

**Docket No. 04-35677**

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

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DAVEL COMMUNICATIONS, INC., *et al.*

*Plaintiffs/Appellants,*

v.

QWEST COMMUNICATIONS,

*Defendant/Appellee.*

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*Appeal from a Decision of the United States District Court  
for the Western District of Washington, No. C03-3680P  
The Honorable Marsha Pechman, District Judge*

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BRIEF OF APPELLEE

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, Qwest Corporation hereby states that it is a wholly-owned subsidiary of Qwest Communications International, Inc., a publicly-traded company (NYSE ticker symbol: Q) in which no person or entity owns 10 percent or more of its stock.

Respectfully submitted,

\_\_\_\_\_  
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## **STATEMENT OF JURISDICTION**

Appellee Qwest Corporation (“Qwest”) agrees with Appellants Davel Communications, Inc. *et al.* (the “Payphone Service Providers” or “PSPs”) that this Court has jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. PSPs Statement of Jurisdiction, however, misleadingly asserts that “[t]he trial court had jurisdiction over the federal claims.” Brief of Appellants (“Br.”) at 1. Whether the District Court had jurisdiction over PSPs’ claims is, of course, the very subject of this appeal.

## **COUNTERSTATEMENT OF ISSUES**

This appeal presents the following issues:

1. Whether the District Court correctly ruled that PSPs could not challenge, or obtain any relief from, rates set forth in Qwest’s tariffs filed with state public utility commissions (“State Commissions”), absent an order from the Federal Communications Commission (“FCC”) or State Commission setting aside those rates.
2. Whether the District Court correctly ruled that PSPs’ cause of action was barred by the Communication Act’s 2-year statute of limitations where PSPs knew or constructively knew of the grounds of their action in 1997.

## **COUNTERSTATEMENT OF THE CASE**

PSPs filed two separate but otherwise identical lawsuits, which the District Court consolidated into a single action (ER 0022). PSPs are fifty-four owners of payphones, known as “payphone service providers” in the industry. PSPs obtain from Qwest the phone lines for these payphones. PSPs essentially allege that

Qwest's rates for these phone line services, set forth in Qwest's filed tariffs from 1997 to 2002 or later, exceeded FCC guidelines. PSPs demand refunds for the amount by which the rates were in excess. PSPs also alleged that Qwest failed to file a tariff with the FCC from 1997 to 2003 for certain kinds of services known as "Fraud Protection."

Despite multiple rounds of briefing, PSPs remain confused as to which causes of action they assert. The Complaint cited various sections of the Communications Act as the grounds for PSPs' claims. *See* Complaint ¶¶ 21, 23-24 (ER 0005-0006) *citing* 47 U.S.C. §§ 201, 203, 206, 207, 276, 407 & 416.<sup>1</sup> In PSPs' Opposition brief filed with the District Court, PSPs ignored their own Complaint and relied *solely* on Section 407 of the Act. Now, in their Brief to this Court, PSPs cannot make up their minds. In one place, they change their position again and say their claim does *not* arise under Section 407. *See* Br. at 33 n. 17. But only a few pages later they claim that Section 407 *does* apply. *See id.* at 37. PSPs never precisely say whether they continue to rely on claims under the other sections of the Act, which they abandoned in their brief to the District Court.

PSPs also incorrectly assert in their "Statement of the Case" that Qwest "argued the statute of limitations as a basis for dismissal *for the first time on*

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<sup>1</sup> PSPs filed two original Complaints, one in the lawsuit *Davel Communications, Inc. v. Qwest Corporation*, No. C03-3680P (filed November 25, 2003), and another in *Access Anywhere v. Qwest Corporation*, No. C03-3819L (filed December 3, 2003). PSPs subsequently filed a First Amended Complaint in each action, which were identical but for different named plaintiffs. Br. at 1 n. 1. For ease of reference, Qwest's references and citations to PSPs' "Complaint" means the First Amended Complaint in the first-filed *Davel* lawsuit.

*reply.*” Br. at 3 (emphasis added). To the contrary, Qwest expressly stated in its initial Motion that PSPs’ claims with regard to Fraud Protection were grossly untimely and thus barred by the Communication Act’s two-year statute of limitations, 47 U.S.C. § 415(b). See Argument Part IV *infra*. PSPs elected not to address this particular issue in their Opposition to Qwest’s Motion.

The District Court granted Qwest’s motion under Fed. R. Civ. P. 12(b)(6) and dismissed the lawsuits. See Order dated July 28, 2004 (“Dismissal Order”) (ER 0290-0298). The District Court’s conclusion applied two well-settled doctrines: (1) the filed-rate doctrine, which this Circuit interprets as a jurisdictional bar to district courts reviewing the reasonableness of filed tariffs; and (2) the doctrine of primary jurisdiction, under which district courts refer to the responsible administrative agencies any challenges to the reasonableness of rates in filed tariffs.<sup>2</sup>

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<sup>2</sup> PSPs’ “Statement of the Case” incorrectly implies that the Dismissal Order did not apply the doctrine of primary jurisdiction. Br. at 3. To the contrary, the District Court applied the doctrine by dismissing PSPs’ claims without prejudice, *see* Dismissal Order at 8 (ER 0297), thereby allowing PSPs to refile their claims with State Commissions or the FCC. *See* Argument Part II.B *infra*.

## COUNTERSTATEMENT OF FACTS

### **I. QWEST FILED RATES FOR PAYPHONE LINE SERVICES AT STATE COMMISSIONS PURSUANT TO FCC REGULATIONS.**

Qwest is a local phone company in fourteen Western states. Qwest offers, among many other things, phone service to pay telephones. These services are called “public access line” (“PAL”) services. PSPs allege they own payphones and purchased Qwest’s PAL services since at least 1997 to obtain phone service for these payphones. Complaint ¶ 15 (ER 0005).

Qwest’s rates for PAL services were set forth in Qwest’s filed tariffs. Complaint ¶ 8 (ER 0003). PSPs essentially claim that these tariffed rates exceeded maximum amounts permitted by the FCC’s applicable regulations, and PSPs demand refunds of the allegedly excessive amount. To analyze these claims, it is necessary to understand the FCC’s governing regulations.

#### **A. In 1996, Congress Directed The FCC To Regulate Qwest’s Rates For Payphone Line Services.**

Traditionally, payphone line services – like any regular local phone line – were the exclusive domain of state law. Section 152 of the Communications Act of 1934 established a dichotomy whereby the FCC and federal law governed “interstate and international” communication services, but state governments had exclusive jurisdiction over “intrastate” services. 47 U.S.C. § 152(a) & (b). Before 1996, Qwest’s payphone line services were within the exclusive jurisdiction of the states. *See New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69,

75 (D.C. Cir. 2003) (“*NEPCC*”) (prior to enactment of Section 276, payphone line services were treated as exclusively intrastate services).<sup>3</sup>

Section 276, enacted as part of the Telecommunications Act of 1996 that amended the Communications Act, changed the landscape regarding payphone line services. *See* Pub. L. No. 104, 104th Cong. 2d Sess. § 151(a), 110 Stat. 56, 106 (1996), *codified at* 47 U.S.C. § 276. Section 276(a) directed the FCC to ensure open competition in the market for payphone services by regulating the PAL rates of the RBOCs:

(a) [A]ny Bell Operating Company that provides payphone service (1) shall not subsidize its payphone service directly or indirectly from its telephone exchange services operations or its exchange access operations and (2) shall not prefer or discriminate in favor of its payphone service. . . .

(b) [T]he Commission shall take all actions necessary . . . to prescribe regulations that . . . (B) discontinue . . . all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues.

*Id.* § 276.<sup>4</sup> Section 276 thereby gave the FCC authority to regulate Qwest’s and other RBOCs’ payphone line services that previously had been reserved for the

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<sup>3</sup> PSPs brazenly claim that Qwest’s rates prior to 1996 were predatory and designed to stifle competition. Br. at 6. The wild accusation is baseless, but if that is what PSPs believed before 1997, they had every right and opportunity to challenge those rates with State Commissions. Qwest was a regulated entity; its rates had to be approved by public bodies, which could hear complaints by any ratepaying customer. PSPs either chose not to challenge Qwest’s rates at the time, or they lost their challenges.

<sup>4</sup> The “Bell Operating Companies,” sometimes also called “Regional Bell Operating Companies” (“RBOCs”), are the incumbent local phone carriers created by divestiture of the Bell system in 1982. As a result of mergers, Qwest (formerly

(continued)

states. *NEPCC*, 334 F.3d at 75; *In re Wis. Pub. Serv. Comm'n*, Mem. Op. & Order, 17 FCC Rcd. 2051, 2060-64, ¶¶ 31-42 (2002) (“*Wisconsin Order*”).

**B. FCC Ordered Qwest To File Tariffs At State Commissions.**

Implementing Section 276, the FCC issued a series of orders in 1996 and 1997 concerning rates for PAL services. In part, the FCC required carriers to ensure that their rates for payphone line services complied with the so-called “New Services Test.” See *In re Implementation of the Pay Tel. Reclassification and Comp. Provisions of the Telecomms. Act of 1996*, Comm. Carr. Bur., Docket No. 96-128 (“*Payphone Docket*”), Report & Order, 11 FCC Rcd. 20541, 20614-15 (1996) (“*First Report*”).

Exercising its discretion, the FCC elected to have State Commissions implement and enforce its New Service Test requirements. The FCC therefore required Qwest and other RBOCs to file their PAL rates in tariffs with the State Commissions. The FCC asked the State Commissions to review and enforce the requirements of Section 276 as implemented by the FCC:

[Local phone carriers] must provide tariffed, nondiscriminatory basic payphone services . . . .  
[Carriers] must file those tariffs with the state. . . .  
. . . . States must apply these requirements and the [New Services Test] guidelines for tariffing such intrastate services. . . . [The FCC] will rely on the states to ensure that the basic payphone line is tariffed by the [carriers] in accordance with the requirements of Section 276.

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known as US WEST Communications) is one of the four remaining RBOCs. The other three are Verizon, SBC and BellSouth.

