

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Cost-Based Terminating Compensation) CC Docket Nos. 95-185 and 96-98,
For CMRS Providers) WT Docket No. 97-207

COMMENTS OF QWEST CORPORATION

Qwest Corporation (“Qwest”) hereby files these comments on SBC Communications Inc.’s (“SBC”) Application for Review (“AFR”)¹ of the Joint Letter issued by the Common Carrier Bureau and the Wireless Telecommunications Bureau (collectively the “Bureaus”).² Qwest supports SBC’s AFR because Commercial Mobile Radio Service (“CMRS”) providers are already presenting the Joint Letter to state commissions as binding policy. As explained below, however, the Joint Letter does not establish binding rules, because it fails to comply with the requirements of the Administrative Procedure Act.

SBC requests review and clarification of the Joint Letter in which the Bureaus advise Sprint PCS that CMRS providers would be entitled to asymmetrical compensation for transport and termination of traffic if they can show that certain costs associated with “spectrum, cell sites, backhaul links, base station controllers and mobile switching centers vary, *to some degree*, with the level of traffic that is carried on the wireless network[.]”³ The Joint Letter also states that a carrier could collect tandem switching rates whenever it serves “a geographic area comparable to

¹ Application for Review of SBC Communications Inc. filed June 8, 2001.

² Letter of Thomas J. Sugrue and Dorothy T. Attwood to Charles McKee, Sprint PCS, May 9, 2001 (“Joint Letter”).

³ Id. at 3 (emphasis added).

that served by the incumbent LEC's [local exchange carrier] tandem switch" regardless of whether the carrier's switch performs tandem switching functions.⁴

The SBC AFR points out, correctly, that the Joint Letter can be read in a manner that is plainly inconsistent with the Federal Communications Commission's ("Commission") reciprocal compensation rules. To the extent the Joint Letter departs from those rules, the principles set forth in the Joint Letter constitute erroneous interpretations of the Commission's rules. We do not reiterate here SBC's salient points, but instead focus on the procedural flaws underlying the Joint Letter.

The policies set forth in the Joint Letter cannot constitute binding legislative rules because they were not adopted in a manner consistent with the Administrative Procedure Act ("APA"). The proceeding which led to the Joint Letter was initiated by Sprint's letter of February 2, 2000 (a year and a half ago) ("Sprint Letter"). Subsequently, following a Public Notice establishing a formal comment cycle,⁵ fourteen parties, including Qwest, filed comments, and eleven filed reply comments. The Joint Letter, which was issued more than a year later, discusses none of the comments, arguments, or facts raised in that proceeding, other than to make a passing and neutral reference to the fact that there were comments filed by a number of parties. The Joint Letter was not published in the Federal Register.

Rather than analyzing the record which had been compiled, the Joint Letter relies entirely on statements appearing in a Notice of Proposed Rulemaking in the Intercarrier Compensation docket, which was issued two weeks prior to the date of the Joint Letter.⁶ Needless to say, the

⁴ Id. (citation omitted).

⁵ Public Notice, 15 FCC Rcd. 8141 (2000).

⁶ In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, rel. Apr. 27, 2001 ("Intercarrier Compensation NPRM" or "NPRM").

Intercarrier Compensation NPRM, being a Notice of Proposed Rulemaking, made no pretense that it was *promulgating* rules -- to the contrary, the NPRM merely sought comment on various possible changes to the Commission's rules. The Intercarrier Compensation NPRM did not even acknowledge that comments had been filed on the very issues addressed in the section of the NPRM cited in the Joint Letter.⁷

Under these circumstances, neither the Joint Letter nor the Intercarrier Compensation NPRM meets the standards of reasoned decision making prerequisite to the adoption of a legislative rule or a proper adjudication under the APA.⁸ There is no precedent which might permit the Commission (or the Bureaus jointly on their own) to promulgate a binding rule without paying even lip service to the requirements of the APA or the record compiled before the agency. The Bureaus do not have authority to modify the Commission's rules. While the Commission clearly possesses authority to modify its rules, the NPRM failed to comply with the necessary procedural requirements to effectuate such a rule change. As noted, the NPRM fails to address the numerous comments filed on these issues.⁹

Given the failure to meet the standard for adopting a legislative rule or proper adjudication, the Joint Letter constitutes at most a "policy statement" or other similar non-binding pronouncement outside the context of the proceeding in which comments on the Sprint Letter were sought and received. As a result, statements in the Joint Letter may not be enforced as binding Commission rules or policies. Neither incumbent LECs nor state regulatory

⁷ Id. at ¶¶ 104-105.

