

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 05-cv-00711-LTB-MJW

MARLYS RATHBUN and LEROY RATHBUN,
on behalf of themselves and all others similarly situated,
Plaintiffs,

v.

QWEST COMMUNICATIONS INTERNATIONAL, INC.,
and THE QWEST TELEPHONE CONCESSION PLAN,
Defendants.

**CONSOLIDATED AMENDED
CLASS ACTION COMPLAINT FOR VIOLATIONS OF
THE EMPLOYEE RETIREMENT INCOME SECURITY ACT**

Marlys Rathbun and Leroy Rathbun, by and through his attorneys, allege as follows:

NATURE OF THE ACTION

1. This is a civil enforcement action brought pursuant to Section 502(a)(1)(B), (a)(2), (a)(3) and (c)(3) of the Employee Retirement Income Security Act of 1974 (“ERISA”), 29 U.S.C. 1132(a)(1)(B), (a)(2), (a)(3) and (c)(3) concerning the establishment or maintenance by Defendant Qwest Communications International, Inc. and its predecessor companies (hereinafter “Qwest”) of a benefit for certain of its retired employees variously described as the “Telephone Concession,” the “Employee Discount” and/or the “Employee Discount Plan” which promised to and did provide that benefit in retirement to employees who met the requirements for a Service or Disability Pension and lived outside of the Qwest Service Area.

2. The fundamental premise of this lawsuit is that by informing post-divestiture employees that they would receive this Out-of-Service-Area Telephone Concession when they

retired with a Service or Disability Pension, and by providing this Out-of-Service-Area Telephone Concession to retirees, Defendant Qwest (and its predecessors) have established and/or maintained a “defined benefit plan,” the Qwest Telephone Concession Plan, within the meaning of section ERISA § 3(35), 29 U.S.C. §1002(35). By establishing and/or maintaining such a plan, Defendant Qwest became responsible for compliance with a myriad of statutory and regulatory obligations that apply to such plans under the provisions of ERISA. At all times, however, Defendant Qwest (and its predecessors) failed to comply with any of these requirements with respect to the Qwest Telephone Concession Plan.

3. This lawsuit alleges that Qwest (and its predecessors) violated every provision of ERISA governing defined benefit plans with respect to the Qwest Telephone Concession Plan based on the mistaken belief that the promise and provision of the Telephone Concession to certain retirees did not establish an ERISA covered employee benefit plan at all. But liability under ERISA does not require that Qwest (or its predecessors) to have knowingly or willfully violated ERISA, only that Qwest had failed to comply with the detailed statutory scheme governing defined benefit plans in establishing, maintaining and administering the Qwest Telephone Concession Plan for certain retirees and promising its benefits to employees on the condition that they retire having met the requirements for a Service or Disability Pension.

4. In December of 2003, Qwest announced that, beginning in January of 2004, it would no longer provide the Telephone Concession to retirees and employees after they retired, who had been receiving the Telephone Concession, and lived outside the Qwest service area. Such retirees received a letter from Qwest’s Chief Human Resources officer explaining that this cutback was made “[a]s part of our responsibility to wisely steward our financial resources.” In changing the terms of the benefit to the Plaintiffs and the class they seek to represent, Qwest

violated the anti-cutback provision of ERISA § 204(g), 29 U.S.C. § 1054(g), which prohibits plan amendments that reduce the accrued benefit under the terms of the plan. By conditioning the Telephone Concession benefit owed to recipients of the benefit on residence in a Qwest service area, Qwest also violated the vesting provisions of ERISA § 203, 29 U.S.C. § 1053, which requires that each plan must provide that once an employee earning a pension benefit has satisfied ERISA's minimum vesting requirements his pension benefit must be non-forfeitable, i.e. unconditional (with certain exceptions enumerated in the statute and not relevant here).

5. Plaintiffs seek reformation of the Qwest Telephone Concession Plan and the documents governing it to comply with ERISA, an Order requiring Qwest to fund the Qwest Telephone Concession Plan, as reformed, in accordance with ERISA's funding provisions, the appointment of an independent fiduciary to administer the Qwest Telephone Concession Plan and manage its assets including its right to receive contributions from Qwest in compliance with ERISA, and an Order requiring the Qwest Telephone Concession Plan to reinstate the benefits to Plaintiffs and other class members consistent with the terms of the Qwest Telephone Concession Plan, as reformed. Likewise, the decision by Qwest to cut benefits applied to current employees and their beneficiaries living outside of the Qwest service area who were entitled to receive the same benefit upon retirement, as of the end of 2003. As a result of the cut in benefits, these current employees and their beneficiaries also will be deprived of the benefit when those employees retire, in violation of ERISA's vesting and accrual provisions, ERISA §§ 203 and 204, 29 U.S.C. §§1053 and 1054.

JURISDICTION AND VENUE

6. This court has jurisdiction pursuant to ERISA § 502(e)(1), 29 U.S.C. § 1132(e)(1) which grants the federal courts jurisdiction over cases brought pursuant to ERISA, and exclusive

jurisdiction over all claims in this litigation other than that brought pursuant to ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

7. Venue is proper in this court pursuant to ERISA § 502(e)(2), 29 U.S.C. 1132(e)(2), because Qwest, a defendant in this action, is found in this district.

THE PARTIES

Plaintiffs

8. Plaintiff Marlys Rathbun retired in June 2001 from Defendant Qwest Communications International, Inc. She receives a Service Pension from the Qwest Pension Plan, and has received the benefit promised pursuant to the Qwest Telephone Concession Plan from Qwest Communications International, Inc. (or a predecessor company), since her retirement. Plaintiff resides in a portion of Montana, which is outside the local service area of Qwest Communications International, Inc. and has resided outside the Qwest Service Area since prior to January 1, 1990. Plaintiff Marlys Rathbun is entitled to receive additional reimbursements from the Qwest Telephone Concession Plan offered to employees who retired from Qwest Communications International, Inc. or its predecessor companies if the concession is reformed to comply with ERISA. As such, Plaintiff Marlyn Rathbun has a colorable claim to benefits under the Qwest Telephone Concession Plan and is a participant entitled to maintain an action with respect to such plan pursuant to ERISA § 502(a)(1)(B), (a)(2), (a)(3) and (c)(3), 29 U.S.C. 1132(a)(1)(B), (a)(2), (a)(3) and (c)(3), as defined in ERISA § 3(7), 29 U.S.C. § 1003(7).

9. Plaintiff Leroy Rathbun is, and at least since 1970 has been the husband of Marlys Rathbun, a former employee of Qwest who retired in June of 2001 with a Service Pension from the Qwest Pension Plan, and has received the benefit promised pursuant to the Qwest Telephone Concession Plan from Qwest since the date of her retirement until Defendant Qwest's December 2003 announcement of changes to the Telephone Concession Benefit. In addition, Leroy

Rathbun is also a retired employee of Qwest who retired in 2003. Since at least May, 1985, Leroy Rathbun has resided with his wife, in a portion of Montana, which is outside the local service area of Qwest and has received telephone service through the Telephone Concession Benefit (originally as provided to active employees and after his wife retired from Qwest as provided to eligible retirees of Qwest) continuously at that residence and has not moved or changed telephone service at that residence since 1985. If the Plan is reformed to comply with ERISA, Plaintiff Leroy Rathbun qualifies as a surviving spouse of a vested participant in any defined benefit pension plan and is entitled to a joint and survivor annuity pursuant to ERISA § 205. In addition, the terms of the Plan provided a benefit to spouses of retired Qwest employees by providing the benefit for two months after the retiree's death. As such, and under the terms of the Plan, Plaintiff Leroy Rathbun is a beneficiary, as defined in ERISA § 3(8), 29 U.S.C. § 1003(9), has a colorable claim to benefits under the Qwest Telephone Concession Plan and/or is entitled to maintain an action with respect to such plan pursuant to ERISA § 502(a)(1)(B), (a)(2), (a)(3) and (c)(3), 29 U.S.C. 1132(a)(1)(B), (a)(2), (a)(3) and (c)(3).