*In re Payphone Docket*, Order on Recon., 11 FCC Rcd. 21233, 21307-310 ¶¶ 162-63 (1996) (“*Order on Recon.*”). The FCC later explained that it was deferring to State Commissions for these matters “in the interests of federal-state comity.” *Wisconsin Order*, 17 FCC Rcd. at 2056 ¶ 15 (refusing request by State Commission for FCC to review tariffed rates for payphone line services).

### C. FCC Extended The Deadline For Filing Tariffs For A “Brief Duration.”

The FCC originally required Qwest and the other RBOCs to file tariffs with New Services Test-compliant PAL rates by April 15, 1997. *Order on Recon.*, 11 FCC Rcd. at 21308 ¶ 163. However, upon request from the RBOCs, just two weeks before that deadline expired the FCC extended the deadline to May 19, 1997. *In re Payphone Docket*, Order, 12 FCC Rcd. 21370 (1997) (“*Waiver Order*”). The FCC characterized this as a “limited waiver” of its filing deadline for a “brief duration.” *Id.* at 21381 ¶ 23. As part of this brief extension, the FCC accepted the RBOCs’ offer to refund or credit to customers any amounts by which rates decreased from April 15, 1997 to May 19, 1997 – effectively putting the customers in the same economic position as if the new rates had been filed on April 15. *Id.* at 21378-80 ¶¶ 18-20. This refund requirement is a central part of PSPs’ lawsuit, so Qwest examines the FCC’s specific language related to this refund as part of its Argument below.

To be clear, the FCC did *not* say Qwest *must* file new tariffed rates by April or May 1997. The FCC allowed Qwest to determine whether any of its rates existing prior to April 1997 already complied with the New Services Test, in which

case Qwest need not file new tariffs. *Order on Recon.*, 11 FCC Rcd. at 21308 ¶ 163. The FCC expressly rejected a suggestion from the payphone industry's trade association (APCC) that the FCC mandate all PAL service tariffs be filed anew in April 1997. *Waiver Order*, 12 FCC Rcd. at 21380 ¶ 21. Therefore, the fact that Qwest might not have filed new tariffs in April or May 1997 for all of its PAL services does not mean that the rates did not meet the New Services Test. *Cf. Br.* at 13-15 (making assumption that pre-1997 rates did not meet New Services Test).

#### **D. Qwest Filed Tariffs From 1997 To 2002.**

Qwest's rates for PAL services were set forth in tariffs that Qwest filed with the State Commissions. Complaint ¶ 15 (ER 0005). The lawsuit's allegations involve hundreds (or more) of individual rates. Plaintiffs allege that they obtained Qwest's payphone line services from 1997 through 2002 in eleven states and paid the full tariffed rates for these services. Complaint ¶15 (ER 0005).

An examination of some of these tariffs show that (1) there are hundreds of different rates at issue in this lawsuit, and (2) these rates were not static from 1997 to 2002, but varied from time to time. Qwest attached to its Motion to Dismiss some excerpts of its Nebraska, Idaho and Colorado tariffs. *See* ER 0029-0043. As an examination of these sample pages reveals, the tariffs are highly technical and use terms and codes not readily understandable. These few tariff pages are but mere excerpts of hundreds of tariff pages filed in eleven states which are at issue in this lawsuit.

These sample tariff pages, which are matters of public record, conclusively rebut some of PSPs' factual allegations. PSPs argue that Qwest did not file any

new tariffs from 1997 to 2002. Br. at 5 & 13. The sample tariff pages show that Qwest was indeed filing tariff revision pages from 1997 through 2001.

## **II. THE FCC ORDERED QWEST'S TARIFFED PAYPHONE LINE RATES TO MEET THE FCC'S "NEW SERVICES TEST"**

As mentioned above, the FCC required that as of May 19, 1997, Qwest's rates (and those of the other RBOCs) for PAL services had to comply with the "New Services Test." This is a test for measuring rates that the FCC developed for other communication services before its application to PAL services. *See In re Amendment of Part 69 of the Comm'n Rules Relating to the Creation of Access Charge Supplemental for Open Network Architecture*, Com. Car. Bur. Docket No. 89-79, Report & Order, 6 FCC Rcd. 4524 ¶¶ 38-44 (1991), *codified at* 47 C.F.R. § 61.49(g)(2). The requirement that PAL rates meet the New Services Test as of 1997 lies as the core of PSPs' lawsuit, so understanding the New Services Test is important for this appeal.

### **A. The New Services Test Is A General Standard The FCC Developed For Establishing Permissible Rates For Communication Services.**

The general requirements of the New Services Test are set forth in the FCC's regulations and decisions. A rate for communication services meets the New Services Test if the rate (1) is based on the direct cost of the carrier providing the service, plus (2) a "reasonable" amount of overhead. 47 C.F.R. § 61.49(g)(2).

A key aspect of the New Services Test is that it is "forward-looking." A rate is set under the New Services Test by looking *only at future costs* (as opposed to sunk costs or variable costs from previous years). *In re Implementation of the*

*Local Competition Provisions in the Telecomms. Act of 1996*, First Report & Order, 11 FCC Rcd. 15499, 15844-45 ¶ 675 (1996). The cost basis of the rates must reflect data for a 12-month period, 47 C.F.R. § 61.49(g)(1)(i), so a rate approved for a particular year is not necessarily the appropriate rate for another year.

The New Services Test is necessarily general and permits a wide variety of specific pricing methodologies to set tariff rates. One well-known pricing method that satisfies the New Services Test is the Total Element Long-Run Incremental Cost (“TELRIC”) method. *Wisconsin Order*, 17 FCC Rcd. at 2055, 2072 It 12 & 68 (TELRIC can be used for PAL rates); *In re SBC Communications, Inc.*, Docket No. 02-306, Mem. Op. & Order, 17 FCC Rcd. 25650, 25737-38 ¶ 159 (2002) (same). Because it is one possible pricing method that can be used to satisfy the New Services Test, the details of the TELRIC method – and particularly the kinds of costs that are considered in setting rates – show the kinds of factors that generally are considered in setting rates. These costs include “incremental costs” (based on “the most efficient telecommunications technology . . . and the lowest cost network configuration, given the existing location of the [carrier’s] wire centers”) plus a “reasonable allocation” of the carrier’s “common costs,” but exclusive of certain factors such as “embedded costs” and “opportunity costs.” 47 C.F.R. § 51.505 (2004).

As these general terms suggest, analyzing whether specific rates comply with the New Services Test is a complicated endeavor. As one example, the Oregon Public Utility Commission (“Oregon PUC”) analyzed Qwest’s tariffed

rates for PAL services by comparing these rates to other business phone line services, compared rates to costs, and analyzed profit margins. *In re Qwest Corporation*, Order No. 01-810, 2001 WL 1286044, at 35-36 (Or. P.U.C. Sept. 14, 2001) (“*Oregon Docket*”); *rev’d on other grounds, Northwest Public Communications Council v. Public Util. Comm’n of Or.*, 100 P.3d 776 (Or. App. 2004)

**B. The New Services Test Permits Each State To Uniquely Define How Qwest Should Set Its Rates Within That State.**

The FCC intended that the New Services Test’s rate requirements would vary from state to state. The Oregon PUC, for example, noted that the New Services Test does “not specify] what kind of evidence is necessary to determine whether [payphone line service] rates satisfy the new service test.” *Oregon Docket*, 2001 WL 1286044 at 46. Therefore, each State Commission has wide latitude to exercise its discretion and expertise to either approve or revise Qwest’s rates.

For example, if a State Commission chooses to apply the TELRIC method – which is just one kind of formula that meets the New Services Test – variation state-by-state is built into the TELRIC method itself. 47 C.F.R. § 51.505(e)(1) (“A state commission may set a rate outside the proxy ranges or above the proxy ceilings”). The FCC repeatedly has stated that “different states may reach different results that are each within the range of what a reasonable application of TELRIC principles would produce. Accordingly, an input rejected elsewhere might be

reasonable under the specific circumstances here.” *In re Qwest Communications Int’l, Inc.*, Mem. Op. & Order, 18 FCC Rcd. 13323, 13344 ¶ 42 (2003).

When exercising its discretion to measure rates, a State Commission does not use a simple formula, but instead must consider a wide variety of *discretionary* factors that do not lend themselves to mathematical precision. As the Nebraska Public Services Commission observed when analyzing some of Qwest’s rates under TELRIC:

Although TELRIC establishes the framework for calculating rates, TELRIC “is not a specific formula, but rather a collection of methodological principles.” Because it is not a specific formula, TELRIC does not mandate specific rates but, instead, allows for a range of rates. The range must be established using inputs and assumptions consistent with TELRIC. The ability to establish rates that fall within a reasonable range gives state commissions “wide latitude to account for local technological, environmental, regulatory, and economic conditions.”

*In re Qwest Corp.*, App. No. C-2516/PI-49, 2002 WL 1058390 ¶ 13 (Neb. P.S.C. Apr. 23, 2002). The State Commission in Washington concurred that application of the New Services Test requires analysis of numerous inherently discretionary factors:

Cost studies are a tool used in determining fair, just, reasonable, and sufficient rates for individual services, but they do not in themselves determine those rates. Other factors, such as effectiveness in yielding total revenue requirements under the fair return standard, fairness in the apportionment of total costs of service among different consumers, and efficiency in discouraging wasteful use of services while promoting all justified types and amounts of use, in view of the relationships between costs incurred and benefits

received, remain an important part of the rate-setting process.

*Washington Utils. & Transp. Comm'n v. Toledo Tel. Co., Inc.*, Docket No. UT-970066, Third Suppl. Order, 1998 WL 223209, slip op. at \*15 (Wash. U.T.C. Jan. 22, 1998).

**C. The FCC's 2002 *Wisconsin Order* Changed The New Services Test And Caused Qwest To File New Tariffed Rates.**

The FCC in 2002 articulated a new expression of the New Services Test as it particularly applies to PAL services, causing Qwest and other RBOCs to lower their rates from 2002 forward.

