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03-175

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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APR 13 2005

In the Matter of)
)
Petition For Waiver of Section 61.45(d),)
or in the alternative a Declaratory Ruling)

Federal Communications Commission
Office of Secretary

WC Docket No. _____

PETITION FOR WAIVER OF SECTION 61.45(D), OR IN THE ALTERNATIVE
DECLARATORY RULING, TO TREAT END USER COMMON LINE
SETTLEMENT PAYMENTS AS EXOGENOUS COSTS
EXPEDITED TREATMENT REQUESTED

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April 13, 2005

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BellSouth Corporation, on behalf of itself and its wholly owned subsidiaries, Cincinnati Bell Telephone Company, SBC Services Inc. on behalf of Pacific Bell Telephone Company, Southwestern Bell Telephone, L.P., Nevada Bell Telephone Company and the Ameritech Operating Companies, Qwest Services Corporation, Sprint Incumbent Local Exchange Companies, and Verizon¹ (collectively "Joint Petitioners") hereby request that the Commission waive Section 61.45(d), or in the alternative issue a declaratory ruling, to permit the Joint Petitioners to treat end user common line ("EUCL") settlement payments to independent payphone service providers ("PSPs") as exogenous costs.² These extraordinary costs represent EUCL costs that the Joint Petitioners are entitled to recover, and attempted to recover from PSPs consistent with the Commission's mandate. The Commission now says that its earlier

¹ The Verizon telephone companies participating in this filing are Contel of the South, Inc. d/b/a Verizon Mid-States; GTE Southwest Incorporated d/b/a Verizon Southwest; The Micronesian Telecommunications Corporation; Verizon California Inc.; Verizon Delaware Inc.; Verizon Florida Inc.; Verizon Hawaii Inc.; Verizon Maryland Inc.; Verizon New England Inc.; Verizon New Jersey Inc.; Verizon New York Inc.; Verizon North Inc.; Verizon Northwest Inc.; Verizon Pennsylvania Inc.; Verizon South Inc.; Verizon Virginia Inc.; Verizon Washington, DC Inc.; Verizon West Coast Inc.; Verizon West Virginia Inc.

² Collectively, the Joint Petitioners seek to recover an estimated \$35 to \$45 million in EUCL settlement payments to PSPs.

interpretation was in error and that Joint Petitioners must make refunds to PSPs because of the Commission's previous mistaken interpretations of its rules, which were overturned on appeal.³

SUMMARY

Joint Petitioners assessed EUCL charges on the PSPs pursuant to not one, but three separate Commission interpretations of its access rules, all of which were overturned on appeal. There is no question that the EUCL charges represented costs that the Joint Petitioners were allowed to recover. The only dispute in the EUCL proceedings was from whom these costs could be recouped: PSPs or other customers. Because of the Commission's change in directives, and the delay in Commission rulings, the Joint Petitioners have not only entered settlement agreements with PSPs that will effectively refund tens of millions of dollars in EUCL charges, but also did not include the recovery of these costs in the rates that they would otherwise have been authorized to charge other common line ratepayers.

In response to several formal complaints following the reversal of the Commission's earlier orders, the Commission determined that the LECs were not without recourse to recover their costs because they could attempt "to demonstrate that the damages paid to the PSPs constitute 'extraordinary cost changes.'" If approved, the LECs could "increase[e] the permitted price caps."⁴

Because the Joint Petitioners assessed these EUCL charges pursuant to Commission interpretations of its rules, they should be permitted to rectify the effects of complying with the Commission's erroneous interpretations. Specifically, the Commission should waive Section 61.45(d), or in the alternative issue a declaratory ruling, to permit the Joint Petitioners to treat

³ *Communications Vending Corp. of Arizona, Inc. v. Citizens Communications Company s/k/a Citizens Utilities Company and Citizens Telecommunications Company d/b/a Citizens Telecom*, Memorandum Opinion and Order, 17 FCC Rcd 24,201, ¶ 35 (2002) ("2002 EUCL Order").

