



Qwest
607 14th Street, NW, Suite 950
Washington, DC 20005
Phone 202-429-3120
Facsimile 202-293-0561

Melissa E. Newman
Vice President – Federal Regulatory

EX PARTE

Filed Electronically Via ECFS

September 5, 2006

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

Re: *In the Matter of Payphone Access Line Rates* -- CC Docket No. 96-128 --
Payphone Provider Refund Developments

Dear Ms. Dortch:

The *ex parte* presentation attached hereto, prepared by Robert B. McKenna, Associate General Counsel for Qwest, discusses recent critical developments in ongoing efforts of payphone providers to collect “refunds” for intrastate payphone access rates paid to incumbent local exchange carriers between 1997 and 2002. In addition, attached at Exhibit 2 is a summary of the treatment of payphone issues by states in Qwest’s region.

This *ex parte* is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b). Please contact me at 202.429.3120 if you have any questions.

Sincerely,

/s/ Melissa E. Newman

Attachments

Copy to:
Anthony J. DeLaurentis (Anthony.DeLaurentis@fcc.gov)
Rosemary McEnery (Rosemary.McEnery@fcc.gov)
Tamara Preiss (Tamara.Preiss@fcc.gov)
Pamela Arluk (Pamela.Arluk@fcc.gov)
Christopher Killion (Christopher.Killion@fcc.gov)
Paula Silberthau (Paula.Silberthau@fcc.gov)



Qwest
1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 383-6650
Facsimile 303 896-1107

Robert B. McKenna
Associate General Counsel

Filed electronically via ECFS

EX PARTE

September 5, 2006

Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW B-204
445 12th Street, S.W.
Washington, DC 20554

RE: *In the Matter of Payphone Access Line Rates -- CC Docket No. 96-128*

Dear Ms. Dortch:

The purpose of this memorandum is to bring the Federal Communications Commission ("Commission" or "FCC") up to date on several critical developments in the ongoing efforts of payphone providers to collect "refunds" for intrastate payphone access rates paid to incumbent local exchange carriers ("ILECs") between 1997 and 2002.

Payphone providers claim that they have a federal right to collect "refunds" because they contend that ILEC intrastate payphone access line ("PAL") tariffs did not comply with the New Services Test, under which ILEC payphone rates were to be based on forward-looking costs and a reasonable overhead allocation. Under the statutory scheme of Section 276 of the Telecommunications Act and the FCC's implementing rules, state regulators were to comply with the guidelines of the New Services Test established by this Commission in evaluating intrastate payphone access rates filed by ILECs.¹ Qwest is an ILEC/RBOC with PAL tariffs on file and has a direct and significant interest in how the Commission treats the issues currently under consideration in this docket. Qwest's intrastate PAL tariffs have always been lawful and in compliance with all relevant FCC directives. But even if they were not, the payphone providers have not postulated a federal refund right.

¹ Ultimately it was determined that this section of the Act applies only to Regional Bell Operating Companies ("RBOCs"). However, most relevant Commission orders refer to ILECs, and we continue to use that term herein.

As Qwest pointed out in its *ex parte* presentation of June 22, 2006, the payphone providers' efforts have no basis in law, fact or equity.² There are currently pending five declaratory ruling petitions raising, in varying styles, the payphone issues that ultimately demand resolution by this Commission.³ This *ex parte* presentation elaborates on some of Qwest's June 22, 2006 analysis, especially in light of the recent decision of the Ninth Circuit Court of Appeals in *Davel Communications, Inc. v. Qwest Corporation*.⁴ As is discussed herein, the *Davel* opinion will ultimately result in referral of one specific issue to this Commission under the doctrine of primary jurisdiction,⁵ and brings into focus other issues already under consideration in this docket. Qwest submits this *ex parte* presentation to address all of these issues. A formal referral document will be filed when feasible. However, Qwest does not expect the Commission to delay these proceedings while the court works out the logistics of referral, and, as the issues to be referred are already under consideration in this docket irrespective of potential referral, a decision need not await referral in order to commence analysis. Certainly analysis of the potential impact of *Davel* on the instant proceedings need not await formal referral. In particular, the Commission should clarify the following threshold issues regarding the refunds sought by the payphone providers:

- That the Commission's 1997 *Waiver Order* did not create an open-ended exemption from the filed tariff doctrine or the rule against retroactive ratemaking.

² Letter from Lynn Starr, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, June 22, 2006, filing attached letter from Robert B. McKenna to Marlene H. Dortch, June 22, 2006 ("June 22 *ex parte*").

³ Illinois Public Telecommunications Association Petition for a Declaratory Ruling, CC Docket No. 96-128, filed July 30, 2004; Petition of the Independent Payphone Association of New York, Inc. for an Order of Pre-emption and Declaratory Ruling, CC Docket No. 96-128, filed Dec. 29, 2004; Southern Public Communications Association Petition for a Declaratory Ruling, CC Docket No. 96-128, filed Nov. 9, 2004; Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption, CC Docket No. 96-128, filed Jan. 31, 2006; Michigan Pay Telephone Association Second Petition for Declaratory Ruling, CC Docket No. 96-128, filed May 22, 2006.

⁴ 2006 U.S. App. LEXIS 21098 (9th Cir. June 26, 2006) ("*Davel*"). The original opinion, reported at 451 F.3d 1037, was amended on rehearing (and withdrawn). See 2006 U.S. App. LEXIS 21061 (9th Cir. Aug. 17, 2006). The amended opinion has not been published in the Federal Reporter at this time, however, it is attached hereto as Exhibit 1.

⁵ Specifically, the scope and intent of the Commission's April 15, 1997 *Waiver Order*. In the *Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (1997) ("*Waiver Order*").

- That the *Waiver Order* had no effect on tariffs that were effective on or before April 15, 1997.
- That only state regulators (and, where appropriate, federal regulators) have the authority to make the determination of whether filed tariffs are reasonable and what the reasonable rates contained in a tariff should be.

This submission also addresses the payphone providers' suggestion that state regulators took casually their responsibility to ensure that payphone rates complied with all relevant laws, including implementing the New Services Test as required by the Commission.⁶ This implication is decidedly untrue, at least in Qwest's territory. Accordingly, in order to dispel this inaccuracy, Qwest presents herein a summary description of the state proceedings that it has been involved in concerning Qwest's intrastate PAL rates. As has been previously discussed, Qwest is of the opinion that the state proceedings (or lack thereof in those states where Davel and others chose not to invoke the formal state challenge mechanisms) are totally dispositive of Davel's claims, and that this position is not disturbed by the Ninth Circuit's *Davel* decision.

I. ISSUES BROUGHT INTO FOCUS BY *DAVEL*

A. Background

As has been noted, the proceedings before this Commission are not the only proceedings where payphone providers are attempting to collect unwarranted "refunds" based on intrastate PAL tariff payments. Most significantly, in the recent *Davel* case, the Ninth Circuit Court of Appeals directed the parties to craft an appropriate process to obtain the Commission's resolution of one issue that the court believed could not be resolved without the Commission's direction (whether the Commission's *Waiver Order* was of universal duration or whether it applied only to the specific time limit covered by the initial filing and effectiveness of ILEC tariffs in April of 1997). The court also issued several interpretations of opinions of this Commission (primarily finding that the Commission intended to overrule state-filed tariff laws and statutes when it issued the *Waiver Order*), and deferred judgment on whether an assessment of the reasonableness of Qwest's intrastate PAL rates between 1997 and 2002 could be made by the court or whether that matter too would ultimately need to be referred to this Commission. Qwest

⁶ See, e.g., Letter from Jonathan L. Rubin, Counsel for Florida Public Telecommunications Association, Inc. to Marlene H. Dortch, FCC, CC Docket No. 96-128, Aug. 3, 2006, at Exhibit A; *Ex Parte* Letter from Michael W. Ward, Counsel for Illinois Public Telecommunications Association to Marlene H. Dortch, FCC, CC Docket No. 96-128, June 23, 2006, at Attachment; *Ex Parte* Letter from Robert F. Aldrich, Counsel for American Public Communications Council to Marlene H. Dortch, FCC, CC Docket No. 96-128, June 23, 2006, at Attachment.

advised the Commission of the issuance of the *Davel* decision and the fact that Qwest had sought limited rehearing by *ex parte* letter of July 19, 2006.⁷

On August 17, 2006, the Ninth Circuit amended its opinion and denied the Qwest rehearing petition.⁸ Thus Qwest will be approaching the district court with appropriate referral documents as soon as issuance of the Ninth Circuit's mandate permits. Thereafter Qwest will file a formal declaratory ruling petition.

In addition, Qwest faces a separate appeal raising exactly the same issues as were examined in *Davel*. In *TON Services, Inc. v. Qwest Corporation*,⁹ a different payphone provider had sought the identical relief before a federal district court in Utah. As was the case in *Davel*, the district court dismissed the case with prejudice, instructing the plaintiff to bring its complaint to the proper regulatory agencies. TON Services, Inc. appealed to the Tenth Circuit Court of Appeals, where briefing is now ongoing (Qwest's brief in opposition was filed on August 11, 2006), and an oral argument date has not yet been scheduled. Given the issues in play, the Tenth Circuit may reach an opinion contrary to that of the Ninth Circuit on at least some of the issues addressed in *Davel*.

The pendency of all these proceedings brings a heightened sense of urgency to the Commission's task of definitively describing what actually happened in 1997 when it established guidelines for states to follow in evaluating intrastate payphone access line rates. It also brings to the fore the importance of the Commission's explanations of the intricacies of the regulatory structure that it established in 1997, and how it interoperated with the Communications Act and the statutes of the various states to whom was delegated the responsibility to oversee the intrastate PAL tariffs that were to comply with Section 276 of the Act and the Commission's guidelines thereunder.

Qwest will file an appropriate petition once the proper referral mechanism has been issued by the district court. In the meantime, it is important that we spell out briefly how the Commission must treat the issues specified and raised in the *Davel* case (and in the *TON* case as well) in order that the Commission's analysis need not be delayed by the referral itself.

⁷ Letter from Melissa Newman, Qwest to Marlene H. Dortch, Secretary, Federal Communications Commission, July 19, 2006, filing attached letter from Robert B. McKenna to Marlene H. Dortch, July 19, 2006.

⁸ See 2006 U.S. App. LEXIS 21061 (9th Cir. Aug. 17, 2006).

⁹ *TON Services, Inc. v. Qwest Corporation*, No. 06-4052 (10th Cir. docketed Feb. 27, 2006).

B. *Davel, Incorporated v. Qwest Corporation*

The *Davel* Court basically addressed three issues. First, it held that the Commission's *Waiver Order* superseded state and federal filed tariff law, permitting "refunds" that deviated from filed tariffs in circumstances covered by the *Waiver Order* itself.¹⁰ As the Court noted:

If a local exchange carrier relied on the waiver, it was required to reimburse its customers 'from April 15, 1997 in situations where the newly [filed] rates, when effective, are lower than the existing [filed] rates.' . . . The order emphasized that the waiver was "limited" and "of brief duration."¹¹

The Court ruled that "the filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff."¹² Thus, for those parties that had taken advantage of the waiver, the filed tariff doctrine, at both the federal and state level, was deemed waived by the Commission in order to effectuate its decision that rates for PALs be effective on April 15, 1997.