In the course of reviewing PSPs' claims concerning PAL rates in the state of Wisconsin (set by four local phone companies), the FCC offered a specific, new articulation of the New Services Test. Although knowledge of the precise terminology and details is not necessary to resolve this appeal, in general the FCC instructed RBOCs to ignore certain kinds of costs when calculating the costs of providing PAL services. *Wisconsin Order*, 17 FCC Red. at 2069-72 ¶¶ 56-69. As a result of this change to the New Services Test, carriers were required to "modify their tariffs to lower their existing rates." *NEPCC*, 334 F.3d at 74.

Qwest in 2002 did as the FCC ordered, lowering its tariffed rates compared to those in effect before the 2002 *Wisconsin Order*. Qwest's lowering of its rates is, of course, the predicate of PSPs' remaining theory for their lawsuit.

### **III. SOME STATE COMMISSIONS HAVE PREVIOUSLY RESOLVED COMPLAINTS AGAINST QWEST’S TARIFFED RATES FOR SOME OF THESE SERVICES.**

State Commissions have followed the FCC’s request that they review and enforce New Services Test requirements. Several State Commissions have previously heard challenges to Qwest’s tariffed rates for PAL services.<sup>5</sup>

For example, the Colorado Public Utility Commission (“Colorado PUC”) reviewed a complaint by the Colorado Payphone Association – a state-wide trade association of owners of payphones, similarly situated to PSPs here – that challenged the rates of Qwest’s payphone line services in Colorado tariffs. *See Colorado Payphone Ass’n v. U S WEST Communications, Inc.*, Docket No. 98F-146T, Dec. No. C99-497, 1999 WL 632854 ¶ 14 (Colo. P.U.C. May 18, 1999). The Colorado PUC concluded that Qwest’s tariffs for some services met the New Services Test, whereas others were slightly overstated. *Id.* ¶ 14.

Similarly, responding to a customer complaint, the Iowa Utilities Board (“IUB”) began an investigation of Qwest’s and other local phone companies’ tariffed rates for payphone line services in Iowa. The IUB ruled that the filed tariffs met the FCC’s New Services Test:

The Board will also decline the Complainant’s invitation to initiate a further investigation into pay phone line rates. Each of the rate-regulated [local phone carriers] has made at least a prima facie showing that its existing

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<sup>5</sup> It is possible that some of these prior State Commission proceedings have legally foreclosed PSPs’ challenge to some of the rates within the scope of PSPs’ Complaint. At this time, Qwest is not raising these grounds as a basis to dismiss PSPs’ lawsuit.

rates for a pay telephone line are consistent with the applicable FCC requirements . . . .

*In re Payphone Servs.*, Order No. INU-99-1, 1999 WL 686075, at \*3 (Iowa U.B. July 30, 1999).

Two other State Commissions – Minnesota and Nebraska – have conducted similar proceedings regarding Qwest’s tariffed rates for payphone line services. *In re Minn. Indep. Payphone Ass’n*, Docket No. P-421/C-98-786, 1999 WL 33594984, at 1 (Minn. P.U.C. Aug. 2, 1999) (concluding that tariffed rates were overstated and ordering prospective rate change, but refusing to award refunds for previously-provided services); *In re Provisioning of Payphones in the State of Neb.*, App. No. C-2112/PI-30, 2002 WL 1058387, at \*1 (Neb. P.S.C. Mar. 19, 2002) (reopening review of all payphone line service tariffs for all local phone carriers). These proceedings demonstrate the ready availability of State Commissions for complaints against Qwest’s tariffed rates.

### **SUMMARY OF ARGUMENT**

In essence, PSPs assert that Qwest’s rates in its filed tariffs were unreasonably high from 1997 through 2002 or later. The District Court correctly ruled, relying on the weight of black-letter Supreme Court and Ninth Circuit precedent, that federal courts have no jurisdiction over challenges to rates contained in filed tariffs. The District Court correctly concluded that “the filed-rate doctrine relegates that particular factual issue to the agency, not a district court.” Dismissal Order at 7 (ER 0296).

The District Court’s conclusion follows well-established precedent to reach a common-sense solution. If this lawsuit were to proceed, the District Court would

have to: (1) replace the policy-making authority and technical expertise of the FCC and eleven State Commissions, and (2) review the reasonableness of hundreds of rates (3) as they varied over a five-year period (4) under eleven different interpretations of the New Services Test (which were not always articulated precisely in each state). The District Court simply has no authority to engage in this kind of analysis. *Hargrave v. Freight Distrib. Serv., Inc.*, 53 F.3d 1019, 1021 (9th Cir. 1995). The District Court did what federal courts ***always do*** when facing these kinds of claims: dismiss them, thereby effectively “referring” them to the appropriate administrative agencies.

To avoid this inevitable conclusion, PSPs present a distorted and incomplete articulation of communications law. Stunningly, for example, PSPs claim that the filed tariff doctrine is “discredited,” citing only an antitrust treatise. Br. at 25-26. PSPs of course completely ignore the Supreme Court’s affirmation of the filed tariff doctrine as recently as 1998. *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222 (1998). Earlier the Supreme Court said, “The tariff-filing requirement is . . . the heart of the common-carrier section of the [federal] Communications Act” and has “enormous importance to the statutory scheme.” *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229, 231 (1994).

PSPs’ gross misstatement of communications law infuses virtually every aspect of its argument. Among their many errors, PSPs:

- Try to avoid the filed tariff and primary jurisdiction doctrines by relying on cases that have ***nothing to do*** with challenges to rates in filed tariffs (see Part II.B.1 *infra*);

- Twist the FCC’s express characterization of a “limited waiver” for a “brief duration” into a perpetual, open-ended requirement (*see* Part III.A *infra*);
- Argue federal law preempts state law, but make this argument by ignoring that the FCC *expressly deferred* to state law based on the interest of “federal-state comity” (*see* Part III.B *infra*); and
- Invoke antitrust law when PSPs have not alleged any antitrust claims (*see* Part III.C *infra*).

Finally, PSPs try to salvage their claim that Qwest failed to file a federal tariff for “Fraud Protection” services at the FCC by May 19, 1997. The District Court correctly dismissed this claim as barred by the statute of limitations. Dismissal Order at 7-8 (ER 0296-0297). PSPs learned of their cause of action on May 19, 1997, when Qwest allegedly did not file the federal tariff by the deadline; the Communication Act’s two-year statute of limitations (47 U.S.C. § 415(b)) ran out on May 19, 1999, years before this lawsuit was filed.

## ARGUMENT

### **I. IN REVIEWING QWEST’S MOTION, THE COURT SHOULD NOT PRESUME THE LEGAL CONCLUSION THAT PSPS WILL PREVAIL ON THE MERITS OF THEIR CLAIMS.**

PSPs weave throughout their brief the contention that the Court must “accept as true” their allegation that Qwest’s tariffs from 1997 to 2002 or later did not comply with the New Services Test. Br. at 3. In so doing, PSPs effectively ask the Court to presume the outcome of the entire lawsuit. That, of course, is *never* the standard for reviewing a motion under Rule 12(b).

It is well established that the question of whether a tariffed rate is “reasonable” presents, at best, a complex mix of factual and legal issues, if not pure legal questions. *Transworld Airlines, Inc. v. American Coupon Exch., Inc.*, 913 F.2d 676, 682-84 (9th Cir. 1990) (reasonableness of tariff was ultimately a legal issue for court that could depend on complex facts); *Klicker v. Northwest Airlines, Inc.*, 563 F.2d 1310, 1313 (9th Cir. 1977) (reasonableness of tariff was “question of law”). And it is black-letter law that a court does not presume as true, when reviewing a Rule 12 motion, a plaintiffs’ conclusions of law drawn from factual allegations. *E.g., Cholla Ready Mix, Inc. v. Civish*, 382 F.3d 969, 973 (9th Cir. 2004) (on Rule 12(b)(6) motion, court “is not required to accept legal conclusions cast in the form of factual allegations if those conclusions cannot reasonably be drawn from the facts alleged”).

So while PSPs can ask the Court to presume *factual* allegations, PSPs cannot demand that the Court presume *legal conclusions*, such as the conclusion that Qwest’s rates were legally “unreasonable” under governing FCC regulations. That question is the ultimate issue for this lawsuit. *Cf. New England Cleaning Serv., Inc. v. American Arb. Assoc.*, 199 F.3d 542, 545 (1st Cir. 1999) (on Rule 12(b)(6) motion, court would not assume as true the legal allegation that the parties had terminated its contract, stating, “Such allegations are not assertions of fact; but rather involve legal issues and conclusions – indeed the ultimate disputed issues presented”). The District Court pointed out that analysis of rate-reasonableness is the primary jurisdiction of agencies, not federal courts. Dismissal Order at 6-7 (ER

0295-0296). So by assuming the very conclusion of the case, PSPs basically try to end-run the doctrine of primary jurisdiction.

PSPs misconstrue *Cost Management Servs., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937 (9th Cir. 1996) to argue the proposition that a court can never refer a rate-reasonableness challenge to an agency on a Rule 12(b) motion. Br. at 35-36. PSPs ignore the fact that this Circuit has often upheld referrals under primary jurisdiction on Rule 12(b) motions. *E.g.*, *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (affirming dismissal under Rule 12(b), approving of referral of rate challenge to agency); *Segal v. AT&T Co.*, 606 F.2d 842, 843 (9th Cir. 1979) (affirming primary jurisdiction referral upon motion to dismiss). The *Cost Management* decision rejected a patently shallow referral argument made for the first time on appeal; it hardly provides any refuge to PSPs here, and it certainly does not stand for the generic proposition that a court can never decide a primary jurisdiction argument on a Rule 12(b) motion.

From a practical perspective, PSPs' position also makes no sense. Adjudication of this lawsuit will require review of the complex facts and law regarding the reasonableness of Qwest's tariffed rates. Nothing should prevent a court from referring these issues to the appropriate administrative agencies at the earliest possible phase in the lawsuit. To take PSPs' argument to its logical conclusion, PSPs would have the Court ignore a primary jurisdiction argument on a Rule 12(b) motion – but, taking PSPs' argument further, the Court then *could* consider referral at some later point in the proceedings. No reason exists that the

Court should delay for another day the result that is already palpably obvious at the outset of the case.

