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VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 – 12th Street S.W.
Washington, D.C. 20554

Subject: In the Matter of Payphone Access Line Rates
CC Docket No. 96-128
Ninth Circuit Order of August 17, 2006

Dear Ms. Dortch:

In accordance with Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206, as counsel for the parties listed in Exhibit 1, we submit this written ex-parte communication in connection with the above-referenced proceeding. We represent 51 payphone providers in 11 states who obtained certain unbundled intrastate services from Qwest. These same 51 payphone providers ("Payphone Providers") are plaintiffs in the pending federal court litigation entitled *Davel Communications, et al. v. Qwest* ("*Davel*"). This correspondence supplements our previous correspondence of July 6, 2006.

We are enclosing the Ninth Circuit's Order and Amended Opinion in the *Davel* (Ex. 2), issued in response to Qwest's petition for panel rehearing (Ex. 3). The Ninth Circuit rejected all four arguments that Qwest made in its petition, which were: (1) the Waiver Order¹ did not apply to Qwest because Qwest did not rely upon the Waiver Order, (2) that the applicability of the filed rate doctrine should be referred to this Commission, (3) that the FCC could not legally interpret its Waiver Order to allow for refunds and (4) that the Court had misapprehended telecommunications law and the intent of the Waiver Order. Moreover, based on the Court's rejection of Qwest's attempt to refer the filed rate doctrine issue to the Commission, the Commission should likewise reject any attempt by Qwest to "end run" the Court. The Court clearly considered the filed rate defense to be within its jurisdiction and intends its opinion rejecting the filed rate defense to be the final word on the subject.

¹ *In re* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Order*, DA 97-805, 12 F.C.C.R. 21,370 (April 15, 1997).

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The Ninth Circuit not only rejected all of Qwest's arguments, it took the opportunity to reiterate and expand upon the reasoning in its original *Davel* opinion that the plaintiffs' refund claims are not barred by the filed rate doctrine as a matter of law. The changes that the Ninth Circuit made to its *Davel* Opinion make it even more clear that the filed rate doctrine does not apply to the Payphone Provider's claims for a refund of overcharges as a result of Qwest's failure to have intrastate PAL rates that complied with the New Services Test on file and effective by April 15, 1997. The court also expands its analysis of Supreme Court precedent in support of its holding that claims for refunds under the present circumstances should not be barred by the doctrine:

In *Reiter*, the Supreme Court held that the claim that a carrier's rates were not "reasonable," as required by Interstate Commerce Act, was not barred by the filed-rate doctrine. 507 U.S. at 266. *Davel's* complaint arises under §§ 201 and 276 of the 1996 Act. Section 201 is nearly identical to the provision of the Interstate Commerce Act at issue in *Reiter*, requiring telecommunications rates to be just and reasonable. Section 276 adds the further command that a carrier may not set its payphone rates so as to discriminate in favor of or subsidize its own payphone services, and instructs the agency to implement regulations requiring rates to meet the new services test. As in *Reiter*, these requirements, as well as the provision conferring on *Davel* a right of action for their enforcement, are accorded by the regulating statute which imposed the tariff filing requirement and are therefore not precluded by the filed rate doctrine.

There is a related reason that the filed rate doctrine is inapplicable to the claims in this case. In *Transcon Lines*, the Supreme Court, following *Reiter*, held that a regulating agency may require a "departure from a filed rate when necessary to enforce other specific and valid regulations adopted under the Act, regulations that are consistent with the filed rate system and compatible with its effective operation." 513 U.S. at 147. Here, the FCC, in adopting the Waiver Order, expressly required a "departure from a filed rate" as to some non-compliant intrastate public access line tariffs. The Waiver Order extended the time for filing NST-compliant rates and provided that any existing non-compliant rates would remain on file in the interim. The Order further provided that once their NST-compliant rates became effective, carriers were to reimburse their customers for the difference between any newly compliant rates and any noncompliant rates on file after April 15, 1997. As the Order thus expressly provided that Qwest's customers might ultimately pay rates different from those on file during the waiver period for certain services obtained during that time, it is not consistent with a strict application of the filed-rate doctrine to a challenge under the Waiver Order to assertedly non-compliant rates on file after April 15, 1997. Consequently, the filed-rate doctrine does not stand as a bar to the reach of and

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then enforcing of the Waiver Order's reimbursement requirement in a case such as this one. This is so even though the lawsuit, in effect, challenges the tariffs on file between 1997 and 2002 and, if successful, would result in Davel paying an amount for public access line services different from that provided in those tariffs.

Slip Op., at 7049 (emphasis added).

The Court's Amended Opinion has not altered in any material manner its holding that interpretation of the scope of the Waiver Order – *i.e.*, whether refunds were due only for the 45 days between April 4 and May 19, 1997; or whether refunds are due from April 15, 1997, until Qwest had on file effective, NST-compliant rates (which did not occur until, at the earliest, 2002) – must be referred to this Commission under the doctrine of primary jurisdiction. We look forward to the Commission's decision on that relatively narrow issue.

Very Truly Yours,



Brooks E. Harlow

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