

**Before the
Federal Communications Commission
Washington, D.C. 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

COMMENTS OF BUSINESS DISCOUNT PLAN, INC.

Dated: March 30, 2005

Respectfully submitted,

BUSINESS DISCOUNT PLAN, INC.

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COMES NOW, Business Discount Plan, Inc. (“BDP”), and respectfully submits its Comments, pursuant to the Commission’s Public Notice, released March 16, 2005 (DA05-691) (the “Public Notice”), inviting comments on three Applications for Review and one Petition for Reconsideration pertaining to the Wireline Competition Bureau’s Order, released December 9, 2004, establishing a 12-month deadline for filing downward revisions to Form 499-A,. For its comments, BDP respectfully states:

I. INTRODUCTION

On December 9, 2004, Wireless Competition Bureau (“WCB”) released an Order establishing a 12-month deadline for filing revisions to FCC Form 499-A, the annual Telecommunications Worksheet (“Form 499-A”), if the revisions would decrease regulatory fees

or contributions to universal service, interstate Telecommunications Relay Service, number administration, or local non-portability, (collectively “USF”). *See Federal-State Joint Board on Universal Service; 1998 Biannual Regulatory Review - Streamline Contributor Reporting Requirements associated with administration of telecommunications relay service, North American Numbering Plan, Local Number Reportability, and Universal Service Support Mechanisms; Changes to the Board of Directors of the National Exchange Carrier Association, Inc., Order, CC. Docket Nos. 96-45, 98-171, 97-21, BA04-3669 (Dec. 9, 2004) (“December 9 Order”).*

In response to the December 9 Order, BDP, Qwest Communications International Inc. (“Qwest”), and SBC Communications, Inc. (“SBC”) filed Applications for Review on January 10, 2005. Sprint Corporation (“Sprint”) filed a Petition for Reconsideration on the same day. Thereafter, AT&T Corp. (“AT&T”) filed comments in response to BDP, Qwest, and SBC’s Applications for Review on January 25, 2005. U.S. Telecom Association (“USTA”) also filed reply comments. In its Public Notice, the Commission specifically invited interested parties to submit comments on these filings.

II. Qwest, Sprint, SDC, and AT&T Each Agree with BDP’s Analysis That the December 9 Order Adopts a Substantive Rule Without a Notice and Comment, and Violates the Federal Administrative Procedures Act.

Qwest, Sprint, SDC, and AT&T each agree with BDP’s analysis that the December 9 Order adopts a substantive rule without a notice and comment, and violates the federal Administrative Procedures Act. 5 U.S.C. § 552 *et seq.* (the “APA”). In its Application for Review, BDP argued that WCB’s December 9 Order adopting a firm 12 month deadline for contributors to file revised FCC Form 499-As after the original due date, if the revisions would result in decreased regulatory fees or contributions to support mechanisms is a substantive rule

adopted without following the notice and comment procedures required under the APA. *See* BDP's Application for Review, pp. 5-20. In its Application for Review, Qwest asserts that the December 9 Order is procedurally defective because it changes the substantive standards established by the Commission that govern the Universal Service Administration Company's ("USAC") review of revisions of FCC Form 499-A. Qwest specifically notes that the Commission's prior rule governing revisions to FCC Form 499-A included a "safety valve" that allowed a filer of an untimely FCC Form 499-A to make a "good-cause" showing for a revision that decreases the filer's universal service contribution. As Qwest observes, however, the December 9 Order eliminates this "safety valve" for untimely downward revisions and, therefore, constitutes a substantive rule change which requires notice and comment under the APA. BDP agrees with Qwest's observation.

Qwest also points out that the rule adopted in the December 9 Order presents a particularly compelling case for notice and comment, because it would likely not have led to promulgation of this rule. Again, BDP agrees. If WCB had sought public comment on the rule, interested parties would have shown that a one-year period does not allow sufficient time for even the most diligent carrier to discover errors, as was the case with BDP when it discovered through a non-routine audit of revenue records supplied to it by its independent billing contractor, that the billing contractor had misreported BDP's gross revenues for several years, resulting in BDP's significant overpayment of its contribution liability to USF. In the case of BDP, the billing contractor's errors in BDP's gross revenue figures for the reporting years 1999-2002 was not discovered until three years after the billing contractor essentially certified the accuracy of the revenue information to BDP for each of these years so it could, in turn, calculate its USF contribution.

