

1 Alan M. Mansfield (SBN 125998)
alan@rosnerandmansfield.com
2 John W. Hanson (SBN 214771)
john@rosnerandmansfield.com
3 ROSNER & MANSFIELD, LLP
10085 Carroll Canyon Road
4 San Diego, CA 92131
Tel: (858) 348-1005
5 Fax: (858) 348-1150

6 Attorneys for Plaintiffs

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8 **UNITED STATES DISTRICT COURT**
9 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

10 UTILITY CONSUMERS' ACTION
11 NETWORK and RICHARD and MARYLIN
12 MAYCUMBER, on behalf of themselves and all
others similarly situated,

13 Plaintiffs,

14 v.

15 POWERNET GLOBAL COMMUNICATIONS,
16 PNG TELECOMMUNICATIONS, INC.,

17 Defendants.

) CASE NO. 06CV1773-H (RBB)
) **CLASS ACTION**
) **FIRST AMENDED COMPLAINT FOR:**
) 1) Violation of Business and
) Professions Code §17200, *et seq.*;
) 2) Breach of Contract;
) 3) Violation of Consumers Legal
) Remedies Act;
) 4) Negligent Misrepresentation;
) 5) Fraud;
) 6) Declaratory Relief;
) 7) Violation of the Federal
) Communications Act, 47 U.S.C.
) §201(b);
) 8) Violation of Ohio Rev. Code
) §4165.01 *et seq.*;
) 10 Unjust Enrichment

21 Plaintiffs, by and through their attorneys, allege as follows against the above-named
22 defendants (hereinafter referred to collectively as "PowerNet" or "defendants"). Except as otherwise
23 noted, such allegations are made on information and belief, formed after an inquiry reasonable under
24 the circumstances, which allegations are likely to have evidentiary support after appropriate
25 investigation and discovery.

26 **SUMMARY OF COMPLAINT**

27 1. On personal knowledge, UCAN is a 501(c)(3) not-for-profit public interest advocacy
28 organization that has over 30,000 members in California, and both it and several of its members have

1 lost money or property or had their rights infringed upon as a result of the acts and practices here at
2 issue. The Maycumbers are a PowerNet telecommunications customer who use such services
3 primarily for personal, family or household use. At all times relevant to this Complaint, both
4 plaintiffs subscribed to PowerNet's land line telecommunications service, which provides long
5 distance telecommunications service.

6 2. At some point during the relevant time period (the exact time of which shall be
7 determined during the course of discovery, but believed to be at least since April 2003), defendants
8 began to include a percentage monthly charge on customers' bills under the "Taxes" heading labeled
9 "Network Access Charge." See Exhibit "1," which are true and correct copies of examples of
10 plaintiffs' PowerNet billing statements, and which are incorporated herein by reference.

11 3. PowerNet's description or explanation of these charges are not contained on these
12 monthly bills, and are misleading and deceptively mislabeled. PowerNet uniformly represented to
13 its customers that this "Network Access Charge" combines "Universal Service Fund and Carrier
14 Fees," but it does not define what "carrier fees" are. In fact, such fees are not government imposed
15 charges at all, as "carrier fees" are not government-mandated fees and the Universal Service Fund
16 recoupment fee is voluntary. In response to plaintiffs' demand, PowerNet has admitted this fee
17 actually comprises three separate charges, only one of which (the Universal Service Fund
18 component) is for an actual government program.

19 4. The Federal Communications Commission ("FCC") sets the level of Universal
20 Service Fund fees on a quarterly basis. These fees have ranged over the years between 8% and 11%
21 of a customer's interstate long distance charges, but are to be uniform among customers. However,
22 the Network Access Charge varies between customers, and ranges between at least 22% and 28%
23 of a customer's total long distance charges (both interstate and intrastate), resulting in the largest
24 non-toll charge on a customer's bill.

25 5. As a result, despite its obligations to avoid disseminating uniformly misleading billing
26 statements, PowerNet is able to mask what appears to be recoupment of general overhead and a
27 secret profit center by combining such costs with other government set rates and representing it all
28 as being "taxes", then charging customers to recoup PowerNet's contributions to Universal Service

1 Fund charges at levels far greater than actually paid to the government. In fact, such charges are not
2 required by the government to be passed on to consumers, resulting in PowerNet reaping substantial
3 rewards and being unjustly enriched as a result of their deceptive billing practices.