Defendants

10. Defendant Qwest Communications, International, Inc. ("Qwest") is a corporation organized under the laws of Delaware which has its corporate headquarters and principal place of business located at 1801 California Street, Denver Colorado, 80202. Defendant Qwest is a telecommunications company that provides communication services, data, multimedia and Internet-based services on a national and global basis, and wireless services, local and IntraLATA telecommunications and related services in a 14 state local service area, including Colorado, but not including part of Montana, where Plaintiff and Plaintiff's wife reside. In July 2000, Defendant Qwest merged with U.S. West, Inc. and Defendant Qwest is the surviving corporation. Qwest is the Plan Sponsor of the Qwest Telephone Concession Plan within the

meaning of ERISA § 3(16)(B), 29 U.S.C. § 1002(16)(B). In the absence of a Plan Administrator designated in or pursuant to any instrument governing the Plan, Qwest is also the Plan Administrator of the Plan within the meaning of ERISA § 3(16)(A), 29 U.S.C. § 1002(16)(A). As such Defendant Qwest is also a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A)(iii) because ERISA assigns Qwest, as Plan Administrator, discretionary responsibility in the administration of the Plan. In addition, under the documents which describe the Telephone Concession benefit, Qwest has discretionary authority and discretionary responsibility in the administration of the Plan, and as such is a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(A)(iii), 29 U.S.C. § 1002(21)(iii). As Qwest also exercises all discretionary authority and control over the management of the Plan, Qwest is a fiduciary with respect to the Plan within the meaning of ERISA § 3(21)(i), 29 U.S.C. § 1002(21)(i). Finally, by failing to enforce Qwest's funding obligation with respect to the Plan, Qwest has exercised discretionary authority and control of the Plan's assets, which consist entirely of Qwest's funding obligation, and as such Qwest is a fiduciary with respect to the Plan pursuant to ERISA § 3(21)(i), 29 U.S.C. § 1002(21)(i).

11. Defendant Qwest Telephone Concession Plan (henceforth "the Plan"), which provides for the Telephone Concession benefit offered to post-divestiture employees of Qwest who retire with a Service or Disability Pension and live Out-of-Service Area, is an employee benefit plan within the meaning of ERISA § 3(3) of 29 U.S.C. 1002(3), a "pension plan" with the meaning of ERISA § 3(2), 29 U.S.C. § 1003(2), and a defined benefit pension plan within the meaning of ERISA § 3(35), 29 U.S.C. § 1002(35).

RELEVANT TERMS

12. The term "local service" refers to the provision of local telephone service in area through a central office that does not require Intra-LATA or InterLATA services.

13. The term “Intra-LATA” refers to telephone service provided within a specific area code and is commonly referred to as “local long distance.”

14. The term “Inter-LATA” refers to traditional long-distance service.

15. The term “In Region” refers to the 14-state region in which Qwest is authorized to provide local telephone service.

16. The term “Service Area” or “Qwest Service Area” refers to the portions of the 14-state region in which Qwest provides local telephone service. Upon information and belief, there are portions of the 14-state region in which Qwest does not provide local telephone service.

17. The terms “In-Service Area Retiree” or “In-Service Area Employee” refers to a person whose residential telephone service is located in the 14-state region and in an area in which Qwest provides local telephone service.

18. The terms “Out-of-Service Area Retiree” or “Out-of-Service Area Employee” refers to a person whose residential telephone service is located outside the 14-state region or a location inside the 14-state region but for which Qwest does not provide local telephone service.

19. The term “Out-of-Service Retiree” or “Out-of-Region Employee” technically refers to a person whose residential telephone service is located outside the 14-state region, but is occasionally used interchangeably with the term “Out-of-Service Area” so as to include a person whose residential service is inside the 14-state region but for which Qwest does not provide local telephone service.

20. The term “Pre-Divestiture Retiree” refers to a person retired prior to the divestiture of the Bell companies, or on or before December 31, 1983.

21. The term “Post-Divestiture Retiree” refers to a person who retired from Qwest (or a predecessor) on or after January 1, 1984.

22. The “Telephone Concession” (also referred to as “Concession,” “employee discount plan” the “employee concession,” and/or the “retiree concession”) refers to the benefit provided by Qwest (or its predecessors) to provide (a) discounted or free local and Intralata telephone service either in the form of a discount for In-Service Area Employees (generally 50%) and In-Service Area Retirees (of 100% or free) and (b) cash reimbursement to Out-of-Service Area Employees (generally of 50%) and Out-of-Service Area Retirees.

23. The “Retiree Telephone Concession” (also referred to by Qwest as the “retiree concession” or “retiree concession plan”) refers to the Telephone Concession promised to and/or provided to Qwest employees who retired on a Service Pension or Disability Pension with 100% Local Telephone Service and 100% IntraLATA service Post-Divestiture.

THE TELEPHONE CONCESSION PLAN

24. The Telephone Concession Plan refers to the Retiree Telephone Concession benefits that Qwest informed Out-of-Service Area Post-Divestiture Employees that they would receive upon retirement or that Qwest actually provided to Out-of-Service Area Post-Divestiture Retirees, together with the administrative scheme and source of payment used to deliver that benefit. As used in this Complaint, the Plan does not refer to any Telephone Concession conferred on active employees while they were actively employed or In-Service Area Employees.

Plan, Fund or Program

25. The Post-Divestiture Out-of-Service Area Retiree Telephone Concession constitutes a “plan” within the meaning of ERISA § 3(3), 29 U.S.C. § 1002(3), because the Regional Policy & Procedures No. 1207 (“RPP No. 1207”), among other documents, sets forth (i) the intended benefits, (ii) a class of beneficiaries, and (iii) the procedure for receiving benefits. In addition, the source of funding is Defendant Qwest.

(a) *Intended Benefits:* The intended benefits of the Post-Divestiture Out-of-Service Area Retiree Telephone Concession provided to retirees are set forth in the RPP No. 1207. The purpose of the Out-of-Service Area Retiree Telephone Concession was to provide a benefit to those Out-of-Service Area Retirees comparable to the benefit provided to In-Service Retirees. As expressed in a letter dated October 5, 1990, Qwest predecessor U.S. West “recognize[d] that telephone concession [wa]s a very important benefit to [its retirees]” and acknowledged that its “policy [wa]s to provide retirees with [such] benefits. . .”

(b) *Class of Beneficiaries:* The Post-Divestiture Out-of-Service Area Retiree Telephone Concession was provided exclusively for certain eligible retired employees and their beneficiaries, as set forth in RPP No. 1207, among other documents. In addition, pursuant to RPP No. 1207, the Out-of-Service Area Retiree Telephone Concession explicitly provides benefits to the members of the eligible retiree’s surviving spouse or other dependents by providing cash reimbursement for telephone service for two months after the retired employee’s death.

