Corban Technologies, Inc.; and Valley Pay Phones, Inc.,

Complainants,

v.

QWEST CORPORATION,

Defendant.

ORDER

**DISPOSITION: MOTION TO STRIKE FIRST AMENDED COMPLAINT  
GRANTED IN PART AND DENIED IN PART; MOTION  
TO ALLOW SECOND AMENDMENT TO THE  
COMPLAINT DENIED; PLAINTIFFS TO FILE AMENDED  
COMPLAINT CONSISTENT WITH ORDER**

**I. INTRODUCTION**

In this Order, we grant, in part, the Qwest Corporation (Qwest) Motion to Strike First Amended Complaint and, in its entirety, the Qwest Motion to Strike Second Amended Complaint. We deny the Motion to Allow Second Amendment to the Complaint filed by the Northwest Public Communications Council (NPCC).

**II. PROCEDURAL HISTORY**

In Order No. 09-155, entered May 4, 2009, we granted in part and denied in part NPCC's February 26, 2009, Motion for Leave to Amend Complaint and Amended Complaint

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(Motion). We denied the portion of the Motion seeking to add new claims against Qwest. The claims NPCC sought to add were for refunds relating to Qwest's provision of "CustomNet" fraud prevention services. We found that granting the request to add the new claims would have: (1) joined claims not sufficiently related to the subject matter of the initial complaint--Public Access Line (PAL) service--to relate back to it, and (2) violated the statute of limitation provisions applicable to the new claims that NPCC proposes to add to this proceeding.

We granted the February 26, 2009, Motion to the extent that we allowed the addition of 13 new plaintiffs. In that Motion, and in the NPCC Reply to Qwest's opposing pleading, NPCC asserted that there would be no change in the claims asserted or the discovery process and that discovery, claims, and damages theories would be the same. The parties proposed to be added by the amendment were the parties with the pecuniary interest in the original complaint, and the amendment served to clarify the true parties with a pecuniary interest in and knowledge of the transactions that were the subject of the complaint. Those parties, not NPCC, had the knowledge and the records, and NPCC had been acting throughout this litigation on their behalf. They would be the ones cross-examined.<sup>1</sup> Therefore, we concluded that Qwest was not prejudiced by their inclusion as parties-plaintiff. NPCC did not request that we reconsider our decision; neither did it appeal our Order, which therefore became final on July 6, 2009.

After substitution of counsel on July 22, 2009, and several subsequent extensions of time in which to file an amended complaint, on November 16, 2009, NPCC simultaneously filed a First Amended Complaint and a Second Amended Complaint and Precautionary Motion to Allow Amendment.<sup>2</sup>

On December 8, 2009, Qwest filed a Motion to Strike First Amended Complaint and a supporting Declaration of Lawrence Reichman (Reichman Declaration) and a Motion to Strike Second Amended Complaint and Response to Complainants' Precautionary Motion to Allow Second Amendment to the Complaint.

On December 22, 2009, NPCC filed a Reply (NPCC Reply) and Memorandum in Support of NPCC Complainants Reply to Qwest Motions to Strike (Reply Memorandum) and supporting Declarations of Charles W. Jones (Jones Declaration) and Frank G. Patrick (Patrick Declaration).

### III. DISCUSSION

#### A. NPCC First and Second Amended Complaints

The First Amended Complaint asks the Commission to order Qwest to pay refunds for "payphone services overcharges" collected by Qwest since April 15, 1997, or approximately 13 years ago. These services include: (1) PAL, and (2) services under various

<sup>1</sup> Order No. 09-155 at 3, 5-6, 8.

<sup>2</sup> On November 13, 2009, NPCC filed a Complaint for Declaratory Relief and Damages in the United States District Court for the District of Oregon, essentially requesting relief similar to that requested in the complaints filed with the Commission on November 16, 2009.

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names such as Fraud Protection, CustomNet, Selective Class of Call Screening or Originating Line Screening, which were referred to in Order No. 09-155, alternatively and collectively, as "CustomNet." Pursuant to Ordering Clause 2 of Order No. 09-155, NPCC now lists the additional Complainants in Exhibit A to the First Amended Complaint.