4 6. This line item charge was uniformly represented to PowerNet's customers on monthly
5 bills to be a tax or fee imposed by the government by being listed under the "Taxes" section of the
6 bill. Yet, based on the other charges it imposes and the government limits on the amount of
7 Universal Service Fund, these added charges are neither imposed by the government on consumers
8 nor necessary to incur to comply with government mandates. Indeed, in an intrastate tariff filed with
9 the California Public Utilities Commission, PowerNet admitted that the Network Access Charge is
10 only supposed to be 10.8% of a customer's charges and is not a tax.

11 7. In assessing the Network Access Charge, PowerNet did not fully disclose to its
12 customers that this charge is not governmentally mandated and, instead, misled its customers to
13 believe that the charge is a tax due to its title and location on the uniform monthly bills. PowerNet
14 has thus consistently and uniformly misrepresented to its customers the true purpose of these charges
15 and its billing practices, claiming that certain significant monthly fees that likely garner PowerNet
16 on average in excess of over \$100.00 a year per customer are imposed to comply with certain
17 government mandates or are imposed on consumers by the government, when in fact neither is true.
18 Alternatively, if the fee is charged for the purpose represented by PowerNet in terms of recouping
19 Universal Service Fund costs, it has been illegally imposed on thousands of persons. Under either
20 scenario such a fee is not properly labeled as a "tax" and collected at the level imposed, and thus
21 should be refunded in whole or in part.

22 JURISDICTION AND VENUE

23 8. This action has been removed to federal court by defendants pursuant to the
24 provisions of the Class Action Fairness Act, 28 U.S.C. §1332. Plaintiffs take no position whether
25 such removal was proper. This Court has jurisdiction over the claims asserted and the defendants
26 because each are individuals, associations or corporations that are either based in, authorized or
27 registered to conduct, or in fact do conduct, substantial business in the State of California. Since
28 defendants estimate over a quarter of their customers are located in California, each of the defendants

1 has sufficient minimum contacts with California, or otherwise intentionally avail themselves of the
2 markets within California, through the collection of monies and the distribution of their services in
3 California to render the exercise of jurisdiction by the California courts permissible under traditional
4 notions of fair play and substantial justice. This action challenges PowerNet's deceptive description
5 of the Network Access Charge and its failure to fully and fairly disclose the nature of such fees. No
6 state or federal regulatory agency has either authorized this conduct or has primary, exclusive or any
7 jurisdiction over the wrongful conduct at issue herein nor can provide the complete relief prayed for
8 in this matter, as the relevant state and federal regulatory agencies possess neither exclusive nor
9 primary jurisdiction over the billing or disclosure methods of such charges, or have "de-tariffed" the
10 entire regulatory scheme such that there is no basis or reason to refer this matter to the FCC. By
11 statute the courts are the sole means available to obtain class-wide relief, as the focus of this
12 litigation is defendants' uniform deceptive billing practices and their method of non-disclosure and
13 misrepresentation of the reasons and bases for charging the Network Access Charge to customers,
14 and the resulting injury to PowerNet customers.

15 9. Venue is proper in this District as the acts upon which this action is based occurred
16 in part in this District. Plaintiffs reside in this District, and defendants received substantial
17 compensation and profits from the sale of their products and services in this District, caused
18 misrepresentations to be disseminated, entered into agreements and transactions and/or breached
19 agreements in this District. Thus, defendants' liability arose in part in this District.

20 **PARTIES**

21 10. (a) On personal knowledge, plaintiff Utility Consumers' Action Network
22 ("UCAN") is a consumer advocacy organization, with its office located at 3100 Fifth Avenue, San
23 Diego, California. Plaintiff has been a customer of PowerNet, and both it and several of its members
24 have been adversely affected by the acts and practices in question and have suffered injury in fact
25 and lost money or property or had their rights infringed upon as a result of such acts and practices
26 by being charged and required to pay the Network Access Charge.