**II. THE DISTRICT COURT CORRECTLY CONCLUDED IT DID NOT HAVE JURISDICTION TO HEAR PSPS' CHALLENGES TO THE RATES IN QWEST'S FILED TARIFFS.**

The District Court correctly dismissed PSPs' claims without prejudice. Pursuant to the "filed tariff doctrine," federal courts must strictly enforce Qwest's tariffs as written and cannot award any damages that would have the effect of varying the rates paid under the tariffs. Pursuant to the doctrine of primary jurisdiction, courts refer to the appropriate agencies all challenges to the reasonableness of filed tariff rates. Because the District Court cannot award damages to PSPs for the rates they paid Qwest under Qwest's tariffs, PSPs must refile their claims at the State Commissions – just as the FCC directed in the *Wisconsin Order*.

**A. The Filed Tariff Doctrine And The Doctrine Of Primary Jurisdiction Together Ensure Tariffs Are Enforced As Written Until Deemed Unreasonable By The Appropriate Agencies.**

PSPs' lawsuit implicates two critical doctrines in communications law, the filed tariff doctrine and the doctrine of primary jurisdiction. The law of these doctrines is well settled and provides no exceptions pertinent to PSPs' claims.

**1. *The Filed Tariff Doctrine "Lies At The Heart" Of Federal And State Telecommunications Law And Mandates Supremacy Of Filed Tariffs Over All Challenges.***

The communications industry is based on a longstanding system of carriers filing tariffs with the FCC and with the State Commissions. "The tariff-filing requirement is the heart of the common carrier subchapter of the [federal]

Communications Act” and has enormous “importance to the statutory scheme.” *MCI Telecomms.*, 512 U.S. at 229, 231.

A filed tariff is not merely a contract between Qwest and its customers, but “bind[s] both carriers and [customers] with the force of law.” *Brown v. MCI Worldcom Network Servs., Inc.*, 277 F.3d 1666 (9th Cir. 2001), 1170; *accord Delaware & Hudson Ry. Co. v. Offset Paperback Mfrs., Inc.*, 126 F.3d 426, 427 (2d Cir. 1997) (filed tariff has “force and effect” of a statute). Because tariffs are publicly-filed documents, Qwest’s customers are irrefutably presumed to have constructive knowledge of their terms, even if they have never seen the tariffs or are ignorant of their existence. *Reiter v. Cooper*, 507 U.S. 258, 266 (1993) (customer cannot claim ignorance of tariff); *Kansas City S. Ry. Co. v. Carl*, 227 U.S. 639, 653 (1913) (customer’s knowledge of tariff is “conclusively presumed”).

The purpose of the tariff-filing requirement is to ensure that Qwest does not discriminate, but instead provides identical rates, terms and services to all customers. *See Central Office*, 524 U.S. at 222 (purpose of the tariff-filing requirement is to “prevent[] unreasonable and discriminatory charges”); *MCI Telecomm. Corp.*, 512 U.S. at 230 (filing requirement “render[s] rates definite and certain, and . . . prevent[s] discrimination and other abuses”); *Louisville & Nashville Ry. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) (doctrine fulfills nondiscrimination purpose; decided in 1915); *see also* 47 U.S.C. § 202(a) (prohibiting carrier from discriminating among its customers).<sup>6</sup>

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<sup>6</sup> Each of the eleven states at issue in this lawsuit have statutes that replicate Communication Act’s § 202(a) prohibition against discrimination. *See Colo. Code*  
(continued)

To ensure nondiscriminatory treatment of all customers, the terms of the tariff strictly govern Qwest's relationship and may not be avoided under any circumstance – a principle known as the “filed tariff doctrine” (or sometimes the “filed rate doctrine”). The Supreme Court summarized the doctrine recently:

“[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext. [Customers] are charged with notice of it, and they as well as the carrier must abide by it . . . .”

Thus, even if a carrier intentionally misrepresents its rate and a customer relies on the misrepresentation, the carrier cannot be held to the promised rate if it conflicts with the published tariff.

*Central Office*, 524 U.S. at 222, quoting *Louisville & Nashville R.R.*, 237 U.S. at 97; accord *Security Servs., Inc. v. K-Mart Corp.*, 511 U.S. 431, 435 (1994) (carrier cannot receive any charge different from that specific in tariff); *Maislin Indus., US., Inc. v. Primary Steel, Inc.*, 497 J.S. 116, 127 (1990) (“This rule is undeniably strict and it obviously may work hardship in some cases, but it embodies the policy which has been adopted by Congress . . . in order to prevent unjust discrimination.”); *Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 596 n.19 (1981) (carrier cannot impose charges different from tariff); *Evanns*, 229 F.3d at 840 (filed tariff doctrine precluded consumer's claims seeking to avoid paying fees imposed by AT&T's tariff).

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§ 40-3-103; Idaho Code § 61-313; Iowa Code § 476.5; Minn. Code § 237.09; Neb. Code Title 291, Ch. 5 § 2.21; N.M. Code § 63-9A-8; N.D. Code § 49-21-07; S.D. Code § 49-31-12.2; Utah Code § 54-3-7; Wash. Code § 80.36.130; Wyom. Code § 37-3-102.

Applying the filed tariff doctrine, courts unhesitatingly reject any claim against carriers that seeks to obtain rates or terms that are different than the rates and terms set forth in the carriers' tariffs. *E.g.*, *Central Office*, 524 U.S. at 225 (rejecting customers' demands for billing services beyond those described in tariff); *Arkansas La. Gas Co.*, 453 U.S. 571 (reversing award of damages to carrier above tariffed rates); *Evanns*, 229 F.3d at 840 (filed rate doctrine precluded consumer's claims regarding types of fees imposed under tariffs).

2. ***The Doctrine Of Primary Jurisdiction Requires All Challenges To Filed Tariffs Be Determined In The First Instance By The Appropriate Agencies.***

In this Circuit, no action exists in federal court to challenge a filed tariff. *E.g.*, *Evanns*, 229 F.3d at 840. Federal courts may not enforce any rates inconsistent with a tariff, or provide relief from rates in tariffs, until after an agency rules that the rates are unreasonable. Consequently, when faced with lawsuits challenging the reasonableness of tariffed rates, this Circuit ***always*** refers such claims to the appropriate agencies.

Courts must strictly enforce Qwest's tariffs as written and, absent a challenge to the reasonableness of the tariffs, ***no action lies against Qwest*** seeking any rates different from the ones stated in the tariffs:

Under [the filed tariff] doctrine, once a carrier's tariff is approved by the [agency], the terms of the federal tariff are considered to be "the law" and to therefore "conclusively and exclusively enumerate the rights and liabilities" as between the carrier and the customer. Not only is a carrier forbidden from charging rates other than as set out in its filed tariff, but customers are also charged with notice of the terms and rates set out in that filed tariff and ***may not bring an action against a carrier that***

**would invalidate, alter or add to the terms of the filed tariff.**

*Evanns*, 229 F.3d at 840 (emphasis added). This Circuit later said:

Under the filed rate doctrine, no one may bring a judicial challenge to the validity of a filed tariff. As a corollary, no one may bring a judicial proceeding to enforce any rate other than the rate established by the filed tariff. . . . The filed-rate doctrine precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the FCC.

*Brown*, 277 F.3d at 1170-71; accord *Montgomery v. American Airlines, Inc.*, 637 F.2d 607, 610 (9th Cir. 1980) (“Independent of [agency] action, there is no right which the court may enforce”).

Because federal courts cannot hear lawsuits challenging the terms of filed tariffs, courts always invoke the doctrine of primary jurisdiction and refer the claims to the administrative agencies that oversee the tariffs. “It is ***beyond dispute*** that claims that filed tariffs are . . . unreasonable in amount . . . are questions that in the first instance must be determined by the agency with which the tariffs are filed.” *Danna v. Air France*, 463 F.2d 407, 409-10 (2d Cir. 1972) (emphases added), followed by *Montgomery*, 637 F.2d at 610.<sup>7</sup>

The Supreme Court and the Ninth Circuit have consistently applied this rule. For example, in *Reiter*, the Court held that a defendant’s counterclaim challenging

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<sup>7</sup> Generally, the doctrine of primary jurisdiction applies where (1) a need exists to resolve issues that (2) the legislature placed within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362 (9th Cir. 1987).

the reasonableness of the plaintiff's tariffed rates must be referred to the agency. 507 U.S. at 268-70. Similarly, the Ninth Circuit has consistently held that challenges to the reasonableness of tariffed rates must be referred to the appropriate agencies:

- *Hargrave v. Freight Distrib. Serv., Inc.*, 53 F.3d 1019, 1021 (9th Cir. 1995) (“the [agency] is the only forum for arguing that a filed rate is unreasonable”);
- *Milne Truck Lines, Inc. v. Makita U.S.A., Inc.*, 970 F.2d 564, 569 (9th Cir. 1992) (“The [Supreme] Court has long held that the issue of [a tariffed rate's] reasonableness requires `preliminary resort to the Commission’);
- *RTC Transp., Inc. v. Conagra Poultry Co.*, 971 F.2d 368, 372 (9th Cir. 1992) (“The [agency] has exclusive primary jurisdiction to determine the reasonableness of a filed rate”); and
- *Montgomery v. American Airlines, Inc.*, 637 F.2d 607, 610 (9th Cir. 1980) (“a claim that a filed tariff is . . . unreasonable in amount . . . is within the primary jurisdiction of the [agency]”).

**B. The District Court Correctly Dismissed PSPs' Claims.**

Based on these twin doctrines that have essentially no exceptions with respect to challenges to the reasonableness of tariffed rates, the District Court correctly dismissed PSPs' claims without prejudice.

**1. The Lawsuit Challenges Qwest's Filed Tariffs.**

The threshold issue of this lawsuit is whether Qwest's tariffed rates from 1997 to 2002 (or beyond) were "reasonable." PSPs' Complaint expressly alleges that Qwest's tariffed rates did not comply with the New Services Test:

¶ 13. From 1997-2002, [Qwest] refused to file Payphone Services rates in the states within its territory that were consistent with the NST [New Services Test] in violation of FCC orders. . . .