⁴ *Id.* at ¶ 38.

settlement payments, which effectively refund EUCL charges to PSPs, as exogenous cost changes, which would allow the Joint Petitioners to adjust their price caps to recover these "exogenous" costs over a 12-month period.⁵ By granting this petition, the Commission would, for the applicable two-year statutory period, allow both parties, Joint Petitioners and the PSPs, the opportunity to put themselves in the position they would have been in had the Commission correctly interpreted its rules. That is, PSPs will effectively get refunds of EUCL charges through settlement payments, and Joint Petitioners will be able to recover the costs from other common line ratepayers as they would have had the Commission correctly interpreted its rules.

I. GENERAL STANDARDS GOVERNING PRICE CAP RULES, EXOGENOUS COST ADJUSTMENTS AND WAIVER

The Commission's price cap rules are designed to regulate local exchange carriers' rates in a way that mimics investment incentives and costs that would occur in an unregulated market. When it established the price cap regime, the Commission recognized that the initial rates and adjustment formulas would not capture all rate changes necessary to replicate the competitive outcome.⁶ To help ensure that prices fairly compensate carriers, the Commission implemented rules to permit carriers to adjust their price caps to recover certain "exogenous" costs.⁷ Under the Commission's orders,

Exogenous costs are in general those costs that are triggered by administrative, legislative or judicial action beyond the control of the carriers. . . . [T]hese are costs that should result in an

⁵ The exogenous cost adjustments would be implemented through tariff filings that would be subject to the Part 61 rules.

⁶ *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 166 (1990) (footnote omitted) ("*First Price Cap Order*").

⁷ *Id.*

adjustment to the cap in order to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.⁸

The Commission specifically identified certain categories of costs that it would treat as exogenous, including separations changes, USOA amendments, transitional and long term support, reallocation of regulated and nonregulated costs, expiration of amortizations, tax law changes, and depreciation rates. Because all exogenous costs would not necessarily fit within those categories, the Commission's initial rules allowed for the exogenous treatment of other costs, including extraordinary costs,⁹ the Commission shall "permit or require."¹⁰ Those rules were further amended in 1995 to clarify the procedural vehicle for seeking exogenous treatment of nonenumerated exogenous costs. Specifically, carriers could adjust their price caps to account for extraordinary or other costs that "the Commission shall permit or require be treated as exogenous by rule, rule waiver, or declaratory ruling."¹¹

In determining the types of costs that generally would warrant exogenous rate adjustments, the Commission has largely looked at two central issues: (1) whether the costs were beyond the carrier's control; and (2) whether the costs are accounted for in the price cap formula.¹² Said another way, the Commission recognized that exogenous treatment generally is

⁸ *Id.*

⁹ All extraordinary costs are not exogenous costs under the Commission's rules. Extraordinary costs are uncontrollable costs that result from natural disasters or other unforeseen events considered truly "extraordinary" by the Commission. The Commission must expressly permit or require these costs to be treated as exogenous by rule, rule waiver or declaratory ruling.

¹⁰ 47 C.F.R. § 61.45(d) (1991).

¹¹ 47 C.F.R. § 61.45(d) & (d)(1)(vi). See also *First Price Cap Order*, ¶ 190 ("consistent with the Constitutional ban on confiscatory rates," the Commission specifically left "open the possibility that, in a truly extraordinary situation, we would approve above-cap rates, even perhaps without suspension and investigation").

¹² See generally *First Price Cap Order*, ¶¶ 166-190; *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Red 8961, ¶275 (1995).

appropriate for costs that are imposed by external forces beyond the carriers' control, and not accounted for in the price cap formula.¹³ The same criteria should be used to determine whether the payments to resolve EUCL complaints constitute extraordinary or other costs entitled to exogenous treatment.

As Joint Petitioners demonstrate below, their assessment of EUCL charges arose solely from adherence to the Commission's interpretation of its rules. Further, the non-traffic sensitive costs recovered through those EUCL charges are not already reflected in the initial price cap rates or any subsequent adjustments. Thus, there is good cause for the Commission to waive Section 61.45(d), or in the alternative issue a declaratory ruling, to treat all settlement payments to resolve EUCL complaints as exogenous cost changes. Section 1.3 of the Commission's rules certainly authorizes such action, specifically allowing the agency to waive any Commission rule if good cause is shown.¹⁴ Further, the exogenous rules – the very rules at issue here – specifically allow the Commission to grant such a waiver.