Second, the Court also found that the scope of the *Waiver Order* was not clear, and that it was not possible, without a specific decision by the Commission itself, to determine whether the *Waiver Order* was an open-ended assault on all PAL tariffs filed at any time after the *Waiver Order* itself, or whether it was limited to the tariffs that were filed within the 45-day period following issuance of the *Waiver Order*.¹³ Recognizing that the "Waiver Order is national in scope, affecting local exchange carriers and payphone service providers throughout the country, including many industry participants not involved in this litigation,"¹⁴ the court remanded the case to the district court with instructions to determine the best process (stay or dismissal without prejudice) for referring the issue of the scope of the *Waiver Order* to the Commission for resolution under the primary jurisdiction doctrine.

Third, the Court ruled that, until the Commission determines the scope of the *Waiver Order*, the court could not make a determination as to whether the question of the reasonableness of Qwest's PAL rates between 1997 and 2002 was within the primary jurisdiction of the Commission, state regulators or the district court, and declined to rule on the issue.¹⁵

¹⁰ *Davel*, 2006 U.S. App. LEXIS 21098 *18-*20.

¹¹ *Id.* *9-*10.

¹² *Id.* *16.

¹³ *Id.* *32.

¹⁴ *Id.*

¹⁵ *Id.* *33.

On August 22, 2006, counsel for Davel filed an *ex parte* letter in which the amended *Davel* opinion was attached and discussed.¹⁶ Davel's characterization of the opinion was dramatically skewed and inaccurate.¹⁷ Perhaps most startling was Davel's implication that matters never discussed in the *Davel* opinion, or discussed and decided in Qwest's favor, had been "rejected" by the Court.¹⁸ Given that the *Davel* case involved an appeal of a motion that required, for purposes of analysis, the assumption that all of Davel's factual allegations be accepted as true, this attempt to bootstrap a legal presumption into a binding conclusion of law is odd and insupportable, to say the least. For the most part we do not treat Davel's latest missive directly, preferring instead to discuss the significance of the court's opinion to the Commission's pending proceeding. Davel's efforts to limit the scope of the authority of this Commission to interpret its own *Orders* are also addressed below.

C. Scope of *Davel* As a Limitation of this Commission's Authority to Determine the Meaning of Its Own Rules and Orders

Davel asserts that the *Davel* decision largely supersedes and negates the Commission's own authority to regulate PAL issues on a nationwide basis.¹⁹ Davel ignores the fact that the vast majority of entities nationwide affected by the Commission's pending proceeding are not parties to the *Davel* litigation. The Commission has the authority and the obligation to rule on all pertinent issues in this proceeding, including those raised by Qwest herein. Although the *Davel* Court required referral to this agency of only one of the three issues that it addressed, the Commission has the authority and the obligation to address all three. This is true for several reasons.

First, the *Davel* decision endorsed referral of a single issue as a first step in what it recognized could be a series of referrals, both to the FCC and to state regulators. The Ninth Circuit concluded that the "scope" of the *Waiver Order* is a threshold issue necessary to a determination of whether Davel has any right to relief under any circumstances. The Ninth Circuit recognized that, even if Davel were to prevail in its argument about the scope of the *Waiver Order*, the court

¹⁶ Letter from Brooks E. Harlow, Miller Nash LLP, counsel to Davel to Ms. Marlene H. Dortch, Secretary, Federal Communications Commission, Aug. 22, 2006 ("Harlow Letter").

¹⁷ On July 6, 2006, Davel had filed an earlier *ex parte* presentation describing the *Davel* decision. Letter from Brooks E. Harlow to Marlene H. Dortch, FCC, July 6, 2006. As described in Qwest's July 19, 2006 *ex parte* letter, Davel's July 6, 2006 *ex parte* presentation also seriously mischaracterized the *Davel* decision.

¹⁸ For example, Davel implies that the *Davel* decision has determined that the *Waiver Order* applies to Qwest, despite the fact that no such decision was made. Harlow Letter at 1.

¹⁹ See Harlow Letter at 3, wherein counsel expresses the expectation that the Commission's action on the primary jurisdiction referral will be limited to "that relatively narrow issue."

would then have to address whether Davel's claims should then be referred to state commissions and/or back to this Commission to address the merits of Davel's rate-reasonableness argument. To the extent that the merits of Davel's claims include issues already before the Commission -- such as the bar against retroactive application of the *Wisconsin Order* in 2002, or Qwest's lack of reliance on the *Waiver Order* in 1997 -- then it would be inefficient for the Commission to not rule on these issues even if the Ninth Circuit had already ruled on them in the context of the specific *Davel* litigation. Nothing in the *Davel* decision in any way bars the Commission from ruling on other issues, either on an industry-wide basis or as they apply to the dispute between Davel and Qwest.

Second, the *Davel* opinion does not even foreclose the Commission from deciding the specific filed tariff issues that the Ninth Circuit analyzed in the context of the dispute between Qwest and Davel. The Ninth Circuit has no authority to preclude the Commission from resolving the meaning of Commission orders. The Commission's *Waiver Order* interpreted and implemented the authority given to the Commission under Section 276 of the Act, and therefore the scope of that authority is within the Commission's jurisdiction even if an appellate court has previously ruled on the same issue in a separate case (*i.e.*, a case not involving a challenge to a Commission decision brought under the Hobbs Act).²⁰

This principle was made clear in *National Cable & Telecommunications Association v. Brand X Internet Services*,²¹ in which the Supreme Court addressed a situation where the Ninth Circuit Court of Appeals had interpreted an ambiguous section of the Communications Act. The Commission subsequently reached a different interpretation, and the Ninth Circuit held that its own earlier ruling was dispositive and binding. The Supreme Court reversed, holding that:

A court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion.²²

This rule has all the more force here because the Ninth Circuit was not merely attempting to interpret the Commission's authority under Section 276, but was attempting to interpret the Commission's own intent in adopting the *Waiver Order*.²³ The Ninth Circuit clearly cannot bind

²⁰ 28 U.S.C. § 2342; 47 U.S.C. § 402.

²¹ *National Cable & Telecommunications Association v. Brand X Internet Services*, 125 S. Ct. 2688 (2005).

²² *Id.* at 2700.

²³ Challenges to Commission rulings orders must be brought under Section 402 of the Act. Courts otherwise do not have the authority to reverse or modify Commission decisions. *See FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984).

the Commission to a particular interpretation of its own rules outside of the context of an appeal pursuant to the Hobbs Act and Section 402 of the Act, nor did the Ninth Circuit evidence any intention of doing so.

Moreover, all of the issues that Qwest submits should be addressed herein are matters of industry-wide concern, not simply matters pertinent to the dispute between Qwest and Davel. Indeed, they are before this Commission irrespective of any referral from the *Davel* Court. All three of the issues addressed by the Ninth Circuit in *Davel* are subject to appraisal and decision by the Commission, and we address all three herein. This is true whether or not the District Court determines to seek the Commission's expert opinion on all three of these issues. What the courts choose to do with the final decisions of this Commission is a matter for the judiciary, and need not disrupt the Commission's processes in interpreting and implementing its own rules.

In addition, despite the fact that counsel for Davel clearly believes otherwise, the decision in the *Davel* litigation itself has, up to this point, been interlocutory, based on assumed facts that are still subject to challenge on remand in court. For example, Davel alleged in its Complaint that Qwest "relied" on the *Waiver Order*. Because Qwest filed its motion to dismiss the Complaint under Fed. R. Civ. P. 12(b)(6), which requires the Court to assume as true all of the factual allegations of the Complaint, the Ninth Circuit was precluded from addressing this factual allegation. As Qwest has pointed out to the Commission, however, Qwest did not rely on the *Waiver Order* and the refund commitments addressed in the *Waiver Order* have no application to Qwest. Davel also alleged, and the Ninth Circuit was required to assume for argument purposes only, that Qwest's rates did not comply with the New Services Test from 1997 to 2002. To the contrary, Qwest's rates have always complied with the New Services Test, and the Ninth Circuit's opinion in no way precludes the district court or the Commission from so finding. Davel's suggestion to the contrary is frivolous.

The Ninth Circuit's decision on the filed tariff doctrine stands for the unremarkable proposition that, for the period April 15 to the effective date of new tariffs that permitted an ILEC to certify that its PAL rates complied with the FCC's rules, ILECs that did not have effective PAL tariffs in effect on April 15 would be required to refund the difference between those tariff rates and the new rates (if lower).²⁴ This refund would be required even if it were to be found that it would have otherwise violated the filed tariff doctrine. Qwest has never challenged this simple proposition. The *Davel* decision does not purport to establish the *Waiver Order*'s effect, or the Commission's intentions or authority, for periods of time after the tariffs upon which certifications were filed took effect, or for ILECs that did not rely on the *Waiver Order*. Indeed, the Ninth Circuit deferred the issue of what the Commission meant when it issued the *Waiver Order* to the Commission itself.

²⁴ The refund obligation ran until the new tariffs, if any, actually took effect. Thereafter it would be meaningless, because the refund was limited to the difference between the new tariffs and the old tariffs.

D. Issues That Should Be Addressed by the Commission in Light of the *Davel* Decision

The *Davel* decision highlights three vital issues that the Commission must decide as part of its overall evaluation of the PAL rate disputes. While these issues are clearly not the only ones that must be addressed in finally disposing of the refund claims submitted in the various forums across the country, the fact that the *Davel* Court chose to focus on them makes it especially important that they be determined conclusively by the Commission.

The issues themselves, and the resolution thereof, are straightforward.

1. The Commission's 1997 Waiver Order did not create an open-ended exemption from the Filed Tariff Doctrine

For the reasons pointed out in Qwest's June 22, 2006 *ex parte* presentation,²⁵ as well as in other *ex parte* presentations and submissions currently on the record,²⁶ the Commission's April 15, 1997 *Waiver Order* was of very limited applicability. It was issued because some ILECs were not able to get their initial PAL tariffs into effect by April 15, 1997, and therefore could not submit the necessary certification to receive per-call compensation under the Commission's rules. Therefore, these carriers promised to make their compliant filings retroactive to April 15, 1997, resulting in refunds for rates paid between that date and the effective date of the new tariffs. The refunds were to cover the period between April 15, 1997 and the date on which tariffs that permitted certifications of compliance to be filed took effect. In the case of tariffs where no challenge to the certification was filed, or where a challenge was filed but rejected,²⁷ whatever waiver of the filed tariff doctrine was envisioned by the *Waiver Order* was fulfilled upon the effective date of the new tariff and further challenges to the lawfulness of ILEC PAL rates would be dealt with under the specific laws of the states where the rates were filed.

²⁵ June 22 *ex parte* at 16-18.

²⁶ See, e.g., Comments of AT&T, Inc., *et al.*, CC Docket No. 96-128, Feb. 28, 2006, at 5-6 ("AT&T, *et al.* Feb. 28, 2006 Comments"); Reply Comments of AT&T Inc., *et al.*, CC Docket No. 96-128, Mar. 10, 2006, at 2-3; Comments of BellSouth Telecommunications, Inc., *et al.*, CC Docket No. 96-128, Jan. 18, 2005, at 4-5; Reply Comments of BellSouth Telecommunications, Inc., *et al.*, CC Docket No. 96-128, Feb. 1, 2005, at 2 ("BellSouth, *et al.* Feb. 1, 2005 Reply Comments").