27 (b) On personal knowledge, plaintiffs Richard and Marilyn Maycumber are residents of
28 San Diego County, California. Mr. Maycumber is over 70 years old and thus is or should be entitled

1 to trial preference. The Maycumbers have been a customer of PowerNet and have suffered injury
2 in fact and lost money or property or had their rights infringed upon as a result of such acts and
3 practices by being charged and required to pay the Network Access Charge.

4 11. Defendants PowerNet Global Communications and PNG Telecommunications, Inc.
5 are corporations with their headquarters at 100 Commercial Drive, Fairfield, Ohio 45014, and are
6 operating and conducting business throughout California and the United States.

7 12. At all times mentioned in the Causes of Action alleged herein, each and every
8 defendant was an agent, representative, affiliate, or employee of each and every other defendant, and
9 in doing the things alleged in the Causes of Action stated herein, each and every defendant was
10 acting within the course and scope of such agency, representation, affiliation, or employment and
11 was acting with the consent, permission and authorization of the other defendants. During the
12 relevant time period, defendants agreed to misrepresent to the Class members the material facts at
13 issue herein and/or not to notify Class members about the scope and nature of the illegal business
14 practices as detailed herein regarding the disclosure and imposition of and bases for the Network
15 Access Charge, thus engaging in a conspiracy that resulted in injury to members of the Class. All
16 actions of each defendant, as alleged in the Causes of Action stated herein, were ratified and
17 approved by the other defendants or their respective directors, officers and/or managing agents, as
18 appropriate for the particular time period alleged herein.

19 13. Whenever this Complaint refers to any act or acts of defendants, the reference shall
20 also be deemed to mean that the directors, officers, employees, affiliates, or agents of the responsible
21 defendant authorized such act while actively engaged in the management, direction or control of the
22 affairs of defendants, and each of them, and/or by persons who are the alter egos of defendants, or
23 while acting within the scope of their agency, affiliation, or employment. Whenever this Complaint
24 refers to any act of defendants, the reference shall be deemed to be the act of each defendant, jointly
25 and severally.

26 **CLASS ACTION ALLEGATIONS**

27 14. This action is brought and may properly be maintained as a class action pursuant to
28 the provisions of Federal Rules of Civil Procedure, Rule 23. Plaintiffs bring this action on behalf

1 of all others similarly situated based on their own circumstances as representative members of the
2 following proposed class (the "Class"): All individual persons or entities who have obtained long
3 distance telecommunications service from PowerNet and were billed for the Network Access Charge
4 at any time during the relevant time period (i.e., since the date this charge first appeared on
5 customers' bills, which has been since at least April 1, 2003). Plaintiffs also bring this action on
6 behalf of a Sub-class of all individual persons and entities who resided in California and were billed
7 for the Network Access Charge during the relevant time period.

8 15. Plaintiffs seek both equitable relief, including declaratory, injunctive, restitutionary
9 and other equitable monetary relief, and economic, compensatory, exemplary and/or statutory
10 damages as set forth more fully below, including but not limited to full credits for and/or repayment
11 of the improperly charged fees, any late fees wrongfully assessed, or any other monies that were
12 improperly required to be expended as a result of defendants' wrongdoing, plus interest thereon.

13 16. Specifically excluded from the proposed Class are the Court and its staff, defendants,
14 any entity in which any of the defendants have a controlling interest, and the officers, directors,
15 affiliates, legal representatives, successors, subsidiaries, and/or assigns of any such entity.

16 **NUMEROSITY OF THE CLASS**

17 17. The proposed Class is so numerous that the individual joinder of all its members in
18 one action is impracticable. While the exact number and the identities of Class members are
19 unknown at this time and can only be ascertained through appropriate investigation and discovery,
20 defendants conduct business nationwide and presumably bill all their customers uniformly and
21 include the same Network Access Charge in these monthly bills. According to defendants' public
22 filings with the California Public Utilities Commission, as of February 2004 (during the time these
23 charges were likely being imposed) PowerNet had over 350,000 customers nationwide and close to
24 89,000 customers in California. Plaintiffs therefore estimate the Class includes hundreds of
25 thousands of individual members.