(i) *Participants:* The categories of those Qwest employees and retirees who are identified in one of the categories in Sections 2.02, 3.02 and 4.02 and not excluded by Sections 2.03, 3.03 and 4.03 were eligible to receive the Retiree Telephone Concession as of December 2003. In general, eligible retirees were those employees identified in the above-referenced sections who “Retired with a Service Pension or Retired with a Disability Pension.” The categories of employees and retirees eligible to receive a Post-Divesiture Out-of-Service Area

Retiree Telephone Concession are identified in RPP No. 1207 §§ 2.05, 3.05 and 4.05, among other documents.

(ii) *Beneficiaries*: The terms of the Plan also identify the spouse (or other dependent) of eligible retirees as a beneficiary of the Plan, including, as eligible recipients for the continuation of benefits for two months after the death, as follows:

(1) In a “Benefits and Compensation” newsletter dated April 29, 1987, Qwest predecessor U.S. West explained “[w]hat are the benefits of the spouse or eligible dependent of a retiree at the time of the retiree’s death?” by explaining as follows:

At the time of the death of the retiree, concession telephone service will be continued for two billing periods. Service pensioners retired after 1/1/84 are **entitled** to 100% local service telephone concession. This includes service with Mountain Bell and independent companies.

(2) Likewise, in the most recent Employee Benefits Handbook provided to Plaintiffs, a section entitled “**Determining Survivor Benefits**” explains regarding the Telephone Concession as follows: “If this benefit has been provided, it will remain in effect for another two months. After that, it will be discontinued.”

(3) The form death notification letter from Qwest states is addressed to the retiree’s surviving spouse:

We received notification of the death of your spouse. Please accept our sincere sympathies for your loss.

In accordance with RPP-1207, the Qwest policy governing your employee discount benefit *you are entitled to continue to receive the employee discount for up to two billing periods after the death of your spouse.*

(c) *Procedure for Receiving Benefits:* The procedures for out-of-service area retirees to receive benefits is summarized in both the RPP No. 1207 as well as communications to retirees as follows:

- Retiree pays the entire amount of the bill to the company providing telephone service.
- [Retiree] signs any page of the billing statement and must include social security number
- [Retiree] forwards all pages of the itemized statement to: [Pensioner Telephone Concession Office] in Omaha, N[ebbraska].
- Reimbursements [for telephone concession benefit was] included on the retirees monthly pension check.

Established By Qwest

26. The Retiree Telephone Concession was established and/or maintained by Defendant Qwest (or a predecessor). After the merger with U.S. West, Defendant Qwest explicitly acknowledged and reaffirmed its role as the provider of the Plan (emphasis added):

With the completed merger of Qwest and U.S. WEST Communications, **Qwest is now the provider of your Employee Discount benefits (formerly referred to as telephone concession benefits)**. Enclosed is a supply of envelopes which are pre-addressed to the Pensioner Employee discount Office of Qwest. Your use of these envelopes helps expedite processing of your telephone bill and reimbursement of your Employee Discount.

27. Since 1989, the administration of the Retiree Telephone Concession was handled by Qwest's "Omaha Telephone Center" also known as the Omaha Telephone Concession Office (the "OTC"). Prior to December 2003, the OTC, was the office primarily handling Retiree Telephone Concession benefit administration for out-of-service area retirees as well as any inquiries relating to the Telephone Concession.

Pension Plan

28. The Post-Divestiture Out-of-Service Area Retiree Telephone Concession constitutes a Pension Plan within the meaning of ERISA § 3(2)(A) because it provides retirement income for at least the following reasons:

(a) The purpose of the Out-of-Service Area Retiree Telephone Concession was to provide a benefit in the form of cash reimbursement for Local and IntraLATA telephone service to its Out-of-Service Area retired employees and their beneficiaries as set forth in RPP No. 1207 in an amount that was comparable to the benefit received by In-Service Area Retirees.

(b) As expressed in a letter dated October 5, 1990, Qwest's predecessor U.S. West "recognize[d] that telephone concession [wa]s a very important benefit to [its retirees]" and acknowledged that its "policy [wa]s to provide retirees with [such] benefits. . ."

(c) The benefit provided to eligible employees by the Post-Divestiture Out-of-Service Area Retiree Telephone Concession was provided in the form of a cash reimbursement, which constituted gross income and taxable income (as defined by the Internal Revenue Code) to participants who retired from Qwest on or after January 1, 1984, such as Plaintiffs Marlys Rathbun, and their beneficiaries to the extent they received the benefit, and for which amount Defendant Qwest issued W-2s and/or 1099s and withheld money for taxes. As such, the benefits promised to and provided to such Out-of-Service Area Participants and Beneficiaries constituted income within the meaning of ERISA § 3(2)(A).

29. The Post-Divestiture Out-of-Service Area Retiree Telephone Concession constitutes a Pension Plan within the meaning of ERISA § 3(2)(A) because it results in a deferral of income for at least the following reasons:

(a) The benefit provided to eligible employees by the Retiree Telephone Concession provided to eligible retirees was provided on a monthly basis after the retirement of eligible employee and such benefits could not be received by the employee prior to retirement;

(b) Qwest's predecessor, U.S. West, specifically described the Telephone Concession received after retirement as the "retirement concession," the "pensioner concession" and explained that this benefit only "bec[a]me effective on [the retiree's] retirement date."

(c) While certain active employees received a Telephone Concession and some eligible active employees received an Out-of-Service Area Telephone Concession, the eligibility requirements to receive Telephone Concession as an active employee differed with the requirements to receive a Retiree Telephone Concession. In addition, the amount of Telephone Concession received by non-pension-eligible employees was at a level (50%) which was significant less than the level provided to pension-eligible employees and retirees (100%).

(d) The cash payments made to Out-of-Service Area Retirees for Telephone Concessions were paid to an employee on account of retirement or amounts paid to an employee after termination of the employment relationship on account of retirement.

(e) The benefit provided by the Post-Divestiture Out-of-Service Area Retiree Telephone Concession (1) meets the ordinary, dictionary definition of income and/or (2)

meets the definition of gross income and taxable income under the Internal Revenue Code.

Defined Benefit Pension Plan

30. The Post-Divestiture Out-of-Service Area Retiree Telephone Concession constitutes a Defined Benefit Pension Plan within the meaning of ERISA § 3(35) because it is a pension plan and is not an individual account plan.

FACTUAL ALLEGATIONS

31. During the period of their employment with Qwest (and its predecessors), Plaintiffs began receiving benefits pursuant to the Telephone Concession offered to active employees by Qwest and its predecessors. In 1985, while Plaintiffs were still employed by a predecessor of Qwest, Plaintiffs moved out of the Qwest service area. At all relevant times prior to January 2004, Plaintiffs were informed by Defendant Qwest (or a predecessor) that they qualified to receive Local and InterLATA Telephone Service through the Qwest Telephone Concession. After Plaintiff Marlys Rathbun retired, Plaintiffs began receiving a Post-Divestiture Out-of-Service Area Retiree Telephone Concession.

Historical Background of the Telephone Concession

32. Prior to the divestiture of AT&T, the wholly-owned holding companies of AT&T (including the predecessor companies of Qwest and U.S. West) informed their employees and retirees that they would provide and did provide a “Telephone Concession” benefit to qualifying retirees. Indeed, the “Baby Bell” companies which would subsequently constitute U.S. West (namely Mountain Bell, Northwestern Bell and Pacific Northwest Bell) – issued to their employees a brochure with the following or substantially similar language:

“TELEPHONE SERVICE AFTER RETIREMENT – Effective with your retirement, charges for your residence telephone service will be paid by this Company. This means that, except for a few

special types of service, you will receive free local service and be allowed a reasonable amount of toll service over Bell System or connecting lines within the continental United States and Canada during your lifetime. . . . After retirement, if you take up residence in an area not served by [the Company] this concession still applies.”