²⁷ As has been noted, a specific challenge to Qwest's certification was filed and rejected by the Commission. See *In the Matter of Ameritech Illinois, U S WEST Communications, Inc., et al. v. MCI Telecommunications Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 18643 (1999).

Thus, the question presented by the *Davel* Court can be answered simply -- the *Waiver Order* was of limited duration and did not provide anything more than a brief refund period between April 15, 1997 and the effective date of the ILEC tariffs that were the basis for certification of compliance for per-call compensation purposes. Whether this brief refund period is characterized as a waiver of the filed tariff doctrine, as was done by the Ninth Circuit, or as a commitment to file retroactive tariffs with refund obligations, the result is the same. The *Waiver Order* was temporally a very limited document, and it applied only to the brief period between April 15, 1997 and the effective date of new tariffs filed by those ILECs covered by the *Waiver Order*. As is discussed in greater detail below and in Qwest's June 22 *ex parte* presentation,²⁸ any expansion of the *Waiver Order* beyond these limits (which were clearly intended by the Commission itself when the *Waiver Order* was adopted and relied on by those ILECs whose tariffs were subject to it) would not be lawful.

2. **The *Waiver Order* had no effect on tariffs filed prior to the 45-day waiver period established by that *Order***

In the case of Qwest (and others similarly situated) that did not rely on the relief granted in the *Waiver Order*, the *Waiver Order* and any resulting exclusion from the filed tariff doctrine did not apply in any event.²⁹ As has been noted, all of Qwest's relevant PAL tariffs (*i.e.*, the rates for "dumb" PALs that would have been covered by the *Waiver Order*) were filed and had taken effect prior to April 15, 1997, and were lawful under the New Services Test. Accordingly, even if the *Waiver Order* did create refund rights beyond the initial PAL tariff filings and certifications, those refund rights accrued only with respect to those ILECs whose tariffs took effect after April 15, 1997. The *Waiver Order* did not apply to carriers that did not need or receive a waiver. This class of carriers includes Qwest.³⁰

3. **State regulators, not courts, have the authority to assess the reasonableness of the tariffs challenged by the payphone providers**

Finally, the *Davel* Court declined to address the question of which entity, regulatory or judicial, would need to assess the reasonableness of Qwest's tariffs should the Commission decide to interpret and expand the scope of the *Waiver Order* in the manner requested by plaintiffs.³¹ Although beyond the scope of the specific referral decision of the appellate court in *Davel*,

²⁸ June 22 *ex parte* at 14-16.

²⁹ See *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21308-09 ¶ 163 (1996).

³⁰ Counsel for *Davel* obviously believes that the Ninth Circuit found that that Qwest was covered by the *Waiver Order*. See Harlow Letter at 1.

³¹ *Davel*, 2006 U.S. App. LEXIS 21098 *34.

Qwest submits that this is part of a vital jurisdictional question that should be decided by the Commission in order to bring closure to this controversy. Rate setting is a regulatory/legislative function, and jurisdiction to determine that a specific rate is unreasonable (which of necessity includes determining what rate would be reasonable) is consigned to the FCC and state regulators, not to courts.³²

E. The Commission Must Analyze These Issues Within the Refund Structure of the Communications Act

Because Davel is seeking refunds from filed intrastate tariffs pursuant to federal law, it is important to put its complaint into the context of the refund provisions of the Communications Act. However, the refund provisions of the Act contain provisions to protect both consumers and carriers. Among other things, these protections operate to protect carriers from precisely the danger poised by the payphone providers in their current attack on ancient tariffs -- the refund and suspension provisions of the Communications Act put a carrier on notice that its rates are in jeopardy of a refund and permit it to take immediate corrective action, if necessary.³³ Qwest would be deprived of these protections in the context of its PAL tariffs should the FCC find a federal refund right. State processes have generally run their course, again with statutory and regulatory protections being afforded to both Qwest and to the payphone providers. Davel's and other payphone providers' only hope of securing the "refunds" that they demand is if they can somehow combine federal and state jurisdictions in a manner that gives them the benefit of both while depriving ILECs of the protections of either jurisdiction.

Both federal and state laws operate, often in different fashions, to protect ILECs against unfair or unreasonable refunds (in addition to protecting consumers against unreasonable rates). If Qwest's and other ILECs' PAL rates had been federally tariffed rates (as initially envisioned by the Commission), the process questions would be easily settled. Only the Commission itself can determine whether a federal tariff is in compliance with the Communications Act or its own rules -- *i.e.*, whether a tariff is just and reasonable under Section 201(b) of the Act.³⁴ Courts simply do not have jurisdiction to determine a just and reasonable rate, and must refer such issues to the FCC under the doctrine of primary jurisdiction.³⁵ Courts do have the authority to examine

³² See *Texas & P. R. Co. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 448 (1907).

³³ *Illinois Bell Telephone Company v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992).

³⁴ 47 U.S.C. § 201(b).

³⁵ This is a matter for Commission resolution under the primary jurisdiction of the FCC. See *Abilene Cotton*, *supra*, note 32. See also *Allnet Communication Service, Inc. v. NECA*, 965 F.2d 1118, 1120-22 (D.C. Cir. 1992).

whether a carrier's tariffed charges violate other laws (*e.g.*, the antitrust laws),³⁶ but the matter of whether a federally tariffed rate is just and reasonable is entrusted to the exclusive jurisdiction of the Commission. Because federal law expressly precludes refunds in the absence of a Commission order suspending filed rates (before they take effect) and issuing of an accounting order,³⁷ refunds would be unlawful *per se* if the PAL tariffs under scrutiny in this proceeding had been filed at the federal level. In other words, a refund claim based on federal tariff law would quite clearly fail.

Moreover, the Commission chose to have ILECs file state, not federal, tariffs for PAL services, and thereby delegated the authority to review carrier PAL tariffs to state regulators. That is, state regulators, not the Commission, would determine whether or not ILEC payphone tariffs reflected rates that were based on forward-looking costs and a reasonable allocation of overhead as required by the New Services Test. As has been repeatedly documented,³⁸ this delegation left considerable flexibility to state regulators in applying the New Services Test, especially prior to the January 31, 2002 issuance of the *Wisconsin Order*.³⁹ In fact, it is clear from the Commission's 2002 *Wisconsin Order* that the Commission was well aware that state regulators were interpreting and applying the New Services Test in differing manners, actions completely consistent with the nature of the jurisdiction of state regulators to administer their own regulatory regimes.⁴⁰ The delegation also specifically recognized that carriers that already had PAL tariffs in effect were not required to file new ones unless either the carriers or the appropriate state regulators concluded that new tariffs were necessary to comply with the New Services Test or

³⁶ See *United States v. American Telephone and Telegraph Co.*, 461 F. Supp. 1314, 1349-50 (D.D.C. 1978); *In the Matter of Satellite Business Systems*, Memorandum, Opinion, Order, Authorization and Certification, 62 FCC 2d 997, 1068-73 ¶¶ 200-16, 1102-32 (1977).

³⁷ 47 U.S.C. § 204(a)(1).

³⁸ See, *e.g.*, Comments of AT&T Inc., CC Docket No. 96-128, June 22, 2006, at 2-5; AT&T, *et al.* Feb. 28, 2006 Comments at 10; BellSouth, *et al.* Feb. 1, 2005 Reply Comments at 1-2; see also *Ex Parte* Letter from Aaron Panner, Counsel for AT&T, *et al.* to Thomas Navin, FCC, Aug. 2, 2006, at 4; *Ex Parte* Letter from Aaron Panner, Counsel for AT&T, *et al.* to Marlene Dortch, FCC, July 19, 2006, at Attachment.

³⁹ See *In the Matter of Wisconsin Public Service Commission, Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002) ("*Wisconsin Order*"), *on recon.*, 21 FCC Rcd 7794 (2005) ("*Wisconsin Reconsideration Order*").

⁴⁰ See *id.* at 2052 ¶ 2: "Although the administrative record for this matter shows disparate applications of the new services test in various state proceedings, we believe that this *Order* will assist states in applying the new services test to BOCs' intrastate payphone line rates in order to ensure compliance with the *Payphone Orders* and Congress' directives in section 276." Needless to say, this language also forecloses any possibility that the analysis in the *Wisconsin Order* was intended to be retroactive in nature.

other federal guidelines.⁴¹ Under this delegation, state regulators were required to apply the federal guidelines in implementing their own processes when evaluating PAL rates, but the Commission did not undertake to federalize the state regulatory schemes.⁴²

This delegation assigned to state regulators and state processes (including appellate review of state regulatory decisions) the responsibility to determine whether ILEC PAL rates complied with the New Services Test and whether, all legal issues considered, the rates were just and reasonable. All of Qwest's states have processes in place to permit a payphone provider to challenge a filed rate if it believed that the tariffed rate was excessive or otherwise unlawful. Implicit in the FCC's delegation was the legal reality that any decision as to the relief to be granted if a rate were found to be unjust and unreasonable would be also treated under state, rather than federal, process. The Commission clearly had the right to assume control over any part of the process by revoking delegation to a state and requiring federal tariffs, but, barring such revocation, the ultimate authority for determining the reasonableness of intrastate PAL tariffs and whether refunds were due and owing if a tariff was found to be unreasonable, was left to the state regulators.

Thus, even if the *Waiver Order* could be read in the expansive manner espoused by the *Davel* plaintiffs, it is still clear that state regulators are the only appropriate entities to review the reasonableness of Qwest's state PAL tariffs under state law and regulations in addition to the New Services Test. State courts reviewing these decisions can be relied on to enforce the applicable federal laws and rules.⁴³

This is important because a post-hoc analysis of Qwest's rates would prove to be a fiercely daunting task, not only because of the great age of the rates complained of, but also because the process of evaluating and setting intrastate rates is itself immensely complex and variegated. Qwest submits that its PAL rates have always complied with all applicable laws and rules, including the New Services Test, and it would be up to *Davel* to actually prove both that the Qwest rates were unjust and unreasonable as well as what the reasonable rate was. While *Davel* had ample opportunity to do so under proper procedures when such challenges were timely (and evidence was fresh), it chose not to do so.

The nature of this task is highlighted by the fact that payphone providers critical of Qwest's past payphone rates do not actually complain about specific Qwest rates that Qwest charged and they

⁴¹ *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21308-09 ¶ 163 (1996) (subsequent history omitted).

⁴² *Id.*

⁴³ *See Northwest Public Communications Council v. Public Utility Commission of Oregon*, 196 Ore. App 94, 100 P.3d 776 (2004).

paid. Instead they refer to “illustrative Qwest PAL rates” as something meaningful, adding the caveat:

These rates are “illustrative” because Qwest has multiple rate plans in most states. In some states rates are measured, so the basic line rates plus estimated usage and mandatory EAS charges are shown.⁴⁴

In other words, the payphone providers are not even at the stage of knowing what rates they were charged. Thus, to highlight the morass into which the payphone providers want this Commission or state regulators to dive, the payphone providers challenging Qwest’s rates would start off their complaint proceeding by establishing, for the first time, what Qwest’s rates were for the relevant time period and why they were unreasonable under federal and state law.