II. THE COMMISSION SHOULD WAIVE ITS RULES, OR IN THE ALTERNATIVE ISSUE A DECLARATORY RULING, TO PERMIT EXOGENOUS TREATMENT OF EUCL SETTLEMENT PAYMENTS TO INDEPENDENT PAYPHONE SERVICE PROVIDERS

A. LEC ASSESSMENT OF THE EUCL CHARGES ON PSPs

EUCL charges are designed to recover certain interstate non-traffic sensitive costs directly from the end user on a per line basis – thus, the name “end user common line” or “EUCL” charges. The Commission's initial orders regarding EUCL charges did not specify how these costs would be recovered in the case of lines used to connect payphones supplied by

¹³ *Id.*; See generally *Southwestern Bell Telephone Co. v. FCC*, 28 F.3d 165, 168 (D.C. Cir. 1994) (“Thus it appeared [from Commission orders] that changes in GAAP were to receive exogenous cost treatment if they were mandated by the Commission (the ‘control’ test) and were shown not to involve double counting with the GNP-PI adjustment”).

¹⁴ 47 C.F.R. § 1.3.

independent PSPs, because such companies did not then exist.¹⁵ However, after the Commission authorized independent payphone provider services, these providers almost always connected their payphones to ordinary local exchange access lines, which they bought out of the Joint Petitioners' local exchange tariffs. As a natural consequence, the Joint Petitioners billed these providers for the charges normally associated with such lines, including the EUCL charge. At least as early as 1988,¹⁶ and on several occasions after that, the then-Common Carrier Bureau and the full Commission expressly held that the access rules *required* the LECs to assess, and independent PSPs to pay, EUCL charges on these lines.¹⁷ Thus, even though certain PSPs appealed the Commission's interpretation of its rules, the Joint Petitioners and other LECs were under a Commission mandate to assess the EUCL charge on PSPs.

In 1996, in response to provisions added by the 1996 Telecommunications Act, the Commission adopted new rules that made it clear that LECs were to assess EUCL charges on lines used by all payphone providers.¹⁸ A year later, in October 1997, the U.S. Court of Appeals

¹⁵ 2002 EUCL Order, ¶¶ 4-6.

¹⁶ Responding to a complaint filed by American Payphones against Southern Bell (now BellSouth), in 1988 the Commission specifically held that the LEC's classification of American Payphones' lines as "multi-line' business service for purposes of applying subscriber line charges does not violate the Commission's rules or telephone company tariffs." Letter from Anita J. Thomas, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, FCC, to Lance C. Norris, American Payphones, Inc., IC-88-04679, at 2 (Sept. 14, 1988).

¹⁷ Commission approval of these charges occurred both in response to specific complaints, and in formal orders of both the Common Carrier Bureau and the full Commission. See, e.g., Letter from Anita J. Thomas, Informal Complaints and Public Inquiries Branch, Enforcement Division, Common Carrier Bureau, FCC, to LeRoy A. Manke, Coon Valley Farmers Telephone Co., IC-89-03671, at 1 (Apr. 4, 1989) (stating that "end user charges apply to [independent payphone provider] lines pursuant to [Section] 69.2(m) of the Commission's rules"); *C.F. Communications Corporation, Complainant, v Century Telephone of Wisconsin, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 7334, ¶ 13 (1993) (Bureau stating "that CFC's pay telephone service is properly subject to EUCL charges"); *C.F. Communications Corporation, Complainant, v Century Telephone of Wisconsin, Inc.*, 10 FCC Rcd 9775, ¶ 23 (1995) (full Commission affirming the Bureau order in all respects and "conclud[ing] that CFC is subject to end user common line charges on its payphone lines").