33. Pursuant the divestiture of AT&T effective January 1, 1984, the Baby Bell companies were transferred to new holding companies, including U.S. West, Inc. The Baby Bell companies which became part of U.S. West, Mountain Bell, Northwestern Bell and Pacific Northwest Bell, respectively became the Central Region, the Eastern Region and the Western Region of U.S. West.

34. Nothing in the terms of the divestiture of AT&T (or any related agreements) required the newly created holding companies, including U.S. West, to continue to provide employees who retired on or after January 1, 1984 with a “Telephone Concession” benefit after those employees retired.

Post-Divestiture Promises Regarding the Retiree Telephone Concession

35. Nonetheless, subsequent to the January 1, 1984 effective divestiture of AT&T and the creation of U.S. West, Inc. as the new holding company for Mountain Bell, Northwestern Bell and Pacific Northwest Bell, U.S. West, informed its employees and retirees that it would provide the “Telephone Concession” benefit to retirees receiving a service or disability pension regardless of whether they lived inside or outside the Qwest Service Area.

36. Throughout the time that Plaintiffs were employed at Qwest (or a predecessor or subsidiary), Qwest’s (or its predecessor, U.S. West) expressed its commitment to provide the “Telephone Concession” benefit to retirees in numerous publications distributed to its employees and retirees, including to those Out-of-Service Area Post-Divestiture Retirees.

37. On January 1, 1990, U.S. West adopted a new regional policy which limited the Telephone Concession provided to certain employees or retirees whose telephone service was provided by an Independent Telephone Service. The January 1, 1990 policy “grandfathered” the benefits promised to and provided to all current employees and retirees as part of the Out-of-Service Area Retiree Telephone Concession whose service was established as of January 1, 1990 and who did not move thereafter (except for retirees in the Central Region whose Telephone Concession, including their Retiree Telephone Concession was protected even if they moved).

38. Whenever U.S. West sold a local telephone exchange, it memorialized its commitment in policies and procedures for the “Telephone Concession” benefit with the following text: *“if U.S. West sells an exchange to an Independent Telephone Company, the sale will be [a] ‘transparent’ employee discount change for employees retired January 1, 1990 and forward. . . Employee Discount will cease when the retiree moves to a new or within the same Independent Company. . .*

39. After U.S. West’s merger with Qwest and up until December 2003, Qwest continued to represent and reaffirm its commitment to provide the “Telephone Concession” to Plaintiffs and class members, on the same terms as if the local telephone service continued to be provided by Qwest. For example, whenever Qwest sold a local telephone exchange to an Independent Telephone Company, Qwest sent out a standardized communication, such as with the following text which appeared in a notice issued in April 2001:

Dear Retiree: Recently, Qwest sold your local telephone exchange to an Independent Company . . . As a result, you must follow the new procedures in order to continue receiving Employee Discount . . . **Protection (or grandfathering)** of Employee Discount reimbursement due to sale of exchange by Qwest to an Independent Company **is contingent on region retired from as well as retirement date.**

Thus, Qwest continued the practice of “grandfathering” the former In-Service Area employees or retirees when Qwest sold the local telephone exchange which provided their telephone service and Qwest then provided such “grandfathered” retirees with reimbursement of their local telephone service as Out-of-Service Area Retirees.

The December 2003 Announcement

40. Despite its previous commitments, in December 2003, Qwest announced that it was no longer going to provide the “Telephone Concession” benefit to the Out-of-Service Area Retirees, who until that time had received the Retiree Telephone Concession and also to current Out-of-Service Area employees who were promised a Post-Divestiture Out-of-Service Area Telephone Concession after retirement.

41. On or about December 9, 2003, Qwest Executive Vice President and Chief Human Resources Officer Barry Allen sent Plaintiffs and other members of the class and/or their spouses a letter containing the following text:

“Dear Concession Participant, As part of our responsibility to wisely steward our financial resources and to encourage and promote use of Qwest products and services, the company has made the decision to no longer reimburse retirees and employees for services not provided by Qwest. Your December 2003 bill will be the last local service bill to be reimbursed.”

42. A similar letter or announcement was sent to the current employee class members which likewise terminated the ability of the current employee class members to receive an Out-of-Service Area Telephone Concession after retirement in the form it was administered as of December 2003.

43. As a result of the announcement of the new policy in the letter dated December 9, 2003, Plaintiffs and the class have not received any benefits pursuant to the Telephone Concession Plan subsequently and Plaintiff Leroy Rathbun reasonably believes that he, like other

spouses, will be denied a qualified joint and survivor annuity and any other benefits to which he is entitled as a beneficiary of the Telephone Concession Plan.

CLASS ACTION ALLEGATIONS

44. Plaintiffs brings this action on behalf of themselves and a class consisting of all persons who were participants or beneficiaries of the Qwest Telephone Concession Plan as of December 2003 and who fall into one of the following categories:

(1) Retirees of Qwest or U.S. West as of December 2003 (and spouses of those retirees) who (a) retired on or after January 1, 1984, (b) were eligible to receive the Telephone Concession as the benefit was administered (as defined by the RPP No. 1207) as of December 2003, and (c) resided outside the Qwest Service Area as of December 2003; OR

(2) Persons employed by Qwest as of December 2003 (and spouses of such employees) who (a) have lived outside the Qwest Service Area since January 1, 1990, and were eligible to receive the Telephone Concession upon retirement as the benefit was administered (as defined by the RPP No. 1207) as of December 2003 and (c) have not changed their residence since December 2003.

Excluded from the Class are the following persons: (1) persons who themselves were included in the class as finally certified by in *Colvin v. Qwest Communications International, Inc.*, No. 04-CV-39 (16th Jud. Dist. Otero Cty Col.) and who have not excluded themselves; and (2) Qwest's officers and directors, including officers and directors of any Qwest subsidiary, affiliate, predecessor, and any persons who acted as a fiduciary of the Plan, and any immediate family member, representative, heir, successor, or assign of any such persons.

45. The prerequisites of a class action pursuant to Rule 23(a) are met in this case because of the following:

(a) **Numerosity:** Members of the Class are so numerous that joinder of all members is impracticable. While the precise size of the class is presently unknown at

this time and can only be ascertained through appropriate discovery, Plaintiff believes that the class consists at least of hundreds of individuals, spread over a wide geographic area.

(b) **Commonality:** Common questions of law and fact exist as to all members of the Class and predominate over any individual questions to the Class. Among the questions of law and fact common to the Class are the following:

(i) Whether by adopting a policy and practice of providing the Post-Divestiture Out-of-Service Area Telephone Concession to employees who retire with a Service or Disability Pension, Qwest (and its predecessors) has established or maintained an employee benefit plan within the meaning of ERISA § 3(3), a pension plan within the meaning of ERISA § 3(2), and a defined benefit plan within the meaning of ERISA § 3(35)?

(ii) Whether Qwest is the Plan Administrator of the Plan?

(iii) Whether Qwest is a fiduciary with respect to the Plan within the meaning of ERISA § 3(21) because it: (A) serves as the Plan Administrator to the Plan; (B) exercises discretionary authority and control with respect to Administration of the Plan; (C) exercises discretionary authority or control with respect to the management of the Plan; or (D) exercises any authority or control with respect to the Plan's assets?

