

**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

(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.

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

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<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.

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,

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<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.

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

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<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.

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

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<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.

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.)

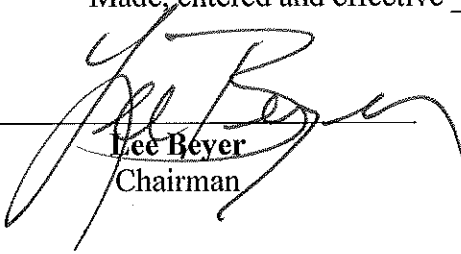
**IV. ORDER**

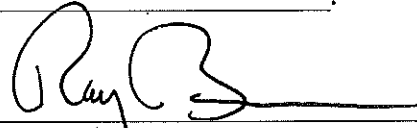
IT IS ORDERED that:

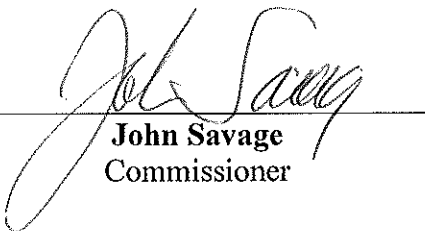
1. The First Amended Complaint is accepted with the following conditions:
  - A. The entities named in Exhibit A of the First Amended Complaint are made parties to the proceeding.
  - B. References to various services generally included under the description "CustomNet" are stricken from the First Amended 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

  
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**Lee Beyer**  
Chairman

  
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**Ray Baum**  
Commissioner

  
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**John Savage**  
Commissioner