The bulk of the First Amendment is a detailed history of the litigation and the actions and inactions of federal and state agencies. NPCC asserts that the outcome of docket UT 125 was a finding that Qwest's Payphone Services rates did not comply with the new services test and Section 276 of the Telecommunications Act of 1996.<sup>3</sup> NPCC contends that the purpose of this Amendment is to join the Payphone Service Providers (PSP) as named Complainants and "conform the Complaint to the evidence developed in the Docket UT-125 proceeding and the developments in the law that have occurred since NPCC filed the original complaint in May of 2001." NPCC asks the Commission to issue an order that Qwest: (1) make refunds for payphone services rates to the extent that they exceeded lawful rates under Section 276 and the new services test since April 15, 1997; (2) refund to the complainants the amount by which Qwest's Payphone Services rates exceeded the legal rates; and (3) calculate those refunds based on the amount by which the rates charged since April 15, 1997, exceeded the Payphone Services rates established in the final order in docket UT 125.<sup>4</sup>

The Second Amended Complaint asserts that it represents "Unidentified Payphone Service Providers A to Z" as well as the NPCC member companies whose interests NPCC had previously represented who "purchase or have purchased Payphone Services from Qwest in Oregon." As in the First Amended Complaint, the subject services are both PAL and CustomNet services, "as well as those services which were the subject of the OPUC Rate Case UT-125." NPCC asserts that it will act on behalf of the "Unidentified Payphone Service Providers A to Z" in a "representative" capacity.<sup>5</sup> The remainder of the Second Amended Complaint largely repeats the First Amended Complaint but claims that the purpose is also "to assert claims arising from the same series of original transactions and related actions that led to the filing of the original Complaint and to take additional evidence as Ordered by the Marion County Circuit Court, if necessary to show that the Complaint of the Complainants is not and was not made moot by the OPUC orders 01-810 and 02-009 in UT-125."<sup>6</sup> NPCC also alleges that Qwest made material representations and promises to the FCC and the Commission when it requested a waiver of the rules and that, due to Complainants' reliance on the representations and promises, "Qwest is estopped from denying their obligation to pay the Federal Refund to Plaintiffs" for the difference between the compliant and non-compliant tariffs during the April 15, 1997, to November 15, 2007, period.<sup>7</sup>

In addition to asking the Commission to issue an order that Qwest make refunds as set forth in the First Amended Complaint, the Second Amended Complaint seeks refunds, based upon the differences between the charged and final rates for the period between April 15, 1997, and November 15, 2007, when the stipulated order establishing final rates in UT 125 was

<sup>3</sup> First Amended Complaint at 5-7.

<sup>4</sup> *Id.* at 8-9.

<sup>5</sup> Second Amended Complaint at 2-3.

<sup>6</sup> *Id.* at 12-13.

<sup>7</sup> *Id.* at 14-15.

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entered, the award of damages for "discrimination and preferential treatment of its own Payphone Services and those of any third party," interest at the highest rate allowed by law, and attorneys' fees both before the Commission and the Oregon circuit and appellate courts.<sup>8</sup>

#### **B. Qwest's Motions to Strike First and Second Amended Complaints**

Qwest contends that the First Amended Complaint doesn't comply with Order No. 09-155 because the First Amended Complaint "clearly continues to include a claim for refund of CustomNet charges, which are expressly included within the operative term 'Payphone Services' in the First Amended Complaint" and, giving no excuse for failure to comply with the order, should therefore be stricken.<sup>9</sup> Qwest contends that any assertion that NPCC's members are not bound by Order No. 09-155 and are thus permitted to file a claim for refund of CustomNet services notwithstanding the Commission's decision is without merit for several reasons. First, NPCC has consistently purported to act exclusively on behalf of its members and asked that its members, not itself, be paid, filing the amendment to add its members only to "remove the distraction of [Qwest's] spurious defense" with respect to the issue of its standing. Second, Qwest asserts that the claim is time-barred and that points of law relating to recovery for alleged overcharges for CustomNet Services may not be relitigated or reconsidered after having been decided at an earlier stage of the same case. This principle applies whether or not the NPCC members were represented by NPCC at the time the Commission issued its decision. Third, regardless of the issue of standing, "The Order was solidly based on Ninth Circuit precedent directly on point" and there is no reason to believe that the Commission would reach a different conclusion because of a change in the status of the complainant. Finally, Qwest asserts, when the individual complainants received permission from the Commission to become parties to the case, they did not seek or obtain leave from the Commission to include CustomNet Services in their complaint.<sup>10</sup>

Qwest asks the Commission to strike the Second Amended Complaint because it was filed without leave of the Commission as required by Oregon law and because it violates an existing Commission Order.<sup>11</sup> Qwest also objects to the Complainants' Precautionary Motion to Allow Second Amendment to the Complaint (Precautionary Motion) for several reasons. First, Qwest objects to its inclusion of a claim for refund of CustomNet charges in violation of our order. Second, the Complainants have added additional claims unrelated to the refunds under the FCC's payphone orders, thus expanding the scope of the proceeding.<sup>12</sup> Finally, Qwest notes with disapproval the bringing of claims on behalf of unidentified non-members,

<sup>8</sup> *Id.* at 17-18.