26 **EXISTENCE AND PREDOMINANCE OF COMMON QUESTIONS**
27 **OF LAW AND FACT**

28 18. Common questions of law and fact arising out of the claims here at issue exist as to

1 all members of the Class and predominate over any potential individual issues. These common legal
2 and factual questions include, but are not limited to, the following:

3 a. What are the true costs covered by the Network Access Charge here at issue and
4 whether defendants misrepresented the bases and reasons for imposing such fees as “taxes”;

5 b. Whether the uniform communications between Class members and defendants as
6 detailed below included defendants’ misleading and inaccurate statements about the nature of certain
7 charges imposed on Class members by PowerNet, or resulted in the issuance of telephone bills
8 containing either no descriptive information or using misleading or deceptive language;

9 c. Whether defendants’ uniform course of conduct was unreasonable and unconscionable
10 or constitutes acts of unfair competition, misleading or deceptive acts or practices, intentional,
11 reckless or negligent misrepresentation or concealment of material facts;

12 d. Whether defendants’ statements about such fees as being “taxes” constitute a material
13 misrepresentation;

14 e. Whether defendants intentionally, recklessly, negligently or otherwise misrepresented
15 to Class members the facts as detailed below, or omitted to disclose material facts necessary in order
16 to make defendants’ other statements not misleading for want of disclosure of such omitted facts;

17 f. Whether defendants knew, recklessly disregarded or reasonably should have known
18 about the material misstatements and omissions in their uniform statements regarding the facts as
19 set forth below;

20 g. Whether and when defendants fully disclosed the true facts that contradicted their
21 prior misrepresentations and omissions;

22 h. Whether defendants continued to collect the monies here at issue despite their
23 knowledge of or reckless or negligent disregard for the true facts;

24 i. Whether the uniform statements and billing language utilized by defendants to
25 identify or describe the Network Access Charge were untrue, violated state or federal directives for
26 ensuring billing statements were clear and not misleading;

27 j. Whether defendants improperly imposed certain charges that were not to be imposed
28 upon the Class members at the levels imposed based on the descriptions provided, and improperly

1 identified such charges as “taxes” on defendants’ uniform monthly billing statements;

2 k. Whether defendants fraudulently, recklessly, negligently or otherwise concealed the
3 true facts at issue in this action;

4 l. When defendants initiated this scheme to mislead Class members;

5 m. The amount of revenues and profits defendants received and/or the amount of monies
6 or other obligations imposed on or lost by Class members as a result of such wrongdoing;

7 n. Whether Class members are threatened with irreparable harm or are otherwise entitled
8 to injunctive and other equitable relief and, if so, what is the nature of such relief; and

9 o. Whether Class members are entitled to payment of equitable monetary relief, actual,
10 incidental, consequential, exemplary and/or statutory damages, plus interest thereon, and if so, what
11 is the nature of such relief.

12 **TYPICALITY OF CLAIMS**

13 19. Plaintiffs’ claims are typical of the claims of members of the Class. Plaintiffs, directly
14 and/or through UCAN’s members, as well as the members of the Class, were all victims of the illegal
15 practices in question by being wrongfully charged the fees here at issue, not receiving accurate
16 information from defendants, and not receiving reimbursement of such charges plus interest thereon,
17 as well as an agreement by defendants to provide a clear and conspicuous corrective notice.
18 Plaintiffs and all Class members have similarly had their legal rights infringed upon, sustained
19 injuries, losses and damages as described herein and/or are facing irreparable harm arising out of
20 defendants’ common course of conduct. The right of each member of the Class to payment of any
21 actual, incidental, consequential, exemplary and/or statutory damages or equitable monetary relief
22 resulting therefrom equally arise from and are attributable to defendants’ wrongful conduct in
23 violation of the laws alleged herein.

24 **ADEQUATE REPRESENTATION**

25 20. Plaintiffs will fairly and adequately protect the interests of the members of the Class
26 in that they have no irreconcilable conflicts with or interests materially antagonistic to those of the
27 other Class members. The interests of the plaintiffs are aligned with the interests of the absent Class
28 members and are focused in the same direction. They understand the nature of these allegations and