(iv) Whether Qwest violated ERISA's reporting and disclosure provisions by: (A) failing to provide Plan participants with a Summary Plan Description; (B) failing to either prepare or file an annual report Form 5500 with the United States Department of Labor including an audited financial statement

and an actuarial statement; (C) failing to provide participants with a Summary Annual Report; and (D) failing to notify participants that it failed to meet ERISA's minimum funding standards?

(v) Whether Qwest (and its predecessors) violated ERISA's minimum vesting standards (A) by establishing and/or maintaining the Plan without a provision that met one of ERISA's minimum vesting schedules (five year cliff vesting or graduated three to seven year vesting) and full vesting on attainment of normal retirement age; and/or (B) by adopting the Plan amendments eliminating Plaintiff's and the Class's right to receive the Retiree Telephone Concession because Plaintiff and the Class resided outside of the Qwest service area, thereby making conditional benefits that were required by ERISA's minimum vesting provisions to have been unconditional?

(vi) Whether Qwest (and its predecessors) violated ERISA's benefit accrual requirements that apply to defined benefit plans by establishing and/or maintaining the Plan so that the accrual of benefits was back-loaded in violation of ERISA § 204, such that no benefits under the terms of the plan accrued until an employee of Qwest or a predecessor retired having satisfied the conditions for a Service or Disability Pension, and that a participant with many years of service who became eligible for a deferred vested Pension from Qwest accrued no benefit at all under the Plan?

(vii) Whether Qwest violated ERISA § 204(g), which prohibits amendments that decrease any accrued benefit under a pension plan, by adopting the Plan amendment eliminating the right of Plaintiffs and the Class to receive the

Retiree Telephone Concession because Plaintiffs and the members of the Class resided outside of the Qwest service area?

(viii) Whether Qwest (and its predecessors) violated ERISA § 302 by failing to fund the Plan in accordance with the provisions of that section of ERISA?

(ix) Whether Qwest (and its predecessors) violated ERISA § 402 by failing to establish or maintaining the plan pursuant to a written instrument meeting the requirements of this section of ERISA?

(x) Whether Qwest has violated ERISA § 403 by failing to establish a Trust in accordance with the provisions of this section to hold its assets, which presently consist of Qwest's unmet funding obligation to the Plan?

(xi) Whether Qwest failed to establish a claims procedure for the Plan in compliance with ERISA § 503 and the regulations hereunder which, among other things, provide any Plan participant whose claim for benefits has been denied with a full and fair review by the appropriate named fiduciary of the decision denying the claim?

(xii) Whether Qwest, as a fiduciary with respect to the Plan, violated ERISA's fiduciary responsibility provisions, which require fiduciaries to fulfill their responsibilities with respect to a Plan solely in the interest of the Plan's participants and beneficiaries by failing to enforce the statutory provisions of ERISA, referred to above, as they applied to the Plan?

(xiii) Whether and to what extent Qwest should be required to pay the \$100 per day fine provided to Plaintiffs and each Class member for failure to

notify each of them pursuant to ERISA § 101(d) that Qwest had not made the minimum required funding payments under ERISA § 302?

(xiv) Whether the Plan and Qwest as the Plan's only funding source are liable under ERISA § 502(a)(1)(B) to provide the Retiree Telephone Concession to Plaintiffs and the Class, from January 1, 2004 and for the rest of their lives and two months?

(c) **Typicality:** Plaintiffs' claims are typical of the claims of the Class and Plaintiffs are aware of no individualized questions that will present manageability issues for the Class.

(d) **Adequacy:** Plaintiffs will fairly and adequately represent and protect the interests of the Class. Plaintiffs have no interest antagonistic to or in conflict with the interests of the Class as a whole. Plaintiffs have retained counsel to represent themselves and the Class who are experienced in the prosecution of class actions in general and ERISA litigation in particular.

46. This action is maintainable as a class action under one or more of the following subsections of Rule 23(b)(1), (b)(2), or (b)(3):

(a) **Rule 23(b)(1):** The prosecution of separate actions by individual members of the class would create a risk of (a) inconsistent and varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the Defendants herein; and (b) adjudications with respect to individual members of the class would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

(b) **Rule 23(b)(2):** Qwest's failure to establish, maintain, and/or administer the Plan in compliance with ERISA's requirements governing all employee benefit plans in general, and defined benefit pension plans in particular establishes that Defendants have acted and refused to act on grounds generally applicable to the Class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole.

(c) **Rule 23(b)(3):** Questions of law and fact common to the members of the Class predominate over any questions affecting only individual Class members, and a class action is superior to other available methods for the fair and efficient adjudication of the controversy presented by this Complaint. Moreover, members of the proposed class have little interest in individually controlling the prosecution of separate actions.

47. Plaintiffs are aware of no currently pending actions which are based on substantially the same operative facts as the present action. Plaintiffs are aware of a prior, now-settled class action, *Colvin v. Qwest Communications International, Inc.*, No. 04-CV-39 (16th Jud. Dist. Otero County, Col.), which solely included certain retirees of Qwest and by virtue of the definition in this case does not overlap with the class of retirees included in this case. Moreover, none of the active employees or spouses included in this class were included in the class in *Colvin*. Even so, because the conduct of Defendant Qwest (and its predecessors) constituted the establishment and/or maintenance of an employee benefit plan governed by ERISA, the claims asserted against Qwest in the state court action are preempted by ERISA § 514, 29 U.S.C. §1144, and the only avenue through which Plaintiff and the class can appropriately seek relief for Qwest's refusal to provide the Telephone Concession benefit to the

Class is through an action pursuant to ERISA over which the federal courts have exclusive jurisdiction.

48. No undue difficulties are anticipated to result from the prosecution of this suit as a class action.

EXHAUSTION

49. To the extent that Plaintiffs herein are under any obligation to exhaust plan remedies for the claims under ERISA set forth herein, it does not apply to statutory violations of ERISA, but only to a claim for benefits pursuant to § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B).

50. To the extent that any obligation exists to exhaust plan remedies for the failure to pay a claim for benefits pursuant to § 502(a)(1)(B) or otherwise, such exhaustion is excused based on futility for the following reasons:

(a) Defendant Qwest and Defendant Plan have not made available to Plaintiffs or any Class member a claims procedure compliant with ERISA § 503 by which Plaintiffs can (1) challenge Qwest's decision not to pay the Telephone Concession benefit, (2) challenge the legality of Qwest's purported amendment of the Plan eliminating her Telephone Concession benefit or (3) obtain review of or appropriate relief for any of the myriad allegations of this Complaint.

(b) In addition, on information and belief, no Class Members (especially the spousal class members) have been provided with any mechanism (even one out of compliance with ERISA § 503 or the regulations promulgated thereunder) through which they can obtain review of or a remedy for the denial of their requests for reinstatement of their Telephone Concession benefit. To comply with ERISA such a procedure must provide for review by an "appropriate named fiduciary." Because the Plan is not maintained pursuant to an instrument which identifies named fiduciaries in accordance

with ERISA § 402, any appeals procedure offered to members of the class would necessarily be insufficient to comply with ERISA.

COUNT I

Violation of Reporting and Disclosure Provisions (Against Defendant Qwest)

51. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

A. Summary Plan Description

52. At no time has Qwest or any of its predecessors provided participants or beneficiaries receiving benefits with a Summary Plan Description with respect to the Plan meeting the requirements of ERISA § 102, 29 U.S.C. § 1022, and the regulations promulgated thereunder.