Davel and other payphone providers have contended that the assessment of refund amounts would be a relatively simple exercise in arithmetic, conducted by subtracting from the amounts paid under the pre-2002 tariffs the amounts that would have been paid under the post-2002 tariffs. This is of course a false analogy, as is evident from the foregoing quotation from one of the payphone providers (one that is represented by counsel for Davel). The rates do not match up that precisely with each other. In addition, the *Wisconsin Order* was not retroactive.⁴⁵ Moreover, even if the *Wisconsin Order* had been retroactive, the post-2002 tariffs filed by Qwest did not contain the highest rates that would have been lawful under the New Services Test, and Qwest is quite confident that its prior rates likewise met standards for reasonableness under federal and state law.⁴⁶ Moreover, the services that the payphone providers actually purchased

⁴⁴ Letter from Brooks Harlow, counsel for the Northwest Public Communications Council, to Marlene H. Dortch, May 9, 2006 at n.3.

⁴⁵ See note 46, *infra*, and June 22, 2006 *ex parte* at 3, 10-11. Also see, Comments of AT&T Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies on Florida Public Telecommunications Association’s Petition for a Declaratory Ruling, filed Feb. 28, 2006 at 14.

⁴⁶ Qwest submits that these rates were reasonable even if the Commission were to rule that the *Wisconsin Order* were to be applied retroactively which cannot be the case). The *Wisconsin Order* left considerable flexibility with ILECs and state regulators to determine cost and overhead, and payphone providers always had state regulatory processes available if they felt that the PAL rates were too high. But the *Wisconsin Order* was not retroactive, either as a matter of law or as a matter of intent. The guidelines issued to the Wisconsin Public Service Commission in the *Wisconsin Order* laid out a new paradigm that made it easier for state regulators to examine PAL rates within the federal guidelines, a fact that was made even more clear when the Commission acted on reconsideration of the *Wisconsin Order*. *Wisconsin Reconsideration Order*, 21 FCC Rcd 7794 at *6-*7 ¶ 6. The *Wisconsin Order* did not affect the lawfulness of rates already in effect in other jurisdictions at the time that it was issued. As the court that reviewed the *Wisconsin Order* made clear, it potentially required prospective corrections to existing rates, and it applied only when an ILEC filed new or revised PAL rates.

prior to 2002 were not uniform during the period 1997-2002, and often fluctuated based on Qwest's tariff filings.⁴⁷

Today, nearly 10 years after the issuance of the *Waiver Order*, the payphone providers request that this Commission direct refunds based on an allegation that Qwest's PAL rates from 1997-2002 were unreasonable -- while at the same time agreeing that the rates upon which they base their claims are "illustrative." It is to prevent fiascos such as the payphone providers hope to cause that the protections against refunds without prior notice via a suspension and an accounting order were enacted into the Communications Act. Because there were no suspension and accounting orders, federal refunds cannot be ordered.

II. STATE REGULATORS DID NOT IGNORE THEIR OBLIGATION TO EXAMINE INTRASTATE PAL RATES UNDER APPLICABLE LEGAL STANDARDS

There is a very serious problem with directing (or permitting) states to reopen their ancient reviews (formal as well as informal) of intrastate payphone rates. At least in the case of Qwest, Qwest's PAL rates have already been subject to extensive review by states regulators, reviews that have included New Services Test evaluations. In some cases, these reviews resulted in payment of refunds to carriers. Payphone providers often seek to characterize state review of carrier payphone rates as generally cursory and disingenuous.⁴⁸ But such aspersions cast on state regulators' efforts to ensure compliance with the New Services Test are neither accurate nor fair.

As discussed in Qwest's June 22, 2006 *ex parte* memorandum, Qwest had "dumb" PAL rates in effect on an unbundled basis in all of its jurisdictions prior to January 1, 1997.⁴⁹ Accordingly,

See New England Public Communications Council, Inc. v. FCC, 334 F.3d 69, 74 (D.C. Cir. 2003), *reh'g and reh'g en banc denied*, 2003 U.S. App. Lexis 19628 (2003); *cert. denied, N.C. Payphone Ass'n v. FCC*, 541 U.S. 1009 (2004).

⁴⁷ *See* Exhibit 2 for an elaboration of state proceedings involving Qwest's PAL rates from 2002 forward. This summary illustrates, albeit only superficially, the scope of states' efforts to carry out their delegation with regard to intrastate payphone rates, both before and after the *Wisconsin Order*.

⁴⁸ *See, e.g.*, Letter from Brooks E. Harlow, counsel for plaintiffs/appellants Davel Communications, *et al.* to Marlene H. Dortch, Federal Communications Commission, dated July 21, 2006 at the attachments -- Comments of the Northwest Public Communications Council, The Minnesota Independent Payphone Association, and the Colorado Payphone Association in Support of Petition for a Declaratory Ruling at 2, "Long experience shows that state commissions and RBOCs will not implement these FCC requirements unless the FCC demonstrates that it will enforce them."

⁴⁹ As used in this memorandum, Qwest's PAL rates encompass multiple service offers that include measured or message or flat-rated service (depending upon the state and time frames) for

during the beginning of that year, Qwest both filed unbundled “smart” PAL rates⁵⁰ and reviewed its existing “dumb” PAL rates for compliance with the Commission’s New Services Test. To determine compliance with the New Services Test, Qwest calculated an unseparated TSLRIC cost for its payphone lines. For existing dumb PAL rates, Qwest compared this cost to its existing payphone rates and, by dividing the cost by the price, derived an overhead percentage. Qwest then added the subscriber line charge into the total price and calculated a second overhead. If the overhead percentages were deemed to be reasonable (the New Services Test standard), Qwest did not modify its prices. Qwest determined that all of its existing prices for “dumb” PAL services were consistent with the New Services Test at that time and that the new prices for “smart” PALs also complied with the New Services Test. Thus, Qwest made no new tariff filings for “dumb” PAL services in the first half of 1997, and Qwest’s certification of compliance was based on the pre-existing PAL rates.

However, this does not mean that Qwest’s PAL rates went unreviewed. Nine of Qwest’s fourteen state commissions specifically reviewed Qwest’s (U S WEST’s) (“smart” or “dumb”) PAL rates in the 1996 to 2002 time period (Arizona, Colorado, Iowa, Minnesota, Montana, Nebraska, New Mexico, Oregon, and South Dakota). Utah refused requests for a generic investigation of all Utah ILEC payphone rates and directed AT&T and MCI to ILEC state filings or the Commission. Later Utah approved reductions in Qwest’s PAL rates in its general rate case and subsequent annual price cap filings. Other states reviewed Qwest’s PAL rates in the context of general rate proceedings in the 1997 to 2002 time period. Six states reviewed subsidies related to the deregulated public telephone services which in some cases included a review of regulated PAL rates (Nebraska, New Mexico, Oregon, South Dakota, Washington and Wyoming). The subsidy investigations were brought primarily by interexchange carriers (“IXCs”) such as AT&T and MCI who alleged that intrastate access rates provided a subsidy to Qwest’s public telephone operations and as such, the access rates should be reduced.

III. CONCLUSION

The *Davel* decision highlights the importance of a final and definitive resolution of the payphone access line controversy. One issue stands out, however. Once the Commission clarifies that the *Waiver Order* did not provide an open-ended elimination of the filed tariff doctrine (and its companion the prohibition against retroactive ratemaking), and instead was intended as a temporary measure to permit ILECs to have intrastate payphone tariffs effective as of April 15, 1997 even if they physically took effect after that date, all of the arguments advanced by the

both Basic PAL and Smart PAL services and other services such as PAL Coinless Subscriber service.

⁵⁰ “Smart PAL rates” were rates for the payphone lines where the intelligence was in the central office, rather than in the coin sets. While some competitive payphone providers purchased “smart” PAL service, the great majority of competitors purchased the “dumb” PAL service.

Ms. Marlene H. Dortch
September 5, 2006

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payphone providers evaporate. The Commission should make that point clear, and should do so expeditiously.

However, should the Commission decide to interpret the *Waiver Order* as providing a broad and timeless waiver of the filed tariff doctrine, it would be necessary to make additional determinations that are still critical and present insurmountable obstacles to the refund demands made by the payphone providers.

- The *Waiver Order* did not apply to Qwest because Qwest did not file dumb PAL rates after April 15, 1997 and did not take advantage of the *Waiver Order*.
- State regulators, not courts, have the jurisdiction to determine the reasonableness of intrastate ILEC PAL rates.
- The *Wisconsin Order* did not create an independent cause of action for rates filed prior to its issuance (*i.e.*, was not retroactive).
- Any federal “refunds” are barred by Section 204 of the Communications Act because of the failure of the FCC to comply with the statutory provisions precedent to the ordering of a refund.⁵¹
- In any proceeding brought by payphone providers based on ILEC PAL rates, the payphone providers have the obligation to prove both that the ILEC PAL rates were unreasonable and what a reasonable rate would be. Simple reliance on the *Wisconsin Order* would not be sufficient.

It is time that the Commission put an end to this interminable, and at its base frivolous, litigation.

Sincerely,

/s/ Robert B. McKenna

Attachments – Exhibit 1 - Amended Opinion
Exhibit 2 - Summary of state payphone rate activity

⁵¹ See Qwest’s June 22, 2006 *ex parte* at 13, 14-16, for a full explication of this argument, which is not repeated in this letter.

EXHIBIT 1

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*2006 U.S. App. LEXIS 21098, **

DAVEL COMMUNICATIONS, INC., a Delaware corporation; ACCESS ANYWHERE LLC; KRISTIN MOELLE; AUTOMATED TELECOM TECHNOLOGY INC., dba A-Tel Inc.; CENTRAL TELEPHONE COMPANY; STEVE PETERMAN, dba Colorado Payphones; COMMUNICATIONS MANAGEMENT SERVICES LLC, Plaintiffs-Appellants, v. QWEST CORPORATION, a Colorado corporation, Defendant-Appellee.

No. 04-35677

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

2006 U.S. App. LEXIS 21098

December 8, 2005, Argued and Submitted, Seattle, Washington
June 26, 2006, Filed

PRIOR HISTORY: [*1] Appeal from the United States District Court for the Western District of Washington. D.C. No. CV-03-03680-MJP. Marsha J. Pechman, District Judge, Presiding.

CASE SUMMARY

PROCEDURAL POSTURE: Plaintiffs, pay phone service providers that purchased telecommunications services from defendant incumbent local exchange carrier, sought review of an order from the United States District Court for the Western District of Washington dismissing their claims for reimbursement based on defendant's alleged noncompliance with a Federal Communications Commission (FCC) Waiver Order and based on an alleged overcharge for fraud protection services.