Moreover, BDP submits that public comment in a notice and comment proceeding on the rule would also have addressed the purported benefits, as well as the disadvantages, of the rule, so that WCB would have had a full and complete record on which to make an appropriate regulatory decision on whether to establish a time limit in which contributors to the USF could file downward revisions to FCC Form 499-A.

Likewise, SBC points out that the December 9 Order promulgating the new rule for revisions that would reduce contributions is a substantive rule requiring notice and comment. SBC correctly points out that the December 9 Order reflects a substantive value judgment which requires a notice and comment proceeding under the APA, a conclusion supported by compelling legal precedent. *See*, SBG's comments, pp. 7-10. *See also United States Telecom Association, et al. v. Federal Communication Commission*, ____ F. 3d ____, ____ U.S. App. D.C. (Case Nos. 03-1414 and 03-1443) (Slip Op. March 11, 2005).

III. Qwest, SBC and Sprint Properly Contend That the December 9 Order is Arbitrary and Capricious

In its Application for Review, BDP asserted that the WCR's December 9 Order was arbitrary and capricious because the WCB exceeded its authority in adopting the rule, failed to adhere to the notice and comment requirements of the APA, and provided no justifiable basis for the rule. Both Qwest and SBC agree with BDP on this point. In addition, both add other reasons demonstrating that the December 9 Order is arbitrary and capricious. First, Qwest points out that the December 9 Order establishes a "one-way" ratchet rule which overstates the benefits to be achieved from prohibiting downward revisions beyond a 12-month period, and which ignores the harm that the rule will produce in terms of burdens placed on contributors to USF.

Qwest quite clearly points out that the purported benefits of administrative efficiency, certainty, and incentives for accuracy on which the WCB relied are greatly overstated, and that

the WBC failed to recognize the impact that a limitation on the filing of revisions would have on USAC's workload of the process of FCC Form 499-As, and administers the USF. Furthermore, Qwest shows that these purported benefits would not provide any more certainty to contributors, given the fact that the Commission changes the contribution factor every quarter, and the change is not known sufficiently in advance to a contributor to actually accord any certainty. Moreover, the new rule would not create any incentives for accuracy, because the one-way ratchet provision does not address circumstances when a carrier understates its revenues. Finally, Qwest observes that carriers already have substantial incentives not to overstate their revenues to avoid contributing more to USF than required. Thus, Qwest concludes that the rule would not really provide any greater incentive to accuracy.

Qwest also appropriately challenges that the WCB's December 9 Order's assertion that 12 months is enough time for a diligent filer to determine what revenues it had earned in the prior year. Indeed, as BDP showed in its Application for Review, despite a filer's diligent efforts, it is not always possible to determine that a downward revision to an FCC Form 499-A is warranted within 12 months of the due date. In fact, as Qwest observes, a carrier's computation of the gross revenues to which the universal service factor applies is a complex calculation, and requires detailed consideration of numerous technical and legal issues, many of which may not be possible to fully address within the 12 month period. Qwest is correct when it concluded that limiting a filer to a 12-month period for making downward revisions to its FCC Form 499-A is completely unreasonable, will not achieve the benefits claimed by the WCB in its Order, and that the harm caused by the rule would clearly outweigh any benefits that might be achieved. *See* Qwest Application for Review, pp. 10-17.

SBC argues that the rule is arbitrary and capricious by focusing on the rule's lack of asymmetry. While the rule announced in the WCB's December 9 Order applies a 12-month period for downward revisions, there is no corresponding limit to revisions that would increase a carrier's contribution. SBC quite correctly observes that if a firm downward deadline is necessary to promote efficiency and ensure the stability of federal support mechanisms, such a deadline should apply to all revisions, regardless of whether the revisions would increase or decrease a carrier's contributions. *See* SBC Application for Review at pp. 10-11. In SBC's words, the WCB's new rule is "patently unfair". BDP agrees and also submits that the rule is actually inconsistent with promoting efficiency and stability to federal support mechanisms because it would require a carrier to file revisions to its FCC Form 499-A more than one year after its original deadlines if the revisions would increase the carrier's contribution.

