

NORTHWEST PUBLIC COMMUNICATIONS COUNCIL ("NPCC")
In the Matter of Payphone Access Line Rates – CC Docket No. 96-128

- **Oregon Is Unique:** The payphone-related facts in Oregon are unique, and distinct from the facts arising in every other state, in two important respects:
 - On November 23, 2005 – *almost three years ago* – the Oregon PUC asked the FCC for guidance on the unresolved issue of how to address Qwest's unjust enrichment from non-compliant payphone access line rates.
 - In Oregon, *Qwest's unjust enrichment remains an open and unresolved issue* with no *res judicata* or pre-emption issues for the FCC to resolve.
- **No Mandate Necessary:** NPCC is not asking the FCC to specifically resolve the unjust enrichment (*i.e.*, refund) issue. The Oregon PUC can address the issue of refunds for Qwest's unjust enrichment.
- **This Is Not About Ratemaking:** Nor is NPCC asking the FCC to revisit or adjust the payphone services rates that the Oregon PUC has already established. That issue is settled.
- **Oregon Would Like Guidance:** What is not settled in Oregon, and the issue on which the Oregon PUC sought guidance from the FCC three years ago, is whether Qwest should refund the amount it overcharged NPCC's members during the six-year period (1996-2002) in which its payphone line rates were non-compliant.
- **NPCC and Qwest Have Not Been Able to Settle the Matter:** After 11 years of regulatory proceedings and litigation the parties have been unable to settle.
- **What the FCC Should Do:** NPCC respectfully requests that the FCC respond to the Oregon PUC's three-year-old request for guidance on the issue of refunds for Qwest's unjust enrichment, with the following key points.
 - The FCC should recognize that in Oregon — unlike every other state where refunds are at issue — the PUC's consideration of refunds remains open and pending. Thus, Qwest cannot claim that federal pre-emption and/or *res judicata* bar NPCC's refund claims.
 - The FCC should clarify that its payphone *Waiver Order* should be interpreted to mean that regulatory delays and legal appeals in implementing compliant payphone rates do not vitiate Qwest's obligation to pay refunds for the period in which its payphone access line rates in Oregon were non-compliant.
 - The FCC should reject, yet again, the claim that Qwest had the legal authority to self-certify that its rates were compliant.
 - The FCC should reject, yet again, the claim that the FCC's *Wisconsin* orders somehow "changed" the FCC's new services test.
 - The FCC should respect and acknowledge the Ninth and Tenth Circuits' holdings that the filed tariff doctrine does not bar refunds under the *Waiver Order*.



Orego

Theodore R. Kulongoski, Governor

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November 23, 2005

Chairman Kevin Martin
Federal Communications Commission
445 12th Street SW
Washington, D.C. 20554

RE: CC docket 96-128

Dear Chairman Martin:

We are writing to request prompt Commission action in CC Docket 96-128, the Consolidation Petition proceeding. Commission action in the docket would allow states, including Oregon, to determine whether incumbent local exchange carriers are bound by the refund provisions of Commission Order DA 97-805 (the *Waiver Order*).

This letter is prompted by a specific issue we are addressing. Specifically, we must determine whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" established in the Commission's *Payphone Orders*. This determination has been mandated by the Oregon Courts.

The Oregon Commission could, of course, interpret Order DA 97-885 in an order. If we were to do so, however, we are certain that either Qwest or the PSPs would appeal our decision. This would likely lead to several years of litigation concerning issues that can best be resolved by your Commission. The only way to avoid such a scenario would be for the Commission itself to interpret the *Waiver Order*. That is why we are requesting that the Commission act as expeditiously as possible in CC Docket 96-128.

Thank you for your consideration.

Lee Beyer
Chairman

John Savage
Commissioner

Ray Baum
Commissioner

cc: Brooks Harlow, Miller Nash
Don Mason, Qwest