

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.	)	CC Docket No. 97-21
	)	

**PETITION OF QWEST COMMUNICATIONS INTERNATIONAL INC.  
FOR STAY PENDING ACTION ON APPLICATION FOR REVIEW**

Pursuant to Section 1.102(b)(3) of the Federal Communications Commission’s (“Commission” or “FCC”) rules (47 C.F.R. § 1.102(b)(3)), Qwest Communications International Inc. (“Qwest”) hereby requests that the Commission stay the effective date of the *Order* of the Wireline Competition Bureau (“Bureau”), released December 9, 2004.<sup>1</sup> In the *Order*, the Bureau adopted a new rule prohibiting the revision of the annual Telecommunications Reporting Worksheet (“Worksheet”) more than twelve months after the due date of the original filing if the revision would decrease the universal service contribution or regulatory fees owed by the contributor. Modifications to the Worksheet reflecting increased contributions are still required.

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<sup>1</sup> *In the Matter of Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review – Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Changes to the Board of Directors of the National Exchange Carrier Associations, Inc.*, Order, CC Docket Nos. 96-45, 98-171, 97-21, DA 04-3669 (rel. Dec. 9, 2004) (Hereinafter “*Order*”).

Simultaneous with the filing of this Stay Petition, Qwest has filed an Application for Review of the *Order* with the Commission. This Stay Petition is accordingly covered by Section 1.102(b)(3) of the Commission's rules, which provides that:

If an application for review of a non-hearing or interlocutory action is filed, or if the Commission reviews the action on its own motion, the Commission may in its discretion stay the effect of any such action until its review of the matters at issue has been completed.

The Application for Review is attached hereto. The arguments made in the Application for Review are not repeated here.

In this case, as has been pointed out in the Application for Review, the Bureau's *Order* is legally defective on a number of fronts and, perhaps most significantly, inconsistent with the fundamental policies of this Commission in administering the universal service provisions of the Communications Act of 1934, as amended. These defects flow from the Bureau's erroneous failure to put the proposed new rule out for public notice and comment as is required by the Administrative Procedure Act ("APA").<sup>2</sup> Qwest requests that the effective date of the *Order* be stayed until after the Commission has acted on the Application for Review.

There are two separate avenues that the Commission can take in reviewing this Stay Petition, both of which lead to its grant.

First, the Commission can recognize that a petition to stay the effective date of an administrative order in a non-hearing case is subject to the same public interest analysis that the Commission applies when it examines requests that the effective date of other rule changes be stayed.<sup>3</sup> The language of the rule certainly permits such an approach.<sup>4</sup> In this case the Bureau

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<sup>2</sup> 5 U.S.C. § 553.

<sup>3</sup> See *In the Matter of Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems Non-Initialized Phones*, Memorandum Opinion and Order, 18 FCC Rcd 23383 (2003); *In the Matter of Rules and Regulations Implementing the*

has adopted a rule without notice and comment which is substantively contrary to the Commission's existing policies. In other words, there is no public policy that would motivate or permit the Commission to allow an unlawful rule adopted without notice and comment under delegated authority to remain in effect pending full review of that order by the Commission itself. Orderly process would dictate that the Commission stay the effective date of the rule at least until after the Commission itself has had the opportunity to review the new rule for lawfulness and consistency with the public interest following proper comments by affected parties. Qwest so requests.

Second, we recognize that at times the Commission has analyzed requests for stay of administrative orders issued under delegated authority under the four-part test set forth in *Virginia Petroleum Jobbers Association v. FPC*.<sup>5</sup> This test requires, as a prerequisite to obtaining a stay of an administrative order, that the petitioning party demonstrate:

1. A substantial likelihood of success on the merits;
2. Irreparable injury in the absence of a stay;
3. Absence of harm to others; and
4. The stay is in the public interest.

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*Telephone Consumer Protection Act of 1991*, Order, 19 FCC Rcd 20125 (2004); *Office of Engineering and Technology Announces Electronic Reporting Procedures for the Outage Reporting System Created by New Part 4 of the Rules*, Public Notice, DA 04-4059 (rel. Dec. 28, 2004).

<sup>4</sup> See *In the Matter of Jen-Shenn Song*, Order, 17 FCC Rcd 3503, 3505-06 ¶ 6 (Chief, Policy and Rules Branch, Commercial and Wireless Division, 2002). Such treatment would be consistent with the principle that the Commission has the general authority to suspend, waive, or modify its rules whenever "particular facts would make strict compliance inconsistent with the public interest." *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631 (D.C. Cir. 1996).

<sup>5</sup> *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921 (D.C. Cir. 1958). And see *In the Matter of the Applications of Cumulus Licensing Corp.*, Order, 16 FCC Rcd 1052 (2001); *In the Matter of CBS Communications Services, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 4471 (1998).