¹⁸ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541, ¶ 187 (1996) ("the multi-line

for the District of Columbia Circuit reversed the Commission's decision interpreting its old rules, and remanded that case and the other complaint proceedings back to the Commission.¹⁹ On remand in April 2000, the Commission ruled that its prior interpretations of its access charge rules were incorrect and that the LECs had violated Section 201(b) of the Act by assessing EUCL charges on independent PSPs.²⁰ That Order was subsequently affirmed on appeal.²¹

As a result of the D.C. Circuit's 1997 decision in *C.F. Communications*, thousands of independent PSPs in late 1997 and 1998 filed informal complaints with the Commission seeking refunds of the EUCL charges they had paid to various LECs.²² Thirteen of these informal complaints were converted to formal complaints.²³ They were considered representative of the thousands of others and were litigated, in effect, as "test cases." Indeed, the Commission stated that it believed its ruling on those complaints would "facilitate informal resolution among the parties of the pending informal complaints."²⁴

In their answer to the formal complaints, the Joint Petitioners argued that they properly assessed the EUCL charge. In any event, even if their assessment of EUCL charges on the PSPs

business SLC *must* apply to subscriber lines that terminate at both LEC and competitive payphones") (emphasis added). See also *C.F. Communications Corp. v. Michigan Bell Telephone Co.*, Section 208 Complaints Alleging Unlawful Application of User Common Line Charges to Independent Payphone Providers, 12 FCC Rcd 2134 (1997) (denying all other formal complaints regarding payment of EUCLs by independent payphone providers, for the reasons given in prior Commission orders).

¹⁹ *C.F. Communications v. FCC*, 128 F.3d 735 (D.C. Cir. 1997).

²⁰ *C.F. Communications v. Century Telephone of Wisconsin, Inc.*, Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759 (2000) ("EUCL Liability Order"). This ruling was ultimately affirmed by the court of appeals. *Verizon Telephone Cos. v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001).

²¹ *Verizon Tel. Cos.*, 269 F.3d at 1100.

²² 2002 EUCL Order, ¶ 2.

²³ *Id.*, ¶ 1.

²⁴ *Id.*, ¶ 2.

was unreasonable, the Joint Petitioners argued that they were not liable for damages.²⁵ The Commission in 2002 ultimately found the Joint Petitioners liable for assessing the EUCL charge on the PSPs. Damages were limited to two years prior to the filing of the informal complaints.

B. WAIVER OF SECTION 61.45(D) TO PERMIT THE JOINT PETITIONERS TO TREAT EUCL SETTLEMENT PAYMENTS AS EXOGENOUS COST CHANGES IS WARRANTED.

Where the Commission commits a legal error, and parties act in conformance with that error, the courts have held that “the proper [action] is one that puts the parties in the position they would have been in had the error not been made.”²⁶ The Joint Petitioners assessed EUCL charges on PSPs in a manner consistent with Bureau and Commission interpretations of Commission rules, which interpretations were later held to be erroneous. Thus, a waiver of Section 61.45(d), or declaratory ruling, to treat settlement payments to resolve EUCL complaints as exogenous cost changes is warranted to allow the Joint Petitioners the opportunity to put themselves in the position they would have been in had the Commission not made the erroneous interpretations.

Here, the costs are being incurred (the refunds are being paid through settlements) because of administrative orders, plainly beyond the Joint Petition’s control, that have changed the way that local exchange carriers must assess EUCL charges. There has never been a dispute

²⁵ Specifically, the Joint Petitioners argued that: (1) LECs assessed the charges pursuant to Commission requirements; (2) any charges assessed because of those Commission requirements could only be refunded pursuant to principles of restitution; (3) restitution is not permissible because the complainants were not unjustly enriched; and (4) equitable considerations barred any imposition of damages.