53. Because Qwest has been the Plan Administrator of the Plan since in or about July 2000, by failing to provide participants, and where appropriate, beneficiaries, with a Summary Plan Description Qwest violated ERISA § 104, 29 U.S.C. § 1024.

B. Annual Report

54. At no time has Qwest or any of its predecessors prepared or filed an annual report with respect to the Plan with the Secretary of Labor in compliance with ERISA § 103, or a Form 5500 and associated schedules and attachments which the Secretary has approved as an alternate method of compliance with ERISA § 103, 29 U.S.C. § 1023.

55. Because Qwest has been the Plan Administrator of the Plan since at least July 2000, by failing to prepare and file an annual report with respect to the Plan with the Secretary of Labor in compliance with ERISA § 103, or a Form 5500 and associated schedules and

attachments that the Secretary has approved as an alternate method of compliance with § 103 of ERISA, Qwest has violated ERISA § 104(a), 29 U.S.C. § 1024(a).

C. Summary Annual Report

56. At no time has Qwest or any of its predecessors furnished participants or beneficiaries receiving benefits with a Summary Annual Report with respect to the Plan in compliance with ERISA § 104(b)(3) and regulations promulgated thereunder.

57. Because Qwest has been the Plan Administrator of the Plan since in or about July of 2000, by failing to furnish Plaintiffs or any member of the Class with a Summary Annual Report with respect to the Plan in compliance with ERISA § 104(b)(3) and regulations promulgated thereunder, Qwest has violated ERISA § 104(b)(3), 29 U.S.C. § 1024(b)(3).

D. Notification of Failure to Meet Minimum Funding

58. At no time has Qwest or any of its predecessors furnished participants and beneficiaries with a Notice with respect to the Plan pursuant to ERISA § 101(d)(1) informing them that Qwest (or its predecessors) had failed to make any payments required to comply with ERISA § 302 with respect to the Plan.

59. Since at least July 2000, Qwest has been the sponsor, and/or provider of the Retiree Telephone Concession, including the Post-Divestiture Out-of-Service Area Retiree Telephone Concession.

60. In addition, since at least July 2000, Qwest has provided the funding for the Post-Divestiture Out-of-Service Area Retiree Telephone Concession.

61. As such, Qwest has been the employer maintaining the Plan at least since in or about July 2000.

62. As a result, Qwest (and its predecessors) have violated ERISA § 302 by failing to fund the Plan, Qwest is liable for its own (and its predecessors) violations of ERISA § 101(d)(1),

and as such may be required by the Court to pay participants and beneficiaries up to \$100 per day for each day that Qwest (or its predecessors) have failed to provide Plaintiff and each Class member with the notice required by ERISA § 101(d)(1).

COUNT II

Violations of Minimum Vesting Standards (Against Defendant Qwest)

63. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

A. Absence of Required Vesting Schedule

64. At no time has the Retiree Telephone Concession contained a vesting schedule in compliance with the minimum vesting standards contained in ERISA § 203(a), 29 U.S.C. 1053(a).

65. An ERISA-complaint vesting schedule would have made the benefits to Plan participants, including the class, unconditional (with exceptions not relevant here) upon the completion of five years of service with Qwest or a predecessor or in a graduated fashion on the completion of 3-7 years of service with Qwest or a predecessor (with 100% vesting at seven years of service). To comply with ERISA participants who had attained age 65 would also have been 100% vested in any benefit they had earned under the terms of the plan.

66. Because Qwest (and its predecessors) have been the employers maintaining the Plan with the power to amend the Plan to comply with the minimum vesting provisions of ERISA, Qwest violated ERISA § 203(a), by failing to adopt a vesting schedule consistent with ERISA.

67. As a result of Qwest's failure to establish a vesting schedule compliant with ERISA, employees of Qwest who have worked for many years while the Plan was in operation

would have vested under any minimum vesting schedule compliant with ERISA, but have not been provided the right to receive the Telephone Concession benefit by virtue of (a) either living outside of the area served by Qwest (or a predecessor) or changing residences while living outside of the area served by Qwest or a predecessor, or (b) failing to qualify for a Service or Disability Pension from Qwest (or a predecessor).

68. The lack of an ERISA compliant vesting schedule has injured the class and others because such a vesting schedule would have precluded Qwest (or its predecessors) from administering the Plan so as to condition a participant's entitlement to a benefit (and therefore a beneficiary's entitlement to benefits) upon residence within the Qwest service area, upon not moving between locations outside the Qwest service area, or upon not moving outside the Qwest service area.

69. The lack of an ERISA compliant vesting schedule has also injured the Class and the Plan because in the absence of an ERISA compliant vesting schedule, the funding obligation mandated by ERISA (which Qwest has never met) has been unlawfully reduced.

B. Illegal Plan Amendments

70. Had the Plan contained an ERISA compliant vesting schedule, any amendment to the Plan changing the vesting schedule would have been illegal as to participants who had already vested or who had three years of service with the Plan, because ERISA §§ 203(c)(1) and (2), 29 U.S.C. §§1053(c)(1) and (2), prohibit changes to a Plan's vesting schedule with respect to Participants who (i) are already vested or (ii) have three or more years of service under the Plan and are not given the opportunity to have their vesting determined under the Plan prior to amendment.

71. By dint of service or the attainment of age 65, Plaintiffs, employee and retiree Class members would have been fully vested under any ERISA compliant vesting schedule.

72. Plaintiffs, the employee and retiree class members have completed more than seven years of service with Qwest (or a predecessor) while Qwest (or a predecessor) offered them a Telephone Concession benefit upon retirement.

73. The amendment to the Plan in December 2003 eliminating the Telephone Concession benefit necessarily would have illegally altered the Plan's vesting schedule had the Plan contained an ERISA compliant vesting schedule.

74. Because Qwest caused the Plan to be amended to eliminate the Telephone Concession benefit at a time when the Plan should have contained an ERISA compliant vesting schedule, said amendment violated ERISA §§ 203(c)(1) and (2) that prohibit certain amendments changing a plan's vesting schedule.

COUNT III

Violations of ERISA's Minimum Accrual Standards (Against Defendant Qwest)

75. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

76. At no time has the Plan complied with ERISA's minimum accrual standards contained in ERISA § 204, 29 U.S.C. § 1054.

77. These minimum accrual standards provide employers maintaining defined benefit plans with wide latitude to choose alternative accrual schedules that comply with ERISA, but they prohibit plans in which participant's accrual of benefits is backloaded to the final years prior to going into pay status.

78. By providing benefits only to individuals who qualified for an immediate Service or Disability Pension from Qwest (or a predecessor of Qwest), and providing no benefit during retirement at all to participants with many years of service who qualified for a deferred vested pension from Qwest or a predecessor of Qwest, the Plan violated ERISA's minimum benefit accrual standards in ERISA § 204.

79. Under the terms of the Retiree Telephone Concession, participant accrued a benefit only by staying in the employ of Qwest (or a predecessor) until the moment before he was eligible to immediately receive a pension.

80. This is the most extreme form of backloading possible and is inconsistent with ERISA's minimum accrual standards.

81. Because Qwest (and its predecessors) as the employer maintaining the Plan had the power to amend the Plan and determine its terms, Qwest violated ERISA § 204, by failing to adopt an accrual schedule for the Plan that complied with ERISA.