OVERVIEW: Plaintiffs claimed that, under the Waiver Order, defendant owed reimbursements for the five-year period in which defendant failed to file public access line tariffs that were compliant with the FCC's new services test. Contrary to the district court, the court held that plaintiffs' claims under the Waiver Order were not barred by the filed-rate doctrine. The requirements of [47 U.S.C.S. §§ 201, 276](#) were accorded by the regulating statute which imposed the tariff filing requirement and were, therefore, not precluded by the filed-rate doctrine. Also, strict application of the doctrine was inappropriate because the FCC expressly required a departure from a filed rate in adopting the Waiver Order. Nevertheless, the court found that issues related to the scope of the Waiver Order implicated policy concerns that required referral to the FCC under the primary jurisdiction doctrine. As to the claims for reimbursement for fraud protection, the district court properly applied inquiry notice in finding that certain claims were untimely under [47 U.S.C.S. § 415\(b\)](#), but the court held that amounts paid under noncompliant tariffs within two years prior to the filing of the complaint were timely.

OUTCOME: In an amended opinion, the court vacated the dismissal without prejudice of plaintiffs' Waiver Order claims, and it remanded for consideration of whether a stay or dismissal without prejudice was the appropriate disposition pursuant to the primary jurisdiction doctrine. The court reversed the dismissal of plaintiffs' fraud protection claims with respect to the claims that were timely, and it remanded for further proceedings.

CORE TERMS: primary jurisdiction, tariff, payphone, carrier, compliant, filed-rate, public

access, provider, regulation, intrastate, threshold, coalition, customer, referral, statute of limitations, telecommunications, reimbursement, non-compliant, refund, motion to dismiss, cause of action, dial-around, effective, filed tariff, forty-five-day, right of action, competence, Telecommunications Act, failed to file, implementing

LexisNexis(R) Headnotes  [Hide Headnotes](#)

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

HN1  The primary jurisdiction doctrine is a doctrine specifically applicable to claims properly cognizable in court that contain some issue within the special competence of an administrative agency. In other words, primary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts. Consequently, even where the doctrine requires an issue to be referred to an administrative agency, it does not deprive the court of jurisdiction. [More Like This Headnote](#) 

[Communications Law](#) > [Telephone Services](#) > [Payphone Services](#) 

HN2  Chapter 5 of the Federal Communications Act of 1934, [47 U.S.C.S. § 151](#) et seq., as amended by the Federal Communications Act of 1996 (1996 Act), regulates the telecommunications industry. As a general matter, the Federal Communications Act requires common carriers subject to its provisions to charge only just and reasonable rates, [47 U.S.C.S. § 201](#), and to file their rates for their services with the Federal Communication Commission (FCC) or, in some cases, with state agencies. [47 U.S.C.S. § 203](#). As part of the 1996 Act's general focus on improving the competitiveness of markets for telecommunications services, [47 U.S.C.S. § 276](#) substantially modified the regulatory regime governing the payphone industry by providing, in general terms, that dominant carriers may not subsidize their payphone services from their other telecommunications operations and may not prefer or discriminate in favor of their payphone services in the rates they charge to competitors. [47 U.S.C.S. § 276\(a\)](#). The 1996 Act directs the FCC to issue regulations implementing these provisions, specifying in some detail the mandatory contents of the regulations. [47 U.S.C.S. § 276\(b\)](#). [More Like This Headnote](#) 

[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 

[Civil Procedure](#) > [Appeals](#) > [Standards of Review](#) > [De Novo Review](#) 

HN3  The appellate court reviews de novo the district court's dismissal for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#). [More Like This Headnote](#) 

[Communications Law](#) > [Federal Acts](#) > [Communications Act](#) > [Tariffs](#) 

[Communications Law](#) > [Federal Acts](#) > [Telecommunications Act](#) > [Tariffs](#) 

[Communications Law](#) > [Telephone Services](#) > [Local Exchange Carriers](#) > [Tariffs](#) 

[Communications Law](#) > [Telephone Services](#) > [Long Distance Telephone Services](#) > [Tariffs](#) 

[Communications Law](#) > [Telephone Services](#) > [Payphone Services](#) 

HN4  The filed-rate doctrine, also known as the filed-tariff doctrine, applies in regulated industries in which federal law requires common carriers publicly to file schedules of services and the rates or tariffs to be charged for those services. The doctrine 

requires that common carriers and their customers adhere to tariffs filed and approved by appropriate regulatory agencies. Under the doctrine, once a carrier's tariff is approved by the Federal Communications Commission or an appropriate state 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. That is, the doctrine bars suits challenging rates which, if successful, would have the effect of changing the filed tariff. [More Like This Headnote](#)

[Communications Law](#) > [Federal Acts](#) > [Telecommunications Act](#) > [Tariffs](#) 

HN5  The regulatory scheme of the Federal Communications Act, [47 U.S.C.S. § 151](#) et seq., the source since 1934 of the filed-rate doctrine in the telecommunications industry, was fundamentally altered with the passage of the Federal Telecommunications Act of 1996 (1996 Act). Although the Federal Communications Act prohibited the Federal Communications Commission (FCC) from eliminating for any covered carriers the requirement that they obtain advance approval of schedules of rates from the agency and adhere to the approved tariffs, the 1996 Act expressly permitted the FCC to "detariff" large swaths of the telecommunications industry. [47 U.S.C.S. § 160\(a\)](#). Where the FCC has done so, the filed-rate doctrine no longer applies. Conversely, where tariff filing is still required by statute or regulation, the filed-rate doctrine continues to apply with full force. [More Like This Headnote](#)

[Communications Law](#) > [Federal Acts](#) > [Communications Act](#) > [Tariffs](#) 

[Communications Law](#) > [Federal Acts](#) > [Telecommunications Act](#) > [Tariffs](#) 

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[Communications Law](#) > [Telephone Services](#) > [Long Distance Telephone Services](#) > [Tariffs](#) 

[Communications Law](#) > [Telephone Services](#) > [Payphone Services](#) 

HN6  The filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff. This principle applies to regulations implementing the statutory command as well as to the statute itself. Carriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it, and their failure to do so may justify departure from the filed rate. [More Like This Headnote](#)

[Communications Law](#) > [Federal Acts](#) > [Telecommunications Act](#) > [Tariffs](#) 

[Communications Law](#) > [Telephone Services](#) > [Payphone Services](#) 

HN7  [47 U.S.C.S. § 201](#) of the Telecommunications Act of 1996 requires telecommunications rates to be just and reasonable. [47 U.S.C.S. § 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. These requirements, as well as the provision conferring on payphone service providers 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. [More Like This Headnote](#)

[Communications Law](#) > [Federal Acts](#) > [Telecommunications Act](#) > [Tariffs](#) 

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HN8  In *Transcon Lines*, the United States 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 regulating statute, regulations that are consistent with the filed rate system and compatible with its effective operation. [More Like This Headnote](#) 

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

HN9  The doctrine of primary jurisdiction is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts. The doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are within the special competence of an administrative body. The doctrine does not, however, require that all claims within an agency's purview be decided by the agency. Nor is the primary jurisdiction doctrine intended to secure expert advice for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit. [More Like This Headnote](#) 

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

HN10  Although no fixed formula exists for applying the doctrine of primary jurisdiction, courts in the United States Court of Appeals for the Ninth Circuit traditionally look for four factors identified in *General Dynamics*. Under this test, the doctrine applies where there is (1) the need to resolve an issue that (2) has been placed by Congress 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. [More Like This Headnote](#) 

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

HN11  Where an issue falls within an agency's primary jurisdiction, the district court enables "referral" of the issue to the agency. "Referral" is the term of art employed in primary jurisdiction cases. In practice, it means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies. There is no formal transfer mechanism between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine, the parties are responsible for initiating the appropriate proceedings before the agency. [More Like This Headnote](#) 

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

[Civil Procedure](#) > [Pleading & Practice](#) > [Defenses, Demurrers, & Objections](#) > [Failures to State Claims](#) 

HN12  Under the standard principles of pleading applicable to any motion to dismiss, the 

federal courts may not dismiss a complaint unless it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. In the context of the primary jurisdiction doctrine, the analogous question is whether any set of facts could be proved which would avoid application of the doctrine. The superordinate question governing the primary jurisdiction doctrine is whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation. Whether this question can be answered on a motion to dismiss depends on the nature of the case. Where the allegations of the complaint do not necessarily require the doctrine's applicability, then the primary jurisdiction doctrine may not be applied on a motion to dismiss; if, on the other hand, the primary jurisdiction doctrine applies on any set of facts that could be developed by the parties, there is no reason to await discovery, summary judgment, or trial, and the application of the doctrine properly may be determined on the pleadings. [More Like This Headnote](#)

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

HN13  Both the United States Court of Appeals for the Ninth Circuit and the United States Supreme Court have held that the interpretation of an agency order issued pursuant to the agency's congressionally granted regulatory authority falls within the agency's primary jurisdiction where the order reflects policy concerns or issues requiring uniform resolution. These decisions are grounded in the central focus of the primary jurisdiction doctrine, the desirability of uniform determination and administration of federal policy embodied in the agency's orders. [More Like This Headnote](#) 

[Administrative Law](#) > [Separation of Powers](#) > [Primary Jurisdiction](#) 

[Civil Procedure](#) > [Judicial Officers](#) > [Judges](#) > [Discretion](#) 

HN14  Whether to stay or dismiss without prejudice a case within an administrative agency's primary jurisdiction is a decision within the discretion of the district court. The court may stay the case and retain jurisdiction or, if the parties would not be unfairly disadvantaged, dismiss the case without prejudice. The factor most often considered in determining whether a party will be disadvantaged by dismissal without prejudice is whether there is a risk that the statute of limitations may run on the claims pending agency resolution of threshold issues. Also, where the court suspends proceedings to give preliminary deference to an administrative agency but further judicial proceedings are contemplated, then jurisdiction should ordinarily be retained via a stay of proceedings, not relinquished via a dismissal. [More Like This Headnote](#) 

[Governments](#) > [Legislation](#) > [Statutes of Limitations](#) > [Time Limitations](#) 

HN15  Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages. Rather, once a plaintiff has inquiry notice of its claim, it bears the responsibility of making diligent inquiries to uncover the remaining facts needed to support the claim. [More Like This Headnote](#) 

COUNSEL: Brooks E. Harlow, Miller Nash LLP, Seattle, Washington, for the plaintiffs-appellants.

Douglas P. Lobel and David A. Vogel, Arnold & Porter LLP, McLean, Virginia, for the defendant-appellee.

JUDGES: Before: Ronald M. Gould and Marsha S. Berzon, Circuit Judges, and William W Schwarzer, * District Judge.

- - - - - Footnotes - - - - -

* The Honorable William W Schwarzer, Senior United States District Judge for the Northern District of California, sitting by designation.

- - - - - End Footnotes - - - - -

OPINIONBY: BERZON

OPINION: AMENDED OPINION

BERZON, Circuit Judge:

The Federal Telecommunications Act of 1996 ("1996 Act") largely deregulated the telecommunications industry. At the same time, the 1996 Act continued to regulate certain segments of the industry so as to increase competition overall. For example, to promote more competitive market conditions, the 1996 Act required incumbent local exchange carriers, including appellee Qwest Corp., to provide access to their telephone lines and services essentially at their cost of providing the service.