²⁶ 1993 *Annual Access Tariff Filings Phase I*, 1994 *Annual Access Tariff Filings*, CC Docket Nos. 93-193, 94-65, 93-193 and 94-157, Order Terminating Investigation, ¶56 ns.182-183 (rel Mar. 30, 2005) (“OPEB Investigation”). See also *PUC of California v. FERC*, 988 F.2d 154, 168 (1993) (“when the Commission commits legal error, the proper remedy is one that puts the parties in the position they would have been in had the error not been made”); *Southeastern Michigan Gas Co. v. FERC*, 133 F.3d 34, 42 (D.C. Cir. 1998) (quoting *United States Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)) (an agency has authority to “undo . . . what was wrongfully done by virtue of [a legally erroneous] order”).

that the Joint Petitioners were entitled to recover the total common line basket revenues authorized under the price cap rules. Under the Commission's rules at the time, these authorized revenues were set on a total basket basis, and then allocated to be recovered in part through EUCL charges and in part through carrier common line or presubscribed interexchange carrier charges.²⁷ While the change in treatment of independent payphone lines changes the *method of recovery*, there is nothing in the price cap rules to suggest it should impact the *total amount to be recovered*. However, as a direct result of erroneous Commission decisions regarding *how* those costs could be recovered, the Joint Petitioners now are forced to refund (whether through settlement agreements or as a result of the Commission's complaint procedures) the EUCL charges collected from independent payphone providers. This petition provides the appropriate vehicle under the price cap rules to allow them to recover those costs from other carriers or end users.

The Joint Petitioners are asking for nothing more here. As previously shown, the Commission on three occasions, 1993, 1994 and 1995, concluded that the LECs *must* recover the NTS costs of serving PSPs via the EUCL charge. The Joint Petitioners not only followed that instruction, but indeed were obligated to do so or risk enforcement action by the Commission. Ultimately, the Commission concluded in November 2002 that the Joint Petitioners were liable for assessing EUCL charges on payphone lines. In anticipation of or in response to the *2002 EUCL Order*, the Joint Petitioners engaged in settlement discussions with numerous PSPs that resulted in settlement agreements that have refunded some portion of the EUCL charges they paid to the Joint Petitioners.²⁸ To the extent that the Joint Petitioners are unable to reach

²⁷ 47 C.F.R. §§ 61.45(c), 69.152-154.

²⁸ In some cases, settlements were reached even before release of the *2002 EUCL Order*.

agreement with the PSPs, the disputes will be resolved in the Commission's formal complaint proceedings. By granting the requested waiver, or declaratory ruling, and permitting the Joint Petitioners to treat all payments in resolution of EUCL complaints as exogenous cost changes, the Joint Petitioners can adjust their price caps to rectify the effect of complying with the Commission's previous mistaken interpretations of its rules.

The FCC certainly recognized in the *2002 EUCL Order* that exogenous treatment may be warranted. Specifically, the Commission stated,

[T]o the extent that Defendants might have recovered their [NTS] costs from IXC's if they had not assessed the EUCLs on IPPs, the Defendants are not without recourse. Commission rules provide a mechanism whereby Defendants can seek to demonstrate that the damages paid to Complainants constitute extraordinary cost changes, thus increasing the permitted price caps.²⁹

The EUCL refunds are precisely the type of "extraordinary" or other costs contemplated by *Section 61.45(d)*. The decision to assess the EUCL charge on the PSPs was completely out of the Joint Petitioners' hands, and squarely within the Commission's. Thus treating the EUCL settlement payments as exogenous cost changes would give the Joint Petitioners the opportunity to put themselves in the position they would have been in but for the Commission's legal error.

Exogenous treatment is appropriate whether the extraordinary costs were incurred pursuant to settlement by the parties³⁰ or pursuant to a final Commission judgment on damages. In either case the EUCL settlement payments, which effectively refund EUCL charges, represent

²⁹ *2002 EUCL Order*, ¶38.

³⁰ Resolving the EUCL complaints via settlement is in the public interest, as the damages awarded by the Commission or a court likely would significantly exceed those paid to the PSPs, resulting in higher charges to end users over the 12-month recovery period.

true costs that the Joint Petitioners were entitled to recover, and would have recovered from the IXCs but for the Commission's error.

III. CONCLUSION

The Commission should grant the Joint Petitioners' request for waiver of Section 61.45(d), or in the alternative issue a declaratory ruling, to allow Joint Petitioners to make exogenous cost adjustments to their interstate access rates to recover EUCL settlement payments to PSPs.

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