¶ 14. Starting in 2002, [Qwest] began to file new Payphone Services rates that are purportedly compliant with the NST. These new rates . . . establish that Qwest's Payphone Services rates in effect since April 15, 1997 did not comply with the NST.

ER 0004. This allegation is the keystone of the lawsuit; if Qwest's rates did comply with the New Services Test from 1997 to 2002, the lawsuit ends.

By alleging that Qwest's rates from 1997 to 2002 exceeded the maximum threshold permitted by the New Services Test, PSPs are arguing that the rates were "unreasonable," even if they obstinately refuse to utter the word. *Montana Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) ("reasonableness" of rate means that the rate must fall within upper and lower bounds set by agency); *Montgomery*, 637 F.2d at 610 (challenge that rate did not meet regulatory requirement was a challenge that rate was unreasonable). PSPs pretend that they are only seeking refunds and not trying to challenge the rates in the tariffs. Br. at 29-31. But **any** claim demanding refunds or damages from a carrier has the effect of lowering the rates previously paid under the tariff, and thereby implicitly seeks to vary the tariff. *Fax Telecomunicaciones Inc. v. AT&T*, 138 F.3d 479, 489 (2d Cir. 1998) (award of damages "would effectively be

setting and applying a rate” other than that in tariff, in violation of filed tariff doctrine). Therefore, when PSPs assert without any legal authority whatsoever that their lawsuit “does not require the court to alter, determine, or recalculate any existing rates,” Br. at 4, they are just wrong – the demand for refunds for tariffed rates is, legally, a challenge barred by the filed tariff doctrine.

Application of the filed tariff and primary jurisdiction doctrines makes perfect sense here, because PSPs’ claims promise vexing factual and legal analyses that require the State Commissions’ technical expertise and policymaking powers. Adjudication of plaintiffs’ challenges to the reasonableness of Qwest’s tariffed rates undoubtedly “requires expertise or uniformity in administration.” *General Dynamics*, 828 F.2d at 1362. Determining (1) whether *each* of Qwest’s *hundreds* of tariffed rates met the applicable regulatory standards, and (2) if they did not, determining what the rates *should have* been from 1997 to 2002, involve complicated technical and financial data and discretionary policy-making decisions regarding numerous different rates and services. These problems are compounded eleven times over because *both* the data *and* the application of the FCC’s New Services Test vary in each state; even that analysis is further compounded multiple times because Qwest filed numerous revisions from time-to-time in each state. See Counterstatement of Facts Part I.D *supra*.

The doctrine of primary jurisdiction applies to “particularly complicated issue,” *Brown*, 277 F.3d at 1172, where “agency knowledge” is “essential to a proper result,” *Hargrave*, 53 F.3d at 1021-22. The result is all the more rational because the State Commissions have already routinely heard precisely the same

kind of claims that PSPs raise here. See Counterstatement of Facts Part III *supra*. The State Commissions have authority to award damages – called “reparations” – if any of them find that the tariffed rates were indeed unreasonable.<sup>8</sup> But Plaintiffs must resort to the State Commissions to avail themselves of these remedies. *E.g., Hargrave*, 53 F.3d at 1021 (only agency, not a court, can set aside tariffed rates and order refunds).

The District Court therefore correctly applied the primary jurisdiction doctrine by dismissing PSPs’ lawsuit without prejudice. PSPs wrongly argue that the District Court did not invoke the doctrine. Br. at 26-27. To the contrary, the District Court directly followed the doctrine. The District Court held that only administrative agencies could determine whether Qwest’s tariffed rates complied with the New Services Test. Dismissal Order at 6-7 (ER 0295-0296). That is a quintessential expression of the primary jurisdiction doctrine. The Court followed the doctrine by dismissing PSPs’ claims without prejudice, giving them the legal ability to refile the same claims at the agencies. *Reiter*, 507 U.S. at 268-69 n.3 (to “refer” a claim to an agency, court dismisses claim without prejudice so that plaintiff can refile claim at agency).

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<sup>8</sup> *E.g., Archibald v. Public Utils. Comm’n of Colo.*, 58 P.3d 1031, 1038 (Colo. 2002) (Colo. Rev. Stat. § 40-3-102 gives PUC right to investigate tariffed rates and award reparations); *Mid-Iowa Cmty. Action, Inc. v. Iowa State Commerce Comm’n*, 421 N.W.2d 899, 901 (Iowa 1988) (Iowa Code § 476.3 authorizes refunds); Minn. Stat. § 237.081 (authority to issue refunds); Wash Rev. Code § 80.04.220 (reparations); Idaho Code § 61-641 (reparations upon complaint); *MCI Telecomms. Corp v. Public Serv. Comm’n of Utah*, 840 P.2d 765, 766 (Utah 1992) (reparations available).

Proving the desperation of their argument, PSPs argue against application of primary jurisdiction by relying on decisions that have nothing to do with challenges to the reasonableness of tariffed rates. Br. at 35-38. Plaintiffs point out that this Court did not refer claims to the FCC in the *Brown* case. *Brown* did not involve challenges to the rates in a tariff, but instead involved **enforcement** of a tariff:

Brown seeks merely to enforce the tariff. He does not claim that he was promised something outside the tariff and then denied it . . . [n]or does he claim that MCI had some obligation to him beyond the obligations set out in the tariff. . . . **Nor does he argue that the \$10 fee, if authorized by the tariff, is unreasonable.** . . . Rather, Brown claims that there is no authorization in the tariff to charge him the \$10 fee, and that the fee therefore violated the tariff.

277 F.3d at 1172 (citations omitted). Similarly, in *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976), see Br. at 37, the Court concluded that a lawsuit need not be referred to a federal agency. However, that case also did not involve a challenge to the reasonableness of tariffed rates. *Id* at 299-300 (“The court in the present case, in contrast, is not called upon to substitute its judgment for the agency’s on the reasonableness of a rate or, indeed, on the reasonableness of any carrier practice.”). The Court expressly distinguished *Nader* from lawsuits where a plaintiff challenges the reasonableness of tariffed rates:

The [primary jurisdiction] doctrine has been applied, for example, when an action otherwise within the jurisdiction of the court raises a question of the validity of a rate or practice included in a tariff filed with an agency . . . . In this case, however, considerations of uniformity in regulation and of technical expertise do not call for prior reference to the Board.

*Id* at 304 (citations omitted). The analyses in Brown and Nader provide no support to PSPs’ efforts to avoid application of the filed tariff and primary jurisdiction doctrines to their challenges to Qwest’s tariffed rates.<sup>9</sup>

The District Court correctly determined that the threshold issue of the lawsuit must be decided in the first instance by the State Commissions, and therefore correctly dismissed the lawsuit without prejudice.

**2      *PSPs Cannot Presume That Qwest’s Tariffed Rates From 1997 to 2002 Were Unreasonable Based on New Rates in 2002.***

To argue against referral, PSPs try to make their lawsuit look easy by saying the Court need only “presume” that the tariffed rates from 1997 to 2002 did not meet the New Services Test, and thus damages will be “easily calculated” as the difference between those rates and the lower new rates in 2002. Br. at 23-25. This argument is specious, for numerous independent reasons.

First and foremost, nothing about the Ninth Circuit’s bright-line application of the filed tariff and primary jurisdiction doctrines depends on whether a plaintiff’s claim is easily calculated. In this Circuit, *every* challenge to the reasonableness of a utility’s rates has been rejected in favor of referral of the issues to the appropriate agencies. PSPs cannot show a single case in this Circuit where a court decided to hear a rate-reasonableness challenge on the grounds that the court thought the case would be “easy.” Indeed, what a court might deem “easy” could

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<sup>9</sup> PSPs’ reliance (Br. at 38) on *APCC Serv. Inc. v. WorldCom*, No. 01-639, 2001 U.S. Dist. LEXIS 23988 (D.D.C. Dec. 21, 2001) is even more fruitless, because that lawsuit did not involve tariffs at all.

well be in error based on a misunderstanding or misapplication of an agency's policymaking authority or technical expertise, which is why courts should refer these issues in all instances.

Second, PSPs are trying to avoid the question before the Court. Qwest's motion fundamentally asked whether courts or agencies should be the first forum to adjudicate the threshold issue present by the lawsuit – whether Qwest's rates are reasonable. PSPs cannot have the court “assume” that PSPs will win the merits of this argument, because that avoids the very question of whether courts or agencies should resolve the issue when it comes time to litigate it. *See supra* Part I.

PSPs also make illogical inferences to buttress their invalid assumptions. PSPs allege that Qwest did not file new tariffed rates in 1997 but “merely continued to charge . . . the rates that Qwest had filed prior to 1997.” Br. at 13. From this factual assertion, PSPs assume the rates were therefore noncompliant with the New Services Test. *Id.* at 5 & 13-15. Even assuming for the moment that Qwest did not file any new tariffs (a flatly wrong assumption, *see* Counterstatement of Facts, Part I.D *supra*), the lack of filing of new tariffs in 1997 did not mean that the pre-1997 rates, to the extent still in effect after 1997, did not comply with the New Services Test. The FCC simply did not mandate that Qwest file new tariffs in 1997. The FCC said that Qwest or other RBOCs could determine that their existing, pre-1997 rates already complied with the New

Services Test, in which case there was no need to file new tariffs. *See* Counterstatement of Facts, Part I.C *supra*.<sup>10</sup>

Third, PSPs are disingenuous in not revealing a critical change in law relevant to their argument. In 2002, ***the FCC changed the meaning of the New Services Test as it applied to these services***. *See* Counterstatement of Facts Part II.C *supra*. As a result of the FCC’s decision in the *Wisconsin Order* changing the application of the New Services Test, Qwest and other RBOCs had to revise many of their tariffed rates for payphone line services. *Wisconsin Order*, 17 FCC Rcd. at 2069-72 ¶¶ 56-69 (describing how carriers had to remove certain costs from their tariffed rates). As a result of this change to the New Services Test, carriers were required to “modify their tariffs to lower their existing rates.” *NEPCC*, 334 F.3d at 74. Consequently, Qwest’s new rates in 2002 are ***legally irrelevant*** to the question of whether rates before the *Wisconsin Order* met the New Services Test, as it existed before that FCC order. Applying the 2002 revision to the New Services Test backwards to 1997 would constitute unconstitutional retroactive ratemaking.<sup>11</sup>

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<sup>10</sup> PSPs assume that the alleged (and demonstrably untrue) lack of filing of new tariffs in 1997 was based on a calculated decision by Qwest to challenge the FCC orders. *See* Br. at 13-14. This inference is hardly logical. The more logical inference – which is also the truth – is that Qwest concluded that many of its rates in effect prior to 1997 already met the New Services Test, so Qwest did not need to file new rates in 1997 in these instances.