These are not hard and fast rules, but must be balanced in determining where the public interest best lies. A powerful showing on three of the factors can justify a stay even in the absence of substantial evidence on the fourth.<sup>6</sup>

In the instant case, Qwest's Stay Petition clearly meets three of the four criteria. 1) The likelihood of success on the merits is very strong—the Commission, and much less the Bureau, may not lawfully adopt new substantive rules, particularly rules that will have such a significant impact on so many parties, without following the notice and comment procedures mandated by the APA. The fact that the *Order* is inconsistent with the Commission's policies and relies on false assumptions is obviously a direct outgrowth of this critical failure to seek notice and comment from the public.<sup>7</sup> 2) There is no possibility of harm to any other party. Stay of the effective date of the new rule promulgated in the *Order* will prevent injustice to those carriers who are entitled to demonstrate their right to remission for overpayments in the past, but will not harm anyone, even remotely. 3) What is more, there is a strong public interest in the Commission's protecting its processes—a fact dramatically demonstrated in the instant case where proper adherence to the notice and comment requirements would have almost certainly led to a different conclusion than the one reached in the *Order*.<sup>8</sup> Thus, this Stay Petition presents an overwhelming case that the *Order* is likely to be reversed based on the Application for Review filed by Qwest, that the public interest will be served by a stay, and that there is no potential or actual harm to any party if the stay is granted. Under these circumstances, the stay should be granted.

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<sup>6</sup> *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843-45 (D.C. Cir. 1977).

<sup>7</sup> See Qwest Application for Review, filed concurrently at Section I.A.

<sup>8</sup> See *id.* at 6.

If the Commission were to insist that Qwest demonstrate irreparable harm as a prerequisite to granting this Stay Petition, proper application of the relevant precedent would likewise lead to a stay of the effective date of the *Order*. To be sure, the harm to Qwest would obviously not take place, at least not directly, until Qwest discovered a reporting error in one of its Form 499-As outside the 12-month window established in the new rules. At that point the new rules would prohibit Qwest from filing an appropriate amendment to the relevant Form 499-A unless the amendment resulted in additional universal service payments by Qwest, in which case the amendment would be required.

In other words, the new rule does not affect the conduct of Qwest or any other carrier until it is actually applied. In Qwest's case the effect would not be immediate, although history indicates that Qwest and others often have made corrections to Form 499-As in the past (reflecting both increases and decreases in contributions). Modifications that resulted in an increase in contributions were duly processed by USAC pursuant to the Commission's rules (the rules amended by the *Order*). As the *Order* found, modifications that resulted in a decrease in contributions also should have been accepted under those rules, assuming good cause for the revisions could be shown. Accordingly, the *Order* remanded to USAC those requests for modification that were pending prior to the effective date of the *Order*. Once it becomes effective, the *Order* changes the entire structure and processing of these filings, both by the Commission and by Qwest. Qwest submits that the harm to Qwest and to the Commission by having both Qwest and the Commission labor under an unlawful regime is irreparable, notwithstanding the fact that Qwest will presumably be able to make all appropriate Form 499-A adjustments and obtain proper refunds (or pay proper additional amounts) once the *Order* has been vacated by the Commission.

Under these circumstances, Qwest submits that the standard for stay established in *Virginia Petroleum Jobbers*, as modified in *Holiday Tours*, has been met.

In conclusion, Qwest submits that proper adherence to law and policy mandates that the Commission stay the effective date of the *Order* until after it has had the opportunity to review the *Order* itself and make necessary modifications (including seeking public comment). The primary basis for granting this stay is that it is proper under the Commission's rules to protect the public from unlawful orders issued under delegated authority whether or not the *Virginia Petroleum Jobbers* test has been satisfied. In any event, in the circumstances of this case, the standards set out by the D.C. Circuit Court of Appeals for grant of a stay in *Virginia Petroleum Jobbers* and *Holiday Tours* have been met, and a stay is warranted under that analysis as well.

Wherefore, Qwest respectfully requests, pursuant to Section 1.102(b)(3) of the Commission's rules, that the effective date of the *Order* be stayed until after conclusion of the Commission's analysis of Qwest's Application for Review.

Respectfully submitted,

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January 10, 2005

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **PETITION OF QWEST COMMUNICATIONS INTERNATIONAL INC. FOR STAY PENDING ACTION ON APPLICATION FOR REVIEW** to be 1) filed with the FCC via its Electronic Comment Filing System, 2) served via e-mail on the FCC's duplicating contractor, Best Copy and Printing, Inc. at [fcc@bcpweb.com](mailto:fcc@bcpweb.com), and 3) served via United States First Class mail, postage prepaid, on the Universal Service Administrative Company at the address listed below.

Richard Grozier  
Richard Grozier

January 10, 2005

ATTN: Form 499-A Revision Order  
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