Sprint likewise discerns that it is unfair to adopt a 12-month cut-off period for correcting errors that work in the contributor's favor, while continuing to place contributors under an obligation of indefinite duration to file revisions that would have the effect of increasing the filing party's contributions.

IV. The WCB Should Grant the Applications for Review, and Initiate a Rule Making to Develop a Complete Record Before Promulgating Any Changes Affecting Revisions to FCC Form 499-A

BDP agrees with Qwest, Sprint and SBC that the WCB should initiate rule-making by giving notice and requesting public comment on any proposed rule change to revisions of FCC Form 499-A for the following reasons. First, such a proceeding will present a full opportunity for filing carriers to address issues of efficiency and stability to universal service support mechanisms which purport to serve as the basis for a rule creating a deadline for filing revisions to FCC Form 499-A. Such a proceeding will also give commenting parties the chance to explain the effects they perceive of any deadline for filing revisions to FCC Form 499-A, including revisions which

result in both upward and downward adjustments. Second, commentors are likely to offer the Commission examples of similar deadlines in connection with similar types of filings before other federal agencies, including the Internal Revenue Service, whose statutory deadlines accord taxpayers ample time to make revisions to their previously-filed federal tax returns, whether such revisions include an increase or decrease in the payment of their taxes. The parallels to the filing of amendments to tax returns and FCC Form 499-A are particularly relevant here, since a carrier's liability to USF is tantamount to a federal tax liability. Finally, commentors are likely to present the Commission with alternatives to a rule having strict deadlines, as the WCB advocates for promoting efficiency and stability to universal support mechanisms.

Indeed, Qwest offered at least two alternatives in its Application for Review, such as the Commission spreading credits resulting from revisions over two quarters instead of one quarter, or applying credits to annual true-up process. *See* Qwest Application for Review, pp. 17-18. Similarly, BDP is prepared to offer alternatives to a rule with strict deadlines in order to achieve the purported benefits of efficiency, certainty and accuracy. Without a notice and comment proceeding, the WCB lacks a full and complete record upon which to base a sustainable regulatory decision pertaining to filing revisions to a carrier's annual report of revenues and contributions to the USF.

V. The FCC's Public Notice will Not Cure its Failure to Initiate a Notice and Comment Proceeding Before Promulgating the Rule Announced in the December 9 Order

The FCC's Public Notice appears to be an attempt on the part of the Commission to convert WCB's December 9 Order into a notice and comment proceeding in order to comply with the APA. The Public Notice, however, will not cure the WCB's failure to comply with the APA in adopting the December 9 Order for at least one reason. The Public Notice only requests comments on the Applications of Review for the December 9 Order filed by BDP, Qwest, and

SBC, and the Petition for Reconsideration filed by Sprint, and not on the rule itself which was announced in the December 9 Order. This is a fatal flaw to any such attempt to cure the legal defects in the December 9 Order.

The APA requires: that a general notice of proposed rule making must be published in the Federal Register; that after such notice as required by the APA, the Commission must give interested persons an opportunity to participate in the rule-making procedure through submissions; that after consideration of the submissions, the Commission must incorporate in any rules adopted a concise statement of the basis and purpose of the rule; and a substantive rule must be published not less than 30 days before its effective date. 5 U.S.C. §553(b)(c) and (d). The Public Notice fails to comply with these statutory requirements because it does not invite interested persons to comment on the actual rule promulgated in the December 9 Order. Thus, interested parties who do file comments may not realize that they can also comment on the proposed benefits and effects of a rule which limits the deadline for filing downward revisions to contributions to the USF.

VI. Conclusion

For the foregoing reasons, BDP respectfully urges the Commission to grant the Applications for Review filed by Qwest, SBC, and BDP, and the Petition for Reconsideration filed by Sprint, as well as adopt the reply filed by AT&T, and the comments of USTA. In granting these Applications for Review and the Petition for Reconsideration, the Commission should reverse the December 9 Order; initiate a notice and comment proceeding pursuant to the Administrative Procedures Act; and request public comment on deadlines for filing revisions, both upward and downward, to a filing carrier's annual report on its contributions to the universal service fund on FCC Form 499-A.

Respectfully submitted,

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