⁸ 5 U.S.C. §§ 553, 706(2)(D). See Motor Vehicle Mfrs. Ass'n of United States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

⁹ Intercarrier Compensation NPRM at ¶¶ 104-105. Modifying the Commission's rules in a Notice of Proposed Rulemaking also would be inappropriate because it would greatly delay, if not deny, a party's ability to seek judicial review of the modified rules.

commissions are bound by the statements in the Joint Letter until such time as the Commission conducts a formal proceeding and adopts rules addressing the issues enunciated in the Joint Letter -- if such a proceeding ever occurs.

Such a policy statement is viewed as the administrative equivalent of what the Commission “might” do if a certain situation arises, and does not set standards of conduct to be followed. This principle is well stated in Pacific Gas and Electric Co.,¹⁰ in which an interpretive policy statement by an agency was attacked on the basis that it had not, as is also the case with the Joint Letter, been promulgated pursuant to the notice and comment provisions of the APA. The agency defended its policy statement on the basis that it had no intention of attempting to enforce what many perceived as a new rule. The Court, in a decision discussed at length by Professor Davis,¹¹ describes the interaction between what the Commission may and may not do without compliance with the APA’s procedural requirements:

An administrative agency has available two methods for formulating policy that will have the force of law. An agency may establish binding policy through rulemaking procedures by which it promulgates substantive rules, or through adjudications which constitute binding precedents. A general statement of policy is the outcome of neither a rulemaking nor an adjudication; it is neither a rule nor a precedent but is merely an announcement to the public of the policy which the agency hopes to implement in future rulemakings or adjudications. A general statement of policy, like a press release, presages an upcoming rulemaking or announces the course which the agency intends to follow in future adjudications.¹²

In sum, to the extent the policies set forth in the Joint Letter are interpreted as departing from the Commission’s rules, those rules are not binding on any party or state commission.¹³

¹⁰ Pacific Gas and Electric Company v. FPC, 506 F.2d 33 (D.C. Cir. 1974).

¹¹ Davis and Pierce -- Administrative Law Treatise, Vol. I, pp. 228-33, Third Edition, 1994.

¹² Pacific Gas, 506 F.2d at 38 (footnotes omitted).

¹³ Qwest seeks clarification that the Joint Letter did not intend to allow a wireless carrier to recover reciprocal compensation twice for the same switch. Pursuant to many of its existing interconnection agreements, Qwest pays CMRS providers an end-office switching rate that is

Based on the foregoing, while the SBC AFR is not strictly necessary because the Joint Letter does not set binding rules of conduct for either incumbent LECs or any other entity, including state commissions, Qwest nevertheless supports SBC's filing and requests that it be given immediate attention. CMRS providers are already presenting the Joint Letter to state commissions on the erroneous premise that it represents a change in Commission policy and is binding on them. If the Commission wishes to change its rules to conform to the statements in the Joint Letter, it must do so on the basis of a rulemaking.¹⁴

For the foregoing reasons the SBC AFR should be granted expeditiously.

Respectfully submitted,

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based on the assumption that the CMRS provider employs a single switch. If a CMRS provider deploys a second switch, additional compensation generally is negotiated, if appropriate. The Joint Letter could be interpreted to indicate that a single competitive LEC switch serving a particular geographic area but not providing tandem functions should nevertheless be treated as a tandem switch. Were Qwest to do this, Qwest would then compensate a CMRS provider with a single switch for tandem switching, rather than end-office switching. Even if the Joint Letter were binding, it would not require Qwest to pay both end office and tandem reciprocal compensation for the same switch.

¹⁴ 5 U.S.C. § 551 (4) and 553 et seq.

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST CORPORATION** to be filed with the FCC via its Electronic Comment Filing System, and (1) a copy of the **COMMENTS** to be served, via hand delivery on the persons/entity denoted with an asterisk (*), and (2) a copy of the **COMMENTS** to be served via United States First Class Mail, postage prepaid, upon all other parties listed on the attached service list.

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June 25, 2001

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