<sup>11</sup> It is a basic tenet of administrative law that rulemaking orders cannot be applied retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215 (1988). It is also indisputable that the *Wisconsin Order* was a rulemaking as opposed to an adjudicatory order:

(continued)

Fourth, even if the New Services Test were said to remain constant from 1997 to 2002 and beyond, the very nature of the New Services Test precludes comparing 1997 rates with 2002 rates. The New Services Test fundamentally requires rates to be justified *looking forward* by known or expected costs over the forthcoming 12-month period *at the time rates are established*. See Counterstatement of Facts Part II.A *supra*. Therefore, the reasonableness of Qwest's new rates in 2002 are measured by Qwest's costs over 2002 and 2003. By definition, then, the 2002 rates are legally irrelevant to Qwest's basis for the 1997 rates, which under the New Services Test would have been based on Qwest's cost over 1997 to 1998. PSPs cannot say automatically, without performing excruciatingly complex analysis of Qwest's internal costs, that the 2002 rates "prove" the rates from 1997 to 2002 were unreasonable

Finally, PSPs make a factual assertion about Qwest's alleged noncompliance with the New Services Test that proves this entire lawsuit is barred by the statute of limitations. Although the Complaint is silent on the issue, PSPs allege in their

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[The *Wisconsin Order*] is more than just "an adjudicatory-type proceeding . . . pertaining to rates in Wisconsin." . . . Instead, it **establishes a rule** that affects payphone line rates in every state. Indeed, the [FCC] itself acknowledged as much, noting that "this *Order* will assist states in applying the new services test to [carriers'] intrastate payphone line rates in order to ensure compliance, with the *Payphone Orders* and Congress' directives in section 276."

*NEPCC*, 334 F.3d at 75 (emphasis added). It would thus be unlawful to apply the order retroactively.

Brief that Qwest failed to publicly file “cost studies” from 1997 to 2002 justifying that Qwest’s rates complied with the New Services Test. Br. at 10. PSPs argue the FCC required these cost studies as part of the New Services Test, so Qwest’s rates were noncompliant with the Test for that reason alone. *Id* PSPs, of course, would have been aware of the lack of such a filing of any cost studies in 1997. If they now believe that this lack of filing of cost studies proves their claims, then their claims accrued in 1997, and were barred as of 1999 under the Communication Act’s two-year statute of limitations. *See* 47 U.S.C. § 415(b).

### **III. THE DISTRICT COURT CORRECTLY REJECTED PSPS’ EFFORTS TO AVOID THE FILED TARIFF DOCTRINE.**

To confuse the application of the filed tariff doctrine, PSPs raise a series of arguments that have no application to their lawsuit. Each of their arguments misreads FCC orders, presents only half of the relevant law, or outright misstates the law. The District Court properly rejected these contentions, as should this Court.

#### **A. The FCC Provided A Refund Remedy That Was Available Only For A “Limited” And “Brief” Time.**

PSPs’ arguments arise almost entirely on the contention that the FCC’s *Waiver Order* provides an open-ended entitlement to PSPs to refunds anytime Qwest’s PAL rates reduced in the future. PSPs’ misconstruction of the FCC’s *Waiver Order* is frivolous.

As an initial matter, even assuming for the moment that PSPs’ interpretation of the *Waiver Order* were correct – and as shown below it demonstrably is not – it does not save their case from referral. Before obtaining the alleged refund in the

*Waiver Order*, PSPs must still prevail on their contention that Qwest's rates from 1997 to 2002 did not comply with the New Services Test. This threshold dispute requires resolution by State Commissions, before PSPs can avail themselves of the purported refund.

**1. *The Refund Related Solely To A "Limited Waiver" Of A Filing Deadline For A "Brief Duration."***

The *Waiver Order* provided local carriers like Qwest a "limited" and "brief" waiver. In the *Waiver Order*, the FCC was ruling on a request by a carrier trade association to extend a filing deadline by 45 days, because some carriers (unnamed in the order) believed they might need extra time.<sup>12</sup> The FCC had imposed April 15, 1997 as the deadline for RBOCs to file state tariffs for PAL rates compliant with the then-existing New Services Test, to the extent that the RBOCs' existing rates did not meet the test. *Waiver Order*, 12 FCC Red. at 21381-82 ¶¶ 23-27. At the request of the trade association, the FCC extended this deadline to May 19, 1997. *Id* at 21370, ¶ 2. The *Waiver Order* **repeatedly** characterized this as a "limited waiver" of a "brief duration":

¶ 2: "limited waiver" . . . "limited waiver";

¶ 13: "limited waiver" . . . "limited waiver";

¶ 18: "limited waiver of the federal guidelines" . . . "this limited waiver";

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<sup>12</sup> Qwest was one of the members of this trade association, which "consist[ed] of all of the Bell Operating Companies ("BOCs") except Ameritech." 12 FCC Red. at 21371 n.7. The trade association's request did not identify whether Qwest specifically needed the waiver sought by the trade association. *See* ER 0114-0116 (copy of trade association's request to FCC).

¶ 19: “this limited waiver”;

¶ 21: “the waiver we grant here, which is for a limited duration to address a specific compliance issue”;

¶ 23: “a limited waiver of brief duration” . . . “this limited waiver” . . . “a limited waiver”;

¶ 25: “we grant all LECs a limited waiver . . . .”

*Id* at 21370-71, 21375, 21378-82.

As part of this “limited waiver” of “brief duration,” the FCC adopted the trade association’s proposal to require that all carriers that utilized the extra time to refund to their customers any amounts by which the rates were reduced, retroactive to April 15, 1997:

A LEC who seeks to reply on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates.

*Id* at 21370 ¶ 2. Because the refund is expressly limited to “the waiver granted in the instant Order,” and the waiver is expressly “limited” and “brief,” the only reasonable interpretation of the Waiver Order is that any refund too is “limited” and “brief.” *Nowhere* does the order address any right to a refund in *perpetuity* in the event that a carrier ever reduces its rates in the future, and in particular, where the FCC five years later revises the governing law that causes a reduction in rates.

On the basis of the plain meaning of the FCC’s order, the District Court rejected PSPs’ bizarre application of the refund requirement to this lawsuit:

In the April 10, 1997 letter [to the FCC] that Qwest and the other RBOCs signed, they requested a 45-day extension to file new NST-compliant rates and in

exchange promised to reimburse or provide credit to customers if the 45-day late rates were lower than the rates that had been charged over those 45 days. Thus, to the extent that Qwest waived its right to invoke a filed-rate doctrine defense against claims for a refund, this waiver extended only to rates charged in that 45-day period.

Dismissal Order at 7 (ER 0296).

Lacking any express support in the *Waiver Order*, PSPs twist its language to argue that the perpetual refund requirement should exist because, otherwise, a carrier could simply have chosen to avoid the May 19 deadline altogether to lower rates. Br. at 11-13. PSPs myopically ignore the consequences of a missed filing. If PSPs believed Qwest missed the May 19, 1997 deadline, their recourse would have been to file complaints at the State Commissions or the FCC on May 20, 1997 – not to wait five-and-a-half years. Had they filed such an action on May 20, 1997, they would have been entitled (if they were right) to reparation damages, so consequently no reason existed for the FCC's *Waiver Order* to address the situation where a customer claims a carrier missed the May 19 deadline.

PSPs also try to argue the refund was open-ended because State Commissions theoretically could have taken some time to approve newly filed tariffs. Br. at 12. PSPs support this argument with citations to State Commissions that do not regulate Qwest. *See id* (citing proceedings in Kentucky, Tennessee and Michigan). But the fact some State Commissions in theory could have taken some time to implement tariffs filed before May 19, 1997, does not *ipso facto* turn the refund into an open-ended perpetual period – Qwest still had to file the new tariffs by May 19, which is the predicate fact of the refund, even if State

Commissions might not finalize those tariffs until later. Tariffs filed in 2002 or later miss this refund period by five years.

**2. *The Court Should Refer To The FCC The Issue Of How To Interpret The FCC's Waiver Order.***

But even if the Court gives any credence to Plaintiffs' twisted reading of the *Waiver Order*, Ninth Circuit law requires this Court to refer this threshold issue to the FCC.

Where the crux of a lawsuit depends on construction of the scope of an agency's order, and the parties advance different potential meanings of the order, the law requires that the agency be given the first chance to pass on the meaning of its own order. *Rilling v. Burlington N. R.R. Co.*, 909 F.2d 399, 401 (9th Cir. 1990) ("Whether such a duty [alleged by plaintiff] is, or should be, imposed on [defendant] under [the ICC Order] is a question which requires an interpretation of the ICC's merger order and thus is within the ICC's special competence."); *see also Zapp v. United Transp. Union*, 727 F.2d 617, 625 (7th Cir. 1984) (referring to agency question of meaning of prior order, because court did not "know unambiguously what right the order accords plaintiffs," which "is the sort of determination . . . classically committed to agency discretion"); *Engelhardt v. Consolidated Rail Corp.*, 594 F. Supp. 1157, 1166 (N.D.N.Y. 1984) ("this Court does not find the terms of the [agency's] orders at all clear . . . . Consequently, the [agency] should initially determine the extent of its orders . . . .").