82. Although Plaintiffs, the employee and retiree Class Members had accrued a benefit under the Plan prior to the amendment eliminating the Telephone Concession Benefit for Plaintiffs and the Class in December 2003, Qwest's (and its predecessors') failure to comply with the minimum accrual standards has the effect of injuring the Plan by reducing the funding obligation of Qwest (and its predecessor) and had the effect of injuring Class Members whose spouses have not become eligible to retire with a Service or Disability Pension.

COUNT IV

Violation of ERISA's Anti-Cutback Rule (Against Defendant Qwest)

83. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

84. ERISA § 204(g), 29 U.S.C. 1054(g), prohibits plan amendments that reduce or “cut back” accrued benefits.

85. The December 2003 Amendment completely eliminated benefits for Plaintiffs and Class Members because they lived outside the Qwest service area.

86. As to Plaintiffs and Class Members who are retirees or are the spouses of retirees, the December 2003 amendment illegally cut back benefits that had already accrued. As to Class Members who are spouses of current employees as of December 2003, the December 2003 amendment cut back benefits that would have accrued under any permissible accrual schedule.

87. Because Qwest adopted the illegal amendment which eliminated benefits for the spouses of the Plaintiffs and the Class, Qwest violated ERISA § 204(g) by adopting the amendment.

COUNT V

Failure to Provide a Benefit in the Form of a Joint and Survivor Annuity (Against Defendant Qwest)

88. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

89. ERISA § 205, 29 U.S.C. § 1055, provides that any defined benefit plan must provide a benefit in the form of a qualified joint and survivor annuity to each vested participant who does not die before he begins to receive his benefit.

90. The Retiree Telephone Concession, including the Post-Divestiture Out-of-Service Area Retiree Telephone Concession, does not provide for a benefit in the form of a qualified joint and survivor annuity as required by ERISA § 205.

91. Because Qwest established and/or maintained the Plan without causing the Plan to offer a qualified joint and survivor annuity, Qwest violated ERISA § 205.

COUNT VI

**Failure to Provide Minimum Funding
(Against Defendant Qwest)**

92. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

93. ERISA § 302, 29 U.S.C. 1082, establishes minimum funding standards for defined benefit plans that require employers to make minimum contributions to their plans so that each plan will have assets available to fund plan benefits even if the employer maintaining the plan is unable to pay benefits out of its general assets.

94. Neither Qwest (nor its predecessors) have ever contributed any assets to the Plan in either whole or partial satisfaction of the minimum funding standards established by ERISA § 302.

95. As the employer maintaining the Plan, Qwest is responsible for making the contributions that should have been made pursuant to ERISA § 302 by itself (and its predecessors) at a level commensurate with that which would be required if the Plan had been properly amended to comply with ERISA's vesting and accrual standards.

96. By failing to make the required contributions to the Plan as set out above, Qwest (and its predecessors) have violated ERISA § 302.

COUNT VII

**Failure to Establish the Plan Pursuant to a Written Instrument
Meeting the Requirements of § 402
(Against Defendant Qwest)**

97. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

98. ERISA § 402, 29 U.S.C. § 1102, provides that every plan will be established pursuant to a written instrument which will provide among other things “for one or more named fiduciaries who jointly or severally shall have authority to control and manage the operation and administration of the plan” and will “provide a procedure for establishing and carrying out a funding policy and method consistent with the objectives of the plan and the requirements of [Title I of ERISA].”

99. Although the Retiree Telephone Concession was described to employees and retirees of Qwest (and its predecessors) in various written communications, the Post-Divestiture Out-of-Service Area Retiree Telephone Concession has never been established pursuant to a written instrument meeting the requirements of ERISA § 402.

100. Because Qwest (and its predecessors) was responsible for establishing and/or maintaining the Plan, and purported to amend it from time to time, Qwest (and its predecessors) violated § 402 by failing to promulgate a written instrument in compliance with ERISA § 402 to govern the plan’s operations and administration.

COUNT VIII

Failure to Establish Trust (Against Defendant Qwest)

101. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

102. ERISA § 403, 29 U.S.C. § 1103, provides that with exceptions not relevant here, all assets of an employee benefit plan shall be held in Trust.

103. While the Plan has no hard assets, its assets consist of the enforceable funding obligation owed by Qwest to the Plan pursuant to ERISA § 302 as detailed above. Like any other asset, this asset must be held in trust pursuant to ERISA § 403, in the possession of a

trustee empowered to manage the asset by among other things collecting on the funding obligation, absent the existence of Plan provisions not present here.

104. Upon information and belief, Qwest never established a Trust to hold assets of the Post-Divestiture Out-of-Divestiture Retiree Telephone Concession at any time from 2000 to 2005.

105. As a result, Qwest (and its predecessors), as the employer(s) establishing and/or maintaining the Plan, violated ERISA § 403 by failing to establish a Trust to hold Plan assets.

COUNT IX

Failure to Establish a Claims Procedure (Against Defendant Qwest)

106. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

107. ERISA § 503, 29 U.S.C. § 1133, and detailed regulations that have been promulgated thereunder by the Secretary of Labor codified at 29 CFR § 2560.503-1, provide that each plan must have a claims procedure that meets the requirements of the regulation providing for a procedure for, among other things: filing claims, obtaining information relevant to a claim; adequate notice of claim denials, the reasons therefore, and the procedures for appealing such denials; and standards governing appeals, including who can decide appeals, what information must be provided to those who appeal, and what explanation must be provided for the denial of appeals.

108. The Retiree Telephone Concession, including the Post-Divestiture Out-of-Divestiture Retiree Telephone Concession, has never had a claims procedure in compliance with ERISA § 503 and the regulations promulgated thereunder.

109. Because Qwest (and its predecessors) have established and/or maintained the Plan, Qwest violated ERISA § 503 by failing to establish a claims procedure for the Plan in compliance with ERISA § 503 and the regulations promulgated thereunder.

COUNT X

Breach of Fiduciary Duty

110. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

A. Breach of the Duty of Prudence and Loyalty

111. ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), provides in pertinent part that a fiduciary:

shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

- (A) for the exclusive purpose of :
 - (i) providing benefits to participants and beneficiaries;
and
 - (ii) defraying reasonable expenses of administering the plan;
- (B) with the care, skill, prudence and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims... [and]
- (C) in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this [title I of ERISA] and title IV.*

(emphasis added).

112. As a fiduciary with respect to the Plan, Qwest (and its predecessors) had the authority to enforce each provision of ERISA alleged to have been violated in the foregoing

paragraphs pursuant to ERISA § 502(a)(3). Having the authority to enforce the provisions of ERISA, the quoted passage of ERISA § 404(a)(1) imposed on Qwest (and its predecessors) the duty to enforce those provisions in the interest of the participants and beneficiaries of the Plan.

113. Defendant Qwest has never enforced any of the provisions of ERISA set forth in the previous counts with respect to the Post-Divestiture Out-of-Divestiture Retiree Telephone Concession.

114. By failing to enforce the provisions of ERISA set forth in previous counts, Qwest (and its predecessors) breached the fiduciary duties that they owed to Plaintiffs and the Class.

115. The failure of Qwest (and its predecessors) to enforce the funding obligations owed by Qwest (and its predecessors) to the Plan has resulted in a loss to the Plan equal to the foregone funding and earnings thereon, and profited Qwest (and its predecessors) by providing them the use of money owed to the Plan for the general business purposes of Qwest (and its predecessors).