<sup>9</sup> Qwest Motion to Strike First Amended Complaint at 3-4.

<sup>10</sup> *Id.* at 4-6.

<sup>11</sup> Qwest Motion to Strike Second Amended Complaint at 1, 5-7.

<sup>12</sup> *Id.* at 1-2, 7-14. Qwest asserts that one of the claims raises new factual and legal issues relating to the circumstances surrounding the FCC's issuance of the Waiver Order in 1997: whether an affirmative claim for estoppel even exists and whether the alleged representations were actually made and is without foundation. Similarly, it asserts that the claim for refunds relating to the last Qwest general rate case is both baseless and beyond the scope of the proceeding, as are the claims for discrimination and "prohibited acts" for which NPCC asserts its members are entitled to relief under ORS 759.455. With respect to attorneys' fees, Qwest notes that the statutes referred to by NPCC relate to costs of judicial review of agency orders by the Court of Appeals, not by the Commission.

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asserting that NPCC lacks standing to bring such claims and that the Commission lacks authority to order refunds to such non-parties.<sup>13</sup>

**C. NPCC's Reply**

On December 22, 2009, NPCC filed a Reply to Qwest Motion to Strike Complainants' First Amended Complaint and Second Amended complaint (Reply). NPCC asserts that Qwest has made a number of pleading errors and "reveals its confusion as to the authority concerning any amendment before the PUC."<sup>14</sup> After discussing the legal evolution of the amending process and the interaction of the Oregon Rules of Civil Procedure (ORCP) and the statutes and Commission Rules relative to such amendments, NPCC asserts:

Given a proper reading and application of ORCP 23, the newly added real parties in interest are entitled to the filing of not only the First Amended Complaint, but also the Second Amended Complaint by which they filed their first amendment under ORCP 23A. Following the addition of the "real parties in interest" they have only for the first time appeared by the filing of the First Amended Complaint \* \* \* . Being named as a party gave them, for the first time, the right to appear on their own, to obtain a refund by a PUC order, and each had the right to file its own Complaint \* \* \* . That amended filing was a matter of right \* \* \* without the necessity of filing an additional motion to amend.<sup>15</sup>

NPCC contends that Qwest is incorrect in its assertion that the added parties are bound by prior pleadings; they are not because they have never been heard before and cannot be bound, having been a non-party at the time of the motion.

Furthermore, the assumptions as to the knowledge and complicity of the newly named Complainants in the motion by Qwest reaches far beyond its knowledge of the parties and their relationship to prior counsel and even the Motion to amend. It is clear that there was some kind of impasse in that earlier relationship or new counsel would not now be present. Suffice to provide that there was an unresolved conflict in direction which necessitated the substitution of new counsel, but that cannot tar nor bind the newly added Complainants \* \* \* .<sup>16</sup>

NPCC next notes that since no economic relief could have been allowed or ordered until the addition of the real parties in interest, the case and the real parties' rights did not really commence until they entered the case and that they therefore may pursue all refunds regardless of their age or the completion and finality of prior dockets. "It would be a travesty for

<sup>13</sup> *Id.* at 15-17.

<sup>14</sup> Reply at 2.

<sup>15</sup> *Id.* at 4-5.

<sup>16</sup> *Id.* at 5-6.

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the Commission to cut short the claims pled by a Complaint which claims could not have been (sic) pled prior to the completion of the over 8 year litigation to develop lawful rates in UT-125 in compliance with Federal law \* \* \* the most of the claims alleged therein did not come into existence until November 15, 2007 when final NST compliant rates were adopted and made effective."<sup>17</sup>

NPCC concludes that the law in Oregon is clearly to allow for a trial on the merits and that a pleading error is to be disregarded unless it affects a substantial right, under ORCP 12, and the amendment is to be liberally granted. Qwest has never filed an Answer or responded to the allegations of the Complaint, and this is the first opportunity they have had to bring their case and obtain reward from the Commission. The Commission granted prior counsel the right to file an Amended Complaint and, the First Amended Complaint was filed in the form as attached to that Motion. Now that the PSP payphone services have been established by UT 125, the Commission should allow the Complainants to proceed under the Second Amended Complaint.<sup>18</sup>