Currently pending at the FCC is a proceeding that addresses exactly this issue. Various PSPs from around the country have petitioned the FCC to hold that

the FCC's 1997 Waiver Order creates a perpetual refund right to PSPs where RBOCs reduced PAL rates in 2002 or later to comply with the revised New Services Test set forth in the FCC's 2002 *Wisconsin Order*. See *Independent Payphone Assoc. of N. Y.'s Petition for Preemption & Declaratory Ruling Concerning Refund of Payphone Line Rate Charges*, Coln. Car. Bur. Docket No. 96-128, \_\_\_\_\_ FCC Rcd. \_\_\_\_\_, 2005 WL 41574 (Jan. 7, 2005). Public and industry comments in this proceeding were due January 18, 2005, and Reply comments will be due January 25, 2005, making the proceeding ripe for the FCC's decision. *Id* Pursuant to Rilling and similar precedent, this Court should defer to the FCC's forthcoming interpretation of the *Waiver Order* and reject PSPs' attempts to have federal courts interpret the *Waiver Order*.

**B. Federal Law Does Not “Preempt” Any State Law Here, Because The FCC Expressly Relies On The States As Part Of The Federal Scheme Of Regulation.**

PSPs argue that the District Court mistakenly failed to consider that federal law (in the form of FCC orders) preempts state law (in the form of state tariffs). Br. at 20-22. This argument is devoid of logic, because it ignores an extremely fundamental aspect of the FCC's orders. The FCC *expressly ordered* Qwest and other RBOCs to file *state tariffs*, and the FCC further ordered that *State Commissions* should review all challenges to these tariffed rates in the first instance. *Order on Recon.*, 11 FCC Rcd. at 21308-21309 ¶ 163. The FCC said it was adopting this structure in the interests of “federal-state comity.” *Wisconsin Order*, 17 FCC Rcd. at 11. Federal law therefore either adopts or defers to state law, however one might want to characterize the FCC's language. But PSPs

cannot possibly point to any aspect of the FCC orders that is *inconsistent* with state law so as to justify preemption under the Supremacy Clause.

As some background, it is important to understand the general context of the FCC's dealings with State Commissions. Historically, the FCC only had jurisdiction over purely interstate communication services; local services, like payphone services, were exclusively the domain of states. *See* 47 U.S.C. § 152(b) (reserving all local communication services to states). Over time, amendments to the Communications Act, including Section 276, gave the FCC some jurisdiction over local services. *Wisconsin Order*, 17 FCC Rcd. at 2060-2062 ¶¶ 31-34. But even with this new power, the FCC sometimes chooses to continue to permit State Commissions to exercise primary authority. *E.g.*, 47 C.F.R. §§ 5.301(c), 51.319(d) & 51.401 (FCC defers to state commissions to enforce “interconnection agreements” between RBOCs and their competitors under §§ 47 U.S.C. 251 & 252); 47 C.F.R. §§ 64.1100, 64.1110 & 64.1150 (FCC defers to State Commissions to enforce FCC's rules against “slamming” implementing § 47 U.S.C. 258). Therefore, the FCC's decision to exercise its authority under Section 276 by continuing the regime of state-filed and state-enforced tariffs for payphone services is not unique.

For PSPs to prove that federal law preempts state law here, PSPs must show that the state law is inconsistent with federal law or somehow stands in the way of important federal purposes. *Louisiana Pub. Serv. Comm'n v. FCC*, 476 US 355, 368-369 (1986). They cannot possibly do that when the *federal law expressly defers to state law*. The FCC intentionally required Qwest to file its payphone

service tariffs with State Commissions, and the FCC requested State Commissions to hear challenges to these tariffs. *Order on Recon.*, 11 FCC Rcd. at 21294 and 21308-21309, ¶¶ 132-33 & 163. The FCC did so in deference to historic state authority over these services:

In the interest of federal-state comity, we stated that we would rely initially on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276.

*Wisconsin Order*, 17 FCC Rcd. at 2056 ¶ 15. Therefore, it cannot possibly be true that State Commission review and enforcement of these tariffs conflicts with or impedes federal law, because *it is the federal law* that they do so.<sup>13</sup>

PSPs' theory that the FCC's orders preempted state-law filed tariff doctrines suffers for numerous other reasons. For example, the state tariffs at issue here arguably are enforced by the *federal* filed tariff doctrine, because ultimately it is *federal* law (the FCC orders) that required the tariffs to be filed at the State Commissions. (PSPs' citation to cases that federal filed tariff doctrine does not

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<sup>13</sup> PSPs argue that this results in a "patchwork" of 51 jurisdictional rules, instead of a uniform federal rule. *See* Br. at 21 n. 14. That is the FCC's intention. As the examples for Sections 251, 252 and 258 show, as well as the fact that each state applies the New Services Test differently (*see* Counterstatement of Facts Part II.B *supra*), the FCC is entirely comfortable with a "patchwork" of state-by-state rules as they apply to inherently local phone services. PSPs simply assume without citation that the FCC wanted uniform interpretation and enforcement of payphone line rates, an assumption completely inconsistent with the FCC's mandate for state-filed and state-enforced tariffs. *See, e.g., Waiver Order*, 12 FCC Red. at 21375 ¶ 12 ("the question of whether a LEC has effective intrastate tariffs is to be considered on a state-by-state basis").

apply to state tariffs, *see* Br. at 20-22, do not arise in situations where the federal law itself mandated state-filed tariffs.) On this basis, PSPs’ preemption argument fails entirely; Qwest’s invocation of the ***federal*** filed tariff doctrine is not preempted by anything.

But even if these state tariffs are ultimately enforced under state filed tariff doctrines, nothing exists to be preempted. PSPs cannot deny that the FCC intended Qwest’s tariffs to be enforced as ***tariffs***, meaning, with the filed tariff doctrine, whether it be state or federal filed-tariff doctrine. If the FCC did not desire the tariffs to be enforced with the filed tariff doctrine, the FCC would have “detariffed” payphone line services and required Qwest not to file tariffs but to file some kind of standard-form contracts.<sup>14</sup>

The Court need not decide whether it is federal or state filed tariff doctrine that applies here. PSPs have not shown that any state filed tariff doctrine is inconsistent with or impedes federal law. Indeed, each of the eleven states here would apply the ***same*** filed tariff doctrine as federal law, so preemption never

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<sup>14</sup> There is ready historic precedent for such a requirement. In July 2001, the FCC detariffed the entire long-distance phone industry. The FCC ordered all long-distance carriers like AT&T, MCI, and Sprint to remove their federal tariffs for their services and instead to go forward with common service contracts. *See MCI WorldCom, Inc. v. FCC*, 209 F.3d 760 (D.C. Cir. 2000); 47 C.F.R. § 61.19 (2001). The purpose of this detariffing was to eliminate application of the filed tariff doctrine to long-distance services. *MCI*, 209 F.3d at 763. Had the FCC intended that the filed tariff doctrine not apply to payphone line rates, the FCC would have detariffed these service as well – which it clearly did not do.

arises.<sup>15</sup> Nothing about Qwest’s invocation of the filed tariff doctrine, whether it be federal or state law, is negated by preemption principles.

**C. The Purported Exception To the Filed Tariff Doctrine In Antitrust Cases Has No Application Because PSPs Have Not Raised Any Antitrust Claims.**

PSPs argue that Qwest cannot invoke the filed tariff doctrine against claims by their competitors that Qwest engaged in anti-competitive behavior – the so-called “competitor exception” to the filed tariff doctrine. Br. at 27-29. PSPs’ contention is frivolous because, even if this Circuit recognized the “competitor exception” (which it has never done), PSPs do not state any antitrust claims so the exception is entirely inapplicable.

As an initial matter, this Circuit has never had occasion to determine if antitrust actions can present a “competitor exception” to the filed tariff doctrine. Other circuits are split, so PSPs cannot presume the exemption exists, in this Circuit. Compare *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d 1144, 1161 (3d Cir. 1993) (applying competitor exception to filed rate doctrine to allow Sherman Act claim) with *Pinney Dock & Transp. Co. v. Penn Central Corp.*, 838

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<sup>15</sup> *US WEST Communications, Inc. v. City of Longmont*, 948 P.2d 509 (Colo. 1997) (*en banc*); *Johnson v. Bekins Moving & Storage Co.*, 389 P.2d 109 (Idaho 1963); *Teleconnect Co. v. US WEST Communications, Inc.*, 508 N.W.2d 644 (Iowa 1993); *Komatz Constr. Co. v. Western Union Tel. Co.*, 186 N.W.2d 691 (Minn. 1971); *Stewart Trucking, Inc. v. PBX Inc.*, 473 N.W.2d 123 (Neb. 1991); *Valdez v. State*, 54 P.3d 71 (N.M. 2002); *E. W. Wylie Corp. v. Menard, Inc.*, 523 N.W.2d 395 (N.D. 1994); *Christensen v. Minneapolis ST. P. & S.S.M. Ry. Co.*, 252 N.W. 738 (S.D. 1934); *American Salt Co. v. W. S. Hatch Co.*, 748 P.2d 1060 (Utah 1987); *Allen v. General Tel. Co. of the NW*, 578 P.2d 1333 (Wash. 1978); *Montana Dakota Utils. Co. v. Public Serv. Comm’n of Wyo.*, 847 P.2d 978 (Wyo. 1993).

F.2d 1445, 1457 (6th Cir. 1988), *cert. denied*, 488 U.S. 880 (1988) (applying filed tariff doctrine to insulate defendant from antitrust liability and rejecting competitor exception).

Even if this Circuit did recognize the “competitor exception” in antitrust lawsuits, it would only apply to antitrust claims. Every case PSPs cite for the “competitor exception” (*see* Br. at 27-29) involves antitrust claims under the Sherman Act or similar antitrust laws. The “competitor exception” does not apply if a lawsuit does not involve antitrust claims. *E.g.*, *Teleconnect Co. v. US WEST Communications, Inc.*, 508 N.W.2d 644, 649 (Iowa 1993) (upon dismissal of antitrust claims from suit, carrier’s filed tariff defense defeated all remaining tort and contract claims).