B. Prohibited Transactions

116. ERISA §406(a)(1)(B), 29 U.S.C. § 1106(a)(1)(B), prohibits a fiduciary with respect to a plan from directly or indirectly causing a plan to extend credit to a party in interest, as defined in ERISA § 3(14), 29 U.S.C. § 1002(14), if he knows or should know that such transaction constitutes an extension of credit.

117. ERISA § 406(a)(1)(D), 29 U.S.C. § 1106(a)(1)(D), prohibits a fiduciary with respect to a plan from directly or indirectly causing a plan to use assets for the benefit of a party in interest, if he knows or should know that such transaction constitutes a use of plan assets for the benefit of a party in interest.

118. ERISA § 406(b)(1), 29 U.S.C. § 1106(b)(1), prohibits the use of plan assets by a fiduciary with respect to a plan in his own interest or for his own account.

119. As a fiduciary with respect to the Plan and an employer of employees covered by the Plan, Qwest (and its predecessors) are parties in interest with respect to the Plan pursuant to ERISA § 3(14)(A) and (C); 29 U.S.C. § 1002(14)(A) and (C).

120. By failing to enforce the funding obligations created by ERISA and owed to the Plan, Qwest (and its predecessors) have extended credit from the Plan to themselves in violation of ERISA § 406(a)(1)(B) when they knew or should have known that their failure to enforce the funding obligation constituted such an extension of credit.

121. By failing to enforce the funding obligations created by ERISA and owed to the Plan, Qwest (and its predecessors) have used Plan assets for their own benefit, when they knew or should have known that their failure to enforce the funding obligation constituted such a use of Plan asset, in violation of ERISA § 406(a)(1)(D).

122. By failing to enforce the funding obligations created by ERISA and owed to the Plan, Qwest (and its predecessors) have used plan assets in their own interest or for their own account, in violation of ERISA § 406(b)(1).

123. The failure of Qwest (and its predecessors) to enforce the funding obligations owed by Qwest (and its predecessors) to the Plan has resulted in a loss to the Plan equal to the foregone funding and earnings thereon.

124. The failure of Qwest (and its predecessors) to enforce the funding obligations owed by Qwest (and its predecessors) to the Plan has profited Qwest (and its predecessors) by providing them the use of money owed to the Plan for the general business purposes of Qwest (and its predecessors).

COUNT XI

**Benefit Claim pursuant to § 502(a)(1)(B) of ERISA, 29 U.S.C. § 1132(a)(1)(B)
(Against Defendant Qwest Telephone Concession Plan)**

125. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

126. As relief, for Counts II and IV, the Plan should be reformed to, among other things, revoke the amendment to the Plan which eliminated the Retiree Telephone Concession for Plaintiffs and the Class, based on their residence outside the Qwest service area.

127. ERISA § 502(a)(1)(B), 29 U.S.C. §1132(a)(1)(B), provides that a participant or beneficiary may bring a civil action “to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.”

128. Once the Plan is reformed as set forth above to reinstate Plaintiffs and the Class’s entitlement as participants and beneficiaries to receive the Post-Divestiture Out-of-Divestiture Retiree Telephone Concession, Defendant Plan, to the extent the Plan is funded, and Defendant Qwest as the funding source for Plan benefits to the extent that the Plan remains unfunded, should be ordered to pay the Retiree Telephone Concession to Plaintiffs and the participant Class Members pursuant to the terms of the Plan as reformed for their lifetimes and to the beneficiary Class Members pursuant to the terms of the Plan as reformed for their lifetimes and for two months thereafter as applicable under the terms of the Plan as it existed prior to the December 2003 Amendment. In addition, the Post-Divestiture Out-of-Divestiture Retiree Telephone Concession should be provided to the participants and beneficiary Class Members in the form of a qualified joint and survivor annuity. Finally, Plaintiffs and the Class are also entitled to a

declaration clarifying their right to receive the Post-Divestiture Out-of-Divestiture Retiree Telephone Concession.

COUNT XII

Claim for Civil Money Penalty Pursuant to § 502(a)(1)(A) of ERISA, 29 U.S.C. § 1132(a)(1)(A) (Against Defendant Qwest)

129. Plaintiffs incorporate and reallege by reference the foregoing paragraphs as if fully set forth herein.

130. ERISA § 502(a)(1)(A), 29 U.S.C. § 1132(a)(1)(A), provides that a beneficiary may bring a civil action for the relief provided in subsection (c) of ERISA § 502.

131. ERISA § 502(c)(3), 29 U.S.C. § 1132(c)(3), provides that an employer maintaining a plan who fails to meet the notice requirement of ERISA § 101(d) with respect to any participant may be liable for up to \$100 dollars per day from the date of such failure.

132. Because Qwest (and its predecessors) have been the employers maintaining the Plan and have not met the notice requirement of ERISA § 101(d) as set forth in Count One Subpart D, having failed at all times to give notice to Plaintiffs and the Class that the Plan has not met ERISA's minimum funding requirements, Defendant Qwest is liable to the Plaintiff and each member of the Class in an amount up to \$100 per day during the time that no notice has been given, as the Court may in its discretion order.

PRAYER FOR RELIEF

Plaintiffs and the Class hereby pray for an Order:

1. Reforming the Plan to comply with ERISA, including its provisions governing vesting, funding, and accrual of benefits and the provision of benefits in the form of a qualified joint and survivor annuity;

2. Requiring the adoption of an instrument governing the Plan that complies with ERISA § 402.
3. Requiring the establishment of a Trust to hold the assets of the Plan in compliance with ERISA § 403.
4. Requiring Qwest to Comply with ERISA's Reporting and Disclosure provisions by filing properly completed Form 5500s with the Secretary of Labor for the past years in which the Plan has been in existence; by distributing to Plaintiffs and the Class ERISA compliant Summary Plan Descriptions and Summary Annual Reports describing the Plan and summarizing its financial statements which comply with ERISA; and by providing Plaintiffs and the Class with notice of the Plan's Funding Deficiencies pursuant to § 101(d) of ERISA.
5. Requiring Qwest and the Plan to provide a claims procedure in accordance with ERISA § 503 and the regulations promulgated thereunder.
6. Requiring Qwest to fund the Plan in accordance with ERISA.
7. Requiring Qwest to make the Plan whole for any losses caused to the Plan by the failure of Qwest (and its predecessors) to fund the Plan and to disgorge any profits Qwest (and its predecessors) made by failing to fund the Plan and to enforce the funding obligations owed to the Plan.
8. Appointing an Independent Fiduciary or Fiduciaries authorized to hold the Plan's assets in Trust, manage and administer the Plan, enforce the terms of ERISA and the Plan against Qwest, and manage the Plan's assets.
9. Declaring and requiring that participants, once they retire, are entitled to receive the Telephone Concession benefit from the Plan or Qwest from January 1, 2004 until two months beyond Plaintiff's and each Class member's death.

10. Declaring and requiring that the Plan provide its benefit in the form of a joint and survivor annuity.

11. Requiring Qwest to pay a civil money penalty of up to \$100 per day to Plaintiffs and each Class member for each day that Qwest failed to inform Plaintiffs and each Class member of its failure to fund the Plan.

12. Requiring Qwest to pay attorney's fees and the costs of this action pursuant to ERISA § 502(g)(1), 29 § 1132(g)(1), and ordering the payment of reasonable fees and expenses of this action to Plaintiff's counsel pursuant to the common fund theory out of the money recovered for the Plan and/or the Class in this action.

13. Such other and further relief as the Court deems proper.

Dated: June 7, 2006

Respectfully submitted,

/s/ R. Joseph Barton
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