**D. Analysis and Opinion**

The history of this proceeding was recently summarized in our Order No. 09-155 and will not be repeated here. There we made it abundantly clear that the sole allowed purpose of an NPCC Amendment was to permit the NPCC member PSPs who would be subject to cross-examination by Qwest regarding PAL services and would receive any damages if awarded to become named parties to the proceeding. The February 26, 2009, Motion unequivocally stated at the time "The addition of the members to this case would not change the claim asserted, the discovery process or the amount being sought from Qwest. The NPCC members seek from Qwest the same relief that NPCC now seeks on its members' behalf. There is no imaginable prejudice or disadvantage to Qwest."<sup>19</sup>

In Order No. 09-155, we rejected the attempt by NPCC (and by extension based upon NPCC's representation, any member PSP) to broaden the scope of the case by the inclusion of CustomNet services, as they did not relate back to the original claim.<sup>20</sup> Our finding that Qwest would not be prejudiced by our decision, *i.e.*, that its exposure to litigation of other issues or additional parties beyond those then represented by NPCC would not change, was explicitly set forth:

Qwest is not prejudiced because it knew or should have known that *these parties* were the most likely targets of its efforts at discovery and cross-examination; there is *no significance* in the timing of mentioning their names specifically as the parties; and the *amendment serves to clarify* the true parties with a pecuniary

<sup>17</sup> *Id.* at 6-8.

<sup>18</sup> *Id.* at 8-10.

<sup>19</sup> Motion at 7.

<sup>20</sup> Order No. 09-155 at 7-8.

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interest in and knowledge of the transactions that are the subject of the complaint.<sup>21</sup>

In both its First and Second Amended Complaints, NPCC and its member PSPs, collaterally attack our opinion in Order No. 09-155, essentially claiming that, with new plaintiffs, all prior rulings and orders are not binding. NPCC then recites the bases on which it believes CustomNet services, and a reopening of issues regarding rights to refunds based on the outcome in docket UT 125, are properly the subject of recovery by its member companies (and any others it might subsequently find along the way).

If that is indeed NPCC's view, it could and should have directly challenged Order No. 09-155, timely seeking either clarification, rehearing, or appeal. It did none of those. Instead, it attempts to identify differences between prior counsel and its clients as a reason why our previous decision should not apply, while failing to provide supporting facts for allegations of inadequate or improper representation of PSPs' interests by prior counsel as the basis for not binding the individual PSPs to our order. We find NPCC's position to be without merit.

The First Amended Complaint should be allowed solely to the extent that we join the entities listed in Exhibit A thereof as Complainants and allow the inclusion of allegations relative to PAL charges. Allegations and argument relative to any other services or charges should be stricken in all respects. The Precautionary Motion should be denied and the Second Amendment not accepted in the proceeding.

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<sup>21</sup> *Id.* at 10 (emphasis added.)

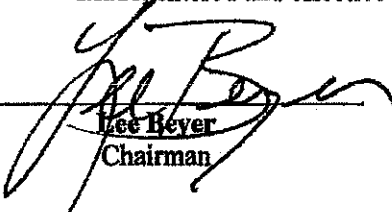
ORDER NO. 10-027

**IV. ORDER**

IT IS ORDERED that:

1. The First Amended Complaint is accepted with the following conditions:
  - A. The entities named in Exhibit A of the First Amended Complaint are made parties to the proceeding.
  - B. References to various services generally included under the description "CustomNet" are stricken from the First Amended Complaint.
  - C. The use of the term "Payphone Services" shall only mean Public Access Line services and references to any other services are stricken from the First Amended Complaint.
  - D. All references to docket UT 125 and the calculation of any refund claims thereunder are stricken from the First Amended Complaint.
2. The Precautionary Motion to Allow Second Amendment is denied. The Second Amended Complaint of NPCC *et al.* is not accepted.

Made, entered and effective FEB 01 2010

  
\_\_\_\_\_  
Lee Bever  
Chairman

  
\_\_\_\_\_  
Ray Baum  
Commissioner

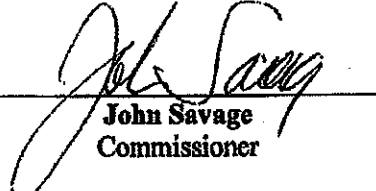
  
\_\_\_\_\_  
John Savage  
Commissioner



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