The “competitor exception” does not apply here because, obviously, PSPs have not raised any antitrust claims. None of their causes of action arise from the Sherman Act or other antitrust laws. *See* Dismissal Order at 7 (ER 0296) (rejecting invocation of “competitor exception” because PSPs have not brought antitrust claims).

PSPs’ claims under the Communications Act, to the extent they have any, do not amount to antitrust violations. The Act’s Section 276, like other sections of the Act (*see, e.g.*, 47 U.S.C. §§ 251, 252 & 271), could be said to require RBOCs like Qwest to take actions towards their competitors to further competition. Br. at 27-29. But an RBOC’s violation of those pro-competition requirements is *not* an antitrust violation, even if it is alleged to have anti-competitive effects. Congress expressly stated that requirements imposed in the Communications Act’s 1996

amendments, which included Section 276, had no effect on antitrust law. *See* Pub. L. No. 104, 104th Cong. 2d Sess. § 601(b)(1), 110 Stat. 56, 601 (1996), *reprinted at* 47 U.S.C.A. § 152 note (West 2004). Based in part on this provision, the Supreme Court completely rejected any connection between the Communications Act’s pro-competition requirements and antitrust obligations. *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (Verizon’s alleged violations of Act § 251, requiring RBOCs to make facilities available to competitors, could not by themselves constitute antitrust violations). To the extent PSPs argue Qwest’s allegedly unreasonably high rates harmed competition (*see* Br. at 27-29), the *Trinko* decision is squarely on point and precludes any notion that Qwest’s alleged actions could constitute an antitrust violation.

Whether PSPs *could* state a valid claim under antitrust law is a matter for another day. The best PSPs could argue is that Qwest’s payphone lines are “essential facilities” that Qwest’s allegedly unreasonably high rates somehow “denied” to PSPs – a kind of claim that the *Trinko* opinion bluntly rejects. *See* 540 U.S. at 880 (rejecting “essential facilities doctrine” applied to Verizon, and holding that antitrust law does not require RBOCs to make facilities available in cost-effective manner to competitors). Lacking any antitrust claims in their Complaint as it currently is written, the “competition exception” PSPs desire to invoke is simply inapplicable to this lawsuit.

**IV. THE DISTRICT COURT CORRECTLY CONCLUDED THAT PSPS' CLAIMS REGARDING "FRAUD PROTECTION" TARIFFS ARE BARRED BY THE STATUTE OF LIMITATIONS.**

Separate from the foregoing analysis, the District Court dismissed PSPs' claim regarding Qwest's alleged lack of a federal tariff from 1997 to 2003 for "Fraud Protection" services on the grounds that the claim was long barred by the Communication Act's two-year statute of limitations. Dismissal Order at 7-8 (ER 0296-0297). This dismissal is beyond reproach.

**A. PSPs' "Fraud Protection" Claim Plainly Is Untimely.**

PSPs allege that Qwest was supposed to file rates for "Fraud Protection" services in a *federal* tariff in 1997, but allegedly Qwest did not put those rates in a federal tariff until 2002 or 2003. The entirety of the Complaints' relevant allegations concerning PSPs' "Fraud Protection" claim are the following:

¶ 11. . . . The FCC also required [Qwest] to file its Fraud Protection rates with the FCC based on the NST ... .

¶ 13. . . . [Qwest] also refused to file a Fraud Protection rate with the FCC in violation of FCC orders.

¶ 16. Further, because [Qwest] failed to file a NST-complaint Fraud Protection rate with the FCC in 1997, [Qwest] discriminated against [PSPs] . . . .

ER 0003-0005; *see* Br. at 15-16 (claim that Qwest failed to file Fraud Protection in federal tariffs was distinct from claim that Qwest's rates, wherever filed, failed to meet New Services Test).

The District Court dismissed this claim as barred by the statute of limitations. The cause of action for this claim accrued on May 15, 1997, the date that PSPs allege Qwest missed the deadline to file these services in a federal tariff.

Dismissal Order at 7-8 (ER 0296-0297). The Communications Act bars any lawsuit for damages against a carrier filed more than two years after it accrues. 47 U.S.C. § 415(b).<sup>16</sup> Therefore, the statute of limitations barred this claim after May 15, 1999.

PSPs try to avoid this straightforward analysis by arguing that they did not “discover” their claim until 2003, when they allege Qwest first filed a federal tariff for these services. Br. at 15-16 and 33-35. They argue that claims under the Communications Act are subject to a “discovery” rule, *id* at 34, so their claim did not accrue until 2003 when they “discovered” that Qwest’s federal tariff contained “Fraud Protection” services for the first time, *id* at 18.<sup>17</sup>

PSPs cannot hide their heads in the sand. Tariffs are matters of public record, and it is black-letter law that all customers are charged with constructive knowledge of the contents of a tariff. *Central Office*, 524 U.S. at 222 (customers “are charged with notice” of tariff); *Kansas City S. Ry.*, 227 U.S. at 653 (customer’s knowledge of tariff terms are “conclusively presumed”). Therefore, PSPs had at least constructive knowledge in 1997 that Qwest’s federal tariffs did

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<sup>16</sup> To the extent PSPs’ cause of action arises under Section 407 of the Communications Act, the statute of limitations is only one year. 47 U.S.C. § 415(f).

<sup>17</sup> The FCC’s “discovery” rule for accrual of causes of action is an objective test, not subjective. The question is not when *this* plaintiff subjectively discovered the cause of action. The cause of action accrues when facts and circumstances available to the plaintiff *could have* led plaintiff, based on reasonable diligence, to discover the cause of action. *In re Communications Vending Corp. of Ariz.*, 17 FCC Rcd. 24201, 24222 ¶ 51 (2002); *In re Aetna Life Ins. Co.*, Mem. Op. & Order, 3 FCC Rcd. 2126 ¶ 14 (1988).

not contain “Fraud Protection” services. If they believed that these services were required in a federal tariff at that time, then they “discovered” their claim when Qwest allegedly missed the filing deadline to add these services to its federal tariff. They filed their claim in late 2003, about four-and-a-half years too late.

At best, PSPs are arguing that they “discovered” in 2003 that the *rates* in Qwest’s federal tariff for “Fraud Protection” services were less than the rates from 1997-2003 for the equivalent services in Qwest’s state tariffs. Br. at 34-35. Even if true, this is irrelevant; nothing in the Complaint alleges that the Fraud Protection rates would have been lower in 1997 had they been filed in 1997 in a federal tariff as opposed to in state tariffs. In this appeal, PSPs have subtly changed the nature of their “Fraud Protection” allegations to now focus on the *amount of the rates*, not the jurisdictional question of whether Qwest filed rates in a state versus a federal tariff. PSPs thus reveal that they are actually just trying to repackage their “rate unreasonableness” argument in different wrapping. Whether the rates were in state or federal tariffs imposes no separate injustice on PSPs, as long as the rates were reasonable. If the rates were unreasonable, wherever filed, PSPs’ remedy still lies at State Commissions or the FCC, not in federal court.

**B. The Record Is Sufficient To Support Dismissal Of The Claim.**

Facing the obvious bar to their claim regarding “Fraud Protection,” PSPs ask this Court to remand the issue so that they can brief it further. Br. at 32. Their theory is that they never had the opportunity to brief it before the District Court because it was sprung on them by surprise in Qwest’s Reply brief. *Id* at 31-32.

PSPs are wrong. The issue *was* raised before the District Court, PSPs simply chose to ignore it. Qwest’s initial brief expressly pointed out the lack of timeliness of the “Fraud Protection” issue:

In addition, plaintiffs allege that Qwest failed to file a federal tariff in 1997 for “Fraud Protection.” Complaint ¶ 16. Besides being barred by the applicable two-year statute of limitations, *see* 47 U.S.C. § 415. . . .

Qwest’s Motion to Dismiss at 23, attached as Appellees’ Supplemental Excerpts of Record (“SR”) SR-0002. Opposition brief did not defend the timeliness of their claim. The District Court’s dismissal of the claim hardly came by surprise.<sup>18</sup>

Remanding the issue serves no purpose. PSPs’ argument in their Brief presumably is the best argument they can advance on the issue, and it fails. This Court should affirm the dismissal even if the District Court had never addressed the issue. Although the general rule is that this Court will not reach an issue not decided upon by the district court, this Court will rule on the issue when it “is purely one of law and either does not affect or rely upon the factual record developed by the parties.” *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978). The applicability of a statute of limitations is a question of law and as such, can be decided by this Court. *United States v. Koonin*, 361 F.3d 1250, 1252 (9th Cir. 2004).

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<sup>18</sup> Qwest’s Reply brief addressed the timeliness of an issue first raised in PSPs’ Opposition – that the *entire* lawsuit arose from Communications Act § 407, which has a strict one-year statute of limitations (*see* 47 U.S.C. § 415(f)). The District Court did not need to address this issue to dispose of the case. PSPs thus are wrong that the District Court “rejected” Qwest’s argument (*see* Br. at 33).

Because the District Court's decision unquestionably was correct, this Court should affirm it. *Williamson v. General Dynamics Corp.*, 208 F.3d 114, 1149 (9th Cir. 2000) ("If support exists in the record, a dismissal may be affirmed on any proper ground, even if the district court did not reach the issue or relied on different grounds or reasoning.").

### **CONCLUSION**

For the foregoing reasons, this Court should affirm the District Court's order granting Qwest's Motion to Dismiss.

Respectfully submitted,

/s/

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QWEST CORPORATION

Dated: January 24, 2005

**CERTIFICATION OF COMPLIANCE WITH  
FED. R. APP. P. 32(a)(7)(C) AND NINTH CIRCUIT RULE 32-1**

I certify that pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Ninth Circuit Rule 32-1, the attached Brief of Appellee is proportionately spaced, has a typeface of 14 points or more and contains 13,686 words.

January 24, 2005

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/s/

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**CERTIFICATE OF SERVICE**

I, Douglas P. Lobel, hereby certify that two true and correct copies of the foregoing Brief of Appellee Qwest Corporation were served this 24th day of January, 2005, upon the following, by overnight courier:

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