In 1996 [***2**] and 1997, the Federal Communications Commission ("FCC") issued a series of orders setting standards for rates and services offered by local carriers to payphone service providers. This case concerns claims by Davel Communications, Inc. and other payphone service providers ("Davel") that, under the FCC's 1996 and 1997 orders, Qwest owes reimbursements for periods in which it failed to file tariffs implementing the new standards or filed tariffs not compliant with the 1996 Act and its implementing regulations. The district court held the reimbursement claims barred by the filed-tariff doctrine and dismissed them without prejudice. In addition, the court dismissed on statute of limitations grounds Davel's claims that Qwest overcharged it for fraud protection services during the time Qwest failed to file required fraud protection tariffs with the FCC.

As a threshold matter, Qwest contends that the district court lacked jurisdiction under the primary jurisdiction doctrine over Davel's claims and that we therefore lack jurisdiction to hear this appeal. That is not so. ^{HN1} The primary jurisdiction doctrine is "a doctrine specifically applicable to claims *properly cognizable in court* that [***3**] contain some issue within the special competence of an administrative agency." [Reiter v. Cooper](#), 507 U.S. 258, 268, 113 S. Ct. 1213, 122 L. Ed. 2d 604 (1993) (emphasis added). In other words, "[p]rimary jurisdiction is not a doctrine that implicates the subject matter jurisdiction of the federal courts." [Syntek Semiconductor Co. v. Microchip Tech. Inc.](#), 307 F.3d 775, 780 (9th Cir. 2002). Consequently, even where the doctrine requires an issue to be referred to an administrative agency, it "does not deprive the court of jurisdiction." [Reiter](#), 507 U.S. at 268.

We therefore have jurisdiction of this appeal from the final judgment of the district court pursuant to [28 U.S.C. § 1291](#), and address Qwest's primary jurisdiction doctrine contention on its merits in due course rather than as a threshold jurisdictional issue. *Cf. Steel Co. v. Citizens for a Better Env't*, [523 U.S. 83, 93-94, 118 S. Ct. 1003, 140 L. Ed. 2d 210](#) (jurisdictional objections must be addressed before proceeding to merits issues). After considering the parties' contentions, we vacate the district court's order of dismissal and remand for further proceedings. **[*4]**

I. Background

Davel and the other appellants are payphone service providers that purchase telecommunications services from Qwest in eleven of the fourteen states in which Qwest operates. Because Qwest operates its own payphones, Davel is both a competitor and a customer of Qwest. The services Qwest provides its payphone service provider customers include public access lines, local usage to enable Davel to connect its payphones to the telephone network for placing calls, and fraud protection.

HN2 Chapter 5 of the Federal Communications Act of 1934 as amended by the 1996 Act regulates the telecommunications industry. [47 U.S.C. § 151 et seq.](#) n1 As a general matter, the Federal Communications Act requires common carriers subject to its provisions to charge only just and reasonable rates, *id.* [§ 201](#), and to file their rates for their services with the FCC or, in some cases, with state agencies. *Id.* [§ 203](#). As part of the 1996 Act's general focus on improving the competitiveness of markets for telecommunications services, [§ 276](#) substantially modified the regulatory regime governing the payphone industry by providing, in general terms, that dominant **[*5]** carriers may not subsidize their payphone services from their other telecommunications operations and may not "prefer or discriminate in favor of [their] payphone service[s]" in the rates they charge to competitors. *Id.* [§ 276\(a\)](#). The 1996 Act directs the FCC to issue regulations implementing these provisions, specifying in some detail the mandatory contents of the regulations. *Id.* [§ 276\(b\)](#).

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n1 All statutory references are to the 2000 edition of Title 47 of the United States Code unless otherwise indicated.

----- End Footnotes -----

Pursuant to this directive, the FCC adopted regulations requiring local exchange carriers such as Qwest to set payphone service rates and "unbundled features" rates, including rates for fraud protection, according to the FCC's "new services test" (sometimes "NST"). The new services test requires that rates for those telecommunications services to which it applies be based on the actual cost of providing the service, plus a reasonable amount of the service provider's overhead costs. The FCC's **[*6]** regulations required local exchange carriers to develop rates for the use of public access lines by intrastate payphone service providers that were compliant with the new services test. The rates were to be submitted to the utility commissions in the states in the local exchange carriers' territory, which would review and

"file" (*i.e.*, approve) the rates. See *In re* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Report and Order*, FCC 96-388, [11 F.C.C.R. 20,541 \(Sept. 20, 1996\)](#); *In re* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Order on Reconsideration*, FCC 96-439, [11 F.C.C.R. 21,233, 21,309 \(Nov. 8, 1996\) P 163](#) ("Order on Recons.") (collectively "Payphone Orders"). Also pursuant to the regulations, local exchange carriers were required to file their "unbundled features" rates with both the state commissions and the FCC for approval. Order on Recons. P 163. The FCC required the local exchange carriers to file the new tariffs for both kinds of rates by January 15, 1997, with an effective date no later **[*7]** than April 15, 1997. *Id.*

In addition, the Payphone Orders required interexchange carriers, mainly long distance telephone service providers, to pay "dial-around compensation" to payphone service providers, including Qwest, for calls carried on the carrier's lines which originated from one of the provider's pay telephones. n2 If, however, the payphone service provider was also an incumbent local exchange carrier, as was Qwest, the Payphone Orders required full compliance with the new tariff filing requirements, including the filing of cost-based public access line rates and fraud protection rates, before the local exchange carrier could begin collecting dial-around compensation.

----- Footnotes -----

n2 Prior to the passage of the 1996 Act, callers could use an access number to bypass the payphone provider and place a call directly with the interexchange carrier. The interexchange carrier then collected the full tariff, leaving the payphone provider with no compensation for the call. Payphone providers were prohibited from blocking these calls. The new rules requiring dial-around compensation changed this regime so as to assure some compensation to the company that provided the payphone. See [47 U.S.C. § 276\(b\)\(1\)\(A\)](#); see generally *Global Crossing Telecomm., Inc. v. FCC*, [347 U.S. App. D.C. 271, 259 F.3d 740, 742, 747 \(D.C. Cir. 2001\)](#) (tracing background of the dial-around compensation regulations).

----- End Footnotes----- **[*8]**

On April 10, 1997, a coalition of regional Bell operating companies ("the Coalition"), which included Qwest, sent a letter to the FCC requesting a limited waiver of certain provisions of the Payphone Orders. The Coalition wanted this waiver so that the constituent companies could begin collecting dial-around compensation before they were in full compliance with the new regulations. Specifically, they requested an extension of time to file intrastate payphone service rates compliant with the new services test. These rates were due to become effective on April 15, 1997, but the Coalition wanted that deadline extended forty-five days from April 4, 1997. (The FCC had earlier granted a similar extension with respect to interstate rates.) The Coalition proposed that, if the FCC granted the waiver and allowed the Coalition companies to file rates that complied with the new services test by the extended deadline, those companies would reimburse or provide a credit back to April 15, 1997, to customers purchasing the services if the new rates were lower than the previous non-compliant rates.

On April 15, 1997, the FCC issued an order granting a limited waiver of the new services test rate-filing **[*9]** requirement. *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 \(Apr. 15, 1997\)](#) ("Waiver Order"). Specifically, the Waiver Order granted an extension until May 19, 1997, for filing intrastate payphone service rates compliant with the new services test, while at the same time permitting incumbent local exchange carriers to begin collecting dial-around compensation as of April 15, 1997. [12 F.C.C.R. 21,370, P 2](#). The Waiver Order stated that the existing rates would continue in effect from April 15, 1997, until

the new, compliant rates became effective ("the waiver period"). The NST-compliant rates were to be filed with state utility commissions, which were required to act on the filed rates "within a reasonable time." [12 F.C.C.R. at 21,379, P 19 n.60](#); see also [12 F.C.C.R. at 21,371, PP 2, 18-19, 25](#). If a local exchange carrier relied on the waiver, it was required to reimburse its customers "from April 15, 1997 in situations where the newly [filed] rates, when effective, are lower than the existing [filed] rates." [12 F.C.C.R. at 21,371 PP 2, 20, 25](#). The order emphasized that the waiver was "limited" and **[*10]** "of brief duration." [12 F.C.C.R. at 21,380, PP 21, 23](#).

In 2002, in a decision subsequently affirmed by the D.C. Circuit, the FCC clarified the requirements of the new services test as it applies to the payphone industry, making it clear that, as in other areas in which it has been applied, the new services test requires forward looking, cost-based rates. [In re Wis. Pub. Serv. Comm'n, Mem. Op. & Order, 17 F.C.C.R. 2051 \(2002\)](#) ("Wisconsin Order"), *aff'd* [New Eng. Pub. Commc'ns Council, Inc. v. FCC, 357 U.S. App. D.C. 231, 334 F.3d 69 \(D.C. Cir. 2003\)](#). That is, the rates must take into account only the ongoing costs of providing the service, and may not recover previously incurred costs, such as those incurred in building the telephone system infrastructure. In so holding, the FCC rejected the Coalition's challenge to its authority to regulate intrastate rates and to require forward-looking cost estimates in determining rates, as well as the Coalition's challenges to the agency's determination of how overhead costs may be allocated. [17 F.C.C.R. at 2063-2072, PP 31-58](#). In 2002, after the FCC's decision in the Wisconsin Order, Qwest dramatically reduced its public access line and fraud **[*11]** protection tariffs.

Davel maintains that the rates Qwest charged for public access lines services from 1997 to 2002 did not comply with the new services test. Because Qwest relied on the Waiver Order by collecting dial-around compensation beginning on April 15, 1997, argues Davel, Qwest is required by the Act itself and by the Waiver Order to refund the difference between the non-compliant rates charged from 1997 to 2002 and the compliant rates filed in 2002.

Davel further contends that: (1) from 1997 to 2002, rather than filing NST-compliant public access line rates in any of eleven states in which the plaintiff payphone service providers operate, Qwest was pursuing legal challenges to the FCC's authority to regulate intrastate public access line rates; (2) the first time Qwest filed NST-compliant rates in the states at issue was in 2002; (3) the rates filed in 2002, which were substantially lower than the 1997-2002 rates, show that Qwest's 1997-2002 rates were not compliant with the new services test. On these premises, Davel argues that the Waiver Order requires Qwest to reimburse it for the difference between the compliant rate filed in 2002 and the non-compliant rates actually **[*12]** charged for the entire preceding period, beginning on April 15, 1997.

In addition, according to Davel, Qwest was required pursuant to the Order on Recons. to file with the FCC rates compliant with the new services test for fraud protection services and other "unbundled features." Davel alleges that Qwest failed to file compliant fraud protection rates from 1997 until 2002 or 2003, and that this lapse violated the Act. Pursuant to [47 U.S.C. §§ 206-207](#), Davel asserts, it is entitled to recover damages for this violation measured by the difference between the amount it was charged and the compliant rates.

Qwest moved to dismiss Davel's complaint under [Federal Rule of Civil Procedure 12\(b\)\(6\)](#), arguing (1) that Davel's claims arising out of the payphone service rates are barred by the filed-rate doctrine; and (2) that Davel's claim arising from the fraud protection rates is time-barred under the applicable statute of limitations. In the alternative, Qwest, invoking the primary jurisdiction doctrine, requested a stay and referral of the threshold legal issues to the appropriate state and federal agencies. **[*13]** The district court granted Qwest's motion to dismiss, holding Davel's refund claims under the Waiver Order barred by the filed-rate doctrine and its fraud protection claims barred by the two year statute of limitations set out in [47 U.S.C. § 415](#). The court dismissed Davel's complaint without prejudice to Davel's asserting the claims before the appropriate administrative tribunals. **HN3** We review de novo

the district court's dismissal for failure to state a claim under [Fed. R. Civ. P. 12\(b\)\(6\)](#). [Madison v. Graham](#), 316 F.3d 867, 869 (9th Cir. 2002).

II. The Filed-Rate Doctrine

HN4 The filed-rate doctrine, also known as the filed-tariff doctrine, applies in regulated industries in which federal law requires common carriers publicly to file schedules of services and the rates or tariffs to be charged for those services. The doctrine requires that common carriers and their customers adhere to tariffs filed and approved by appropriate regulatory agencies. [Evanns v. AT&T Corp.](#), 229 F.3d 837, 840 (9th Cir. 2000). "Under the doctrine, once a carrier's tariff is approved by the FCC [or an appropriate [*14] state 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." *Id.* (quoting [Marcus v. AT&T Corp.](#), 138 F.3d 46, 56 (2d Cir.1998)).

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.

Id. (citations omitted). That is, the doctrine bars suits challenging rates which "if successful, would have the effect of changing the filed tariff." [Brown v. MCI WorldCom Network Servs., Inc.](#), 277 F.3d 1166, 1170 (9th Cir. 2002).

HN5 The regulatory scheme of the Federal Communications Act, the source since 1934 of the filed-rate doctrine in the telecommunications industry, see [Evanns](#), 229 F.3d at 840, was fundamentally altered with the passage of the 1996 Act. Although the Federal Communications Act prohibited the FCC from eliminating for any [*15] covered carriers the requirement that they obtain advance approval of schedules of rates from the agency and adhere to the approved tariffs, see [Ting v. AT&T](#), 319 F.3d 1126, 1131-32 (9th Cir. 2003) (citing [MCI Telecomms. Corp. v. AT&T Corp.](#), 512 U.S. 218, 231, 114 S. Ct. 2223, 129 L. Ed. 2d 182 (1994)), the 1996 Act expressly permitted the FCC to "detariff" (to use the telecommunications industry's "horrid neologism," [Verizon Del., Inc. v. Covad Commc'ns Co.](#), 377 F.3d 1081, 1089 (9th Cir. 2004)) large swaths of the telecommunications industry. [47 U.S.C. § 160\(a\)](#); see [Ting](#), 319 F.3d at 1132. Where the FCC has done so, the filed-rate doctrine no longer applies. See [Verizon Del.](#), 377 F.3d at 1088. Conversely, where tariff filing is still required by statute or regulation, the filed-rate doctrine continues to apply with full force. [Id.](#) at 1089.

In its regulations implementing the requirements of [§ 276](#), the FCC chose to require filing of tariffs for certain aspects of the payphone system while leaving others to the freemarket. See Order on Recons. With respect to the public access [*16] line rates at issue here, the FCC indisputably imposed a rate-filing requirement. See [11 F.C.C.R. at 21,309, P 163](#). The Commission similarly imposed a tariffing requirement with respect to fraud protection rates. *Id.* Intrastate public access line tariffs are to be filed with state regulatory agencies, while rates for unbundled services, including fraud protection, are to be filed with both the state agencies and the FCC. *Id.* Thus, while Davel may be correct as a general matter that "the filed-rate doctrine is all but dead in telecommunications law," the "but" qualifier applies here, as the doctrine is not dead with respect the rates at issue in this case.

Nevertheless, **HN6** the filed-tariff doctrine does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement, even where the effect of enforcement would be to change the filed tariff. [Reiter](#), 507 U.S. at 266 (holding, in a motor

carrier case, that the filed-rate doctrine applies to common-law claims but "assuredly does *not* preclude avoidance of the tariff rate . . . through claims and defenses that are specifically accorded by the [Interstate Commerce Act] itself". **[*17]** n3 This principle applies to regulations implementing the statutory command as well as to the statute itself. See *ICC v. Transcon Lines*, 513 U.S. 138, 147, 115 S. Ct. 689, 130 L. Ed. 2d 562 (1995) ("Carriers must comply with the comprehensive scheme provided by the statute and regulations promulgated under it, and their failure to do so may justify departure from the filed rate.").

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n3 We note that the question whether the 1996 Act provides a private right of action to enforce payphone regulations such as the Waiver Order is pending before the United States Supreme Court. See *Metrophones Telecomm., Inc. v. Global Crossing Telecomm., Inc.*, 423 F.3d 1056, 1065-70 (9th Cir. 2005), cert. granted 126 S. Ct. 1329, 164 L. Ed. 2d 46 (Feb. 21, 2006). However, as Qwest emphatically stated in its October 3, 2005, Fed. R. App. P. 28 (j) letter, it has never disputed in this case that Davel has such a right of action. We therefore decline to address the issue, assuming for purposes of this case only that Davel does have a right of action. See *Burks v. Lasker*, 441 U.S. 471, 475-76, 99 S. Ct. 1831, 60 L. Ed. 2d 404 & n.5, 441 U.S. 471, 99 S. Ct. 1831, 60 L. Ed. 2d 404 (1979) (the existence of a private right of action is not a jurisdictional question, and, where not raised, may be assumed without being decided).

----- End Footnotes----- **[*18]**

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. ^{HN7} 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. ^{HN8} In *Transcon Lines*, the Supreme Court, following *Reiter*, held that a regulating agency may require a "departure from a filed rate **[*19]** 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 the 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, n4 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 **[*20]** construing the reach of and then enforcing 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. n5

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n4 Qwest does not raise any challenge to the FCC's authority to promulgate such an order, and indeed, was part of the Coalition that requested it.

n5 By so holding, we do not decide whether the Waiver Order applies with respect to the particular rates challenged in this case or to any particular time period. As discussed below, the primary jurisdiction doctrine precludes us from determining the scope of the Waiver Order.

- - - - - End Footnotes- - - - -

Accordingly, we hold that Davel's claims in this case are not barred by the filed-rate doctrine. n6

- - - - - Footnotes - - - - -

n6 The parties' arguments with regard to the fraud protection rates concern only the district court's statute of limitations decision. We therefore do not decide on this appeal whether the filed-rate doctrine is applicable to that claim.

- - - - - End Footnotes- - - - - [*21]

III. The Primary Jurisdiction Doctrine

The conclusion that the filed-rate doctrine does not preclude Davel's lawsuit does not mean that the case can go forward. Davel's refund claim presents several issues that arguably implicate technical and policy considerations. Qwest contends that under the primary jurisdiction doctrine, these issues must be addressed in the first instance by the agencies with regulatory authority over the payphone industry.

HN9 The doctrine of primary jurisdiction "is a prudential doctrine under which courts may, under appropriate circumstances, determine that the initial decisionmaking responsibility should be performed by the relevant agency rather than the courts." [Syntek, 307 F.3d at 780](#). "The doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are 'within the special competence of an administrative body.'" [Farley Transp. Co. v. Santa Fe Trail Transp. Co., 778 F.2d 1365, 1370 \(9th Cir. 1985\)](#) (quoting [United States v. W. Pac. R.R. Co., 352 U.S. 59, 63, 77 S. Ct. 161, 1 L. Ed. 2d 126, 135 Ct. Cl. 997 \(1956\)](#)). The doctrine does not, however, "require that all claims within [*22] an agency's purview be decided by the agency." [Brown, 277 F.3d at 1172](#); accord [United States v. Gen. Dynamics Corp., 828 F.2d 1356, 1363 \(9th Cir. 1987\)](#) ("While it is certainly true that the competence of an agency to pass on an issue is a necessary condition to the application of the doctrine, competence alone is not sufficient."). "Nor is [the primary jurisdiction doctrine] intended to 'secure expert advice' for the courts from regulatory agencies every time a court is presented with an issue conceivably within the agency's ambit." [Brown, 277 F.3d at 1172](#).

HN10 Although "[n]o fixed formula exists for applying the doctrine of primary jurisdiction,"

W. Pac., 352 U.S. at 64, courts in this circuit traditionally look for four factors identified in *General Dynamics*. Under this test, the doctrine applies where there is "(1) the need to resolve an issue that (2) has been placed by Congress 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. [*23] " Gen. Dynamics, 828 F.2d at 1362.

HN11 Where an issue falls within an agency's primary jurisdiction, the district court enables "referral" of the issue to the agency. Reiter, 507 U.S. at 268. As we have explained,

"Referral" is the term of art employed in primary jurisdiction cases. In practice, it means that a court either stays proceedings, or dismisses the case without prejudice, so that the parties may pursue their administrative remedies. There is no formal transfer mechanism between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine, the parties are responsible for initiating the appropriate proceedings before the agency.

Syntek, 307 F.3d at 782 n.3 (citations omitted).

Qwest argues that the primary jurisdiction doctrine requires "referral" of two issues necessary to the resolution of this case: First, Qwest contends that, to assure uniformity of administration, the FCC, rather than the court, should resolve the parties' dispute as to the scope of the Waiver Order--that is, whether, as Qwest would have it, the refund obligation was limited to the forty-five-day period in which [*24] Qwest was to bring its public access line rates into compliance with the new services test, or whether, as Davel asserts, the obligation was open-ended, continuing until Qwest filed rates which were in fact compliant. Second, Qwest argues, whether Davel is entitled to any refund depends on whether the public access line rates Qwest filed prior to 2002 were in fact not compliant with the new services test, as Davel alleges. Qwest maintains that this determination will require a highly technical application of the new services test, a task within the primary jurisdiction of the state utility commissions and the FCC.

A.

Relying on Cost Management Services, Inc. v. Washington Natural Gas Co., 99 F.3d 937, 948-49 (9th Cir 1996), Davel asserts as an initial matter that the primary jurisdiction doctrine does not apply at this juncture--that is, when a case is at the motion to dismiss stage. Davel maintains that it has adequately alleged that the public access line rates Qwest filed prior to 2002 were not cost-based, so the threshold issue of whether the rates were consistent with the new services test must be resolved in Davel's favor, and it is therefore entitled [*25] to go forward with its case. Qwest, in contrast, maintains that the proper interpretation of an agency order, here the Waiver Order, is an issue which must be decided by the agency, regardless of the plaintiffs' factual allegations. n7

----- Footnotes -----

n7 Qwest additionally contends that the issue of its rates' compliance with the new services test may be referred on a motion to dismiss. Because we conclude that referral of the proper construction of the Waiver Order is required, we do not address this contention.

----- End Footnotes-----

In *Cost Management*, the plaintiff claimed that the owner of the natural gas delivery facilities violated its own filed tariff in an effort to monopolize the local natural gas market, in violation of the Sherman Antitrust Act. *Id.* at 940-41. The defendant sought dismissal on the ground, among others, that the issue whether it had violated the tariff was within the primary jurisdiction of the state utility commission. *Id.* at 941, 948-49. We held the primary jurisdiction doctrine [*26] inapplicable on the grounds that the facts alleged in the complaint established a violation of the tariff, and thus, on a 12(b)(6) motion, the issue to be referred "must necessarily be resolved in favor of [the plaintiff]." *Id.* at 949. Implicit in this conclusion was the recognition that resolving the question whether there was a violation of an applicable tariff did not necessarily involve complex issues requiring agency expertise. *Cf. W. Pac.*, 352 U.S. at 69; *Brown*, 277 F.3d at 1173.

Reading *Cost Management* against the background of established Rule 12(b)(6) jurisprudence, it becomes clear that *Cost Management's* primary jurisdiction holding was but a straightforward application in the context of the primary jurisdiction doctrine of standard principles of pleading applicable to any motion to dismiss. ^{HN12} Under these principles, "the federal courts may not dismiss a complaint unless 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Kwai Fun Wong v. United States*, 373 F.3d 952, 956-57 (9th Cir. 2004) (quoting *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 514, 122 S. Ct. 992, 152 L. Ed. 2d 1 (2002)). [*27]

In the context of the primary jurisdiction doctrine, the analogous question is whether any set of facts could be proved which would avoid application of the doctrine. The superordinate question governing the primary jurisdiction doctrine is "whether the reasons for the existence of the doctrine are present and whether the purposes it serves will be aided by its application in the particular litigation." *W. Pac.*, 352 U.S. at 64. Whether this question can be answered on a motion to dismiss depends on the nature of the case.

Where the issues raised by a complaint necessarily implicate policy concerns requiring application of the primary jurisdiction doctrine, a federal court may suspend its resolution of those issues in favor of their referral to the governing agency. *Cost Management* by contrast did not *necessarily* involve policy concerns committed to an agency, and our decision there simply conforms the primary jurisdiction doctrine with the usual principles that apply on motions to dismiss. In other words, where, as in *Cost Management*, the allegations of the complaint do not necessarily require the doctrine's applicability, then the primary jurisdiction [*28] doctrine may not be applied on a motion to dismiss; if, on the other hand, the primary jurisdiction doctrine applies on any set of facts that could be developed by the parties, there is no reason to await discovery, summary judgment, or trial, and the application of the doctrine properly may be determined on the pleadings. The Waiver Order construction issue in this case, as will appear, is of the latter variety.

B

The threshold dispute regarding the refund claim centers on whether the Waiver Order entitles Davel to the refund, assuming the facts Davel has alleged. Specifically, the parties dispute whether the Waiver Order's reimbursement requirement is limited to the forty-five-day period of the Order's waiver of the rate filing deadline, or whether the reimbursement obligation instead extends indefinitely--that is, until Qwest's NST-compliant rates are on file and effective. Davel contends that the plain language of the Waiver Order provides for an open-ended obligation. Qwest maintains, in contrast, that the waiver provided by the order was expressly limited to a forty-five-day period, and that it would be absurd to construe the reimbursement obligation as extending beyond [*29] that period. Qwest further contends that if, as Davel alleges, it failed to file NST-compliant rates at all during the forty-five-day extension provided by the Waiver Order, then the Order's refund obligation never arose, and Davel's only remedy was a reparations claim filed with the FCC at the time of the missed

deadline. Finally, Qwest argues, this threshold dispute over the scope and construction of the Waiver Order must be referred to the FCC under the primary jurisdiction doctrine.

We agree that the primary jurisdiction doctrine requires referral of the threshold issue of the scope of the Waiver Order. ^{HN13} Both this court and the Supreme Court have held that the interpretation of an agency order issued pursuant to the agency's congressionally granted regulatory authority falls within the agency's primary jurisdiction where the order reflects policy concerns or issues requiring uniform resolution. *See, e.g., Rilling v. Burlington N. R.R. Co.*, 909 F.2d 399, 401 (9th Cir. 1990) (holding that the resolution of plaintiff's claim required a proper interpretation of an ICC merger order, an issue within ICC's primary jurisdiction); *see also Serv. Storage & Transfer Co. v. Virginia*, 359 U.S. 171, 177, 79 S. Ct. 714, 3 L. Ed. 2d 717 (1959) [*30] (holding that the interpretation of a certificate of convenience and necessity issued by ICC to an interstate motor carrier was an issue within the primary jurisdiction of the ICC). These decisions are grounded in the central focus of the primary jurisdiction doctrine, the desirability of uniform determination and administration of federal policy embodied in the agency's orders. *Serv. Storage*, 359 U.S. at 177; *Rilling*, 909 F.2d at 401.

Given this emphasis on achieving uniformity in policy determination and administration, the application of the primary jurisdiction doctrine to the issue of the scope of the FCC's Waiver Order is particularly compelling. The Waiver Order was issued pursuant to the congressional mandate that the FCC regulate the payphone industry and, specifically, that it provide for payphone service providers to receive compensation from interexchange carriers and for incumbent local exchange carriers to eliminate cost subsidies for their payphone systems. Davel observes that the Waiver Order's plain language may be read as open-ended. Opposed to that observation is the argument that, in adopting the Order, the FCC initially contemplated [*31] that all local exchange carriers *would* file NST-compliant tariffs within the forty-five-day waiver period. As the current dilemma may not have been contemplated at the outset by the agency, interpreting the Waiver Order requires consideration of policy considerations similar to those that gave rise to the FCC's 1996 and 1997 orders applying the new services test to intrastate payphone rates, as well as to the Waiver Order itself.

More specifically, with the issuance of the Wisconsin Order in 2002, it became apparent that any initial expectation of prompt filing of NST-compliant tariffs may not have been fulfilled. Thus, beyond issues of initial FCC intent, any application of the Order to the several-year period beyond the original forty-five-day waiver term--a several-year period in which the existence of NST-compliant tariffs was uncertain--would raise policy questions not resolved by the Waiver Order itself. Those policy questions include whether applying the refund obligation should depend on whether or not there were good-faith efforts to file compliant rates; whether future enforcement of tariffs will be impeded by allowing rate payers to complain about noncompliant rates [*32] years after the fact; and, conversely, whether a narrow construction of the Waiver Order would reward intentional non-compliance with FCC orders under the 1996 Act.

We cannot say without addressing such policy considerations how the Waiver Order should be applied in the circumstances of this case. How the Waiver Order applies here thus involves questions of policy best left to the FCC, the agency that adopted the Waiver Order in the first place pursuant to its regulatory authority in this arena.

In addition, the Waiver Order is national in scope, affecting local exchange carriers and payphone service providers throughout the country, including many industry participants not involved in this litigation. For the Order's reimbursement requirement to be applied uniformly, it is the FCC that must construe its scope. We note that there are currently five requests for such a construction pending before the FCC. The agency has provided some indication that it will determine this issue in due course. *See In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of*

1996, *Public Notice*, New England Public Communications Council, **[*33]** Inc. Filing of Letter from Supreme Judicial Court of Massachusetts Regarding Implementation of the Pay Telephone Compensation Provisions of the Telecommunications Act of 1996, [21 F.C.C.R. 3519, DA06-780, 2006 WL 850948 \(Apr. 3, 2006\), P 1](#) & n.3; *see also In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Public Notice, Pleading Cycle Established for Michigan Pay Telephone Association Petition for Declaratory Ruling, DA 06-1190, 21 F.C.C.R. 6289, 2006 WL 1519441 (June 2, 2006). It is precisely the purpose of the primary jurisdiction doctrine to avoid the possibility of conflicting rulings by courts and agencies concerning issues within the agency's special competence. At least unless and until the FCC declines to determine the scope of the Waiver Order, questions regarding that scope, including those at the core of this case, are within the agency's primary jurisdiction. n8*

----- Footnotes -----

n8 Whether, as Davel maintains, the FCC could decline to address the scope of its Waiver Order, either expressly or by failing to respond to the outstanding requests, and, if it does, whether the district court could then proceed to do so, are questions we do not decide.

----- End Footnotes----- **[*34]**

We conclude that the issue of the scope of the Waiver Order should be referred to the FCC.

C.

If the Waiver Order does entitle Davel to some relief as a result of Qwest's alleged failure to file public access line rates compliant with the new services test by the specified deadline, the pivotal question would become whether Qwest's rates between 1997 and 2002 were NST-compliant. Until we know whether and, if so, to what degree the Waiver Order gives rise to refund relief for all or part of the several year period in which Qwest's rates were assertedly non-NST-compliant, however, we cannot evaluate this refund claim on its merits. Nor, applying our understanding of *Cost Management*, can we determine whether the refund claim is sufficiently fact-dependent that any primary jurisdiction determination must await factual development. Consequently, because we have held that the scope of the Waiver Order is within the primary jurisdiction of the FCC, we cannot now address whether the issue of Qwest's pre-2002 rates' compliance with the new services test is also within the agency's primary jurisdiction, and we do not do so. n9

----- Footnotes -----

n9 Qwest also contends that the determination of whether its pre-2002 intrastate public access line rates complied with the new services test is within the primary jurisdiction of the *state* utility commissions, with which, pursuant to the FCC's Order on Recons., those rates are filed. For the same reasons we cannot address whether the issue is within the FCC's primary jurisdiction, we cannot address this contention. We thus do not decide the open question whether primary jurisdiction referral to a state agency would be proper in any event. *See Cost Mgmt., 99 F.3d at 949 n.12.*

----- End Footnotes----- **[*35]**

D.

The district court dismissed the case pursuant to the filed rate doctrine. Davel contends that, under the primary jurisdiction doctrine, the appropriate disposition of this case is a stay, not a dismissal. ^{HN14} Whether to stay or dismiss without prejudice a case within an administrative agency's primary jurisdiction is a decision within the discretion of the district court. [Reiter, 507 U.S. at 268-69](#). The court may stay the case and retain jurisdiction or, "if the parties would not be unfairly disadvantaged, . . . dismiss the case without prejudice." *Id.* The factor most often considered in determining whether a party will be disadvantaged by dismissal without prejudice is whether there is a risk that the statute of limitations may run on the claims pending agency resolution of threshold issues. [Syntek, 307 F.3d at 782](#); [Brown, 277 F.3d at 1173](#). Also, where the court suspends proceedings to give preliminary deference to an administrative agency but further judicial proceedings are contemplated, then jurisdiction should ordinarily be retained via a stay of proceedings, not relinquished via a dismissal. [N. Cal. Dist. Council of Hod Carriers, Bldg. & Constr. Laborers, AFL-CIO v. Opinski, 673 F.2d 1074, 1076 \(9th Cir. 1982\)](#). **[*36]**

Here, because it dismissed the case on the basis of the filed-rate doctrine, the district court did not address whether Davel would be disadvantaged by dismissal. In particular, the district court had no occasion to consider that Davel's claims are subject to a two-year statute of limitations that began to run, at the latest, when Qwest first filed its NST-compliant tariffs, so Davel may well lose its claims before the FCC resolves the threshold issues.

We therefore remand to the district court to determine whether to stay the case or dismiss it without prejudice, applying the pertinent factors.

IV. Statute of Limitations

The district court dismissed Davel's claims based on Qwest's fraud protection rates as barred by the two-year statute of limitations of [47 U.S.C. § 415\(b\)](#). Davel contends this dismissal was error because its fraud rate claims did not accrue until Qwest filed NST-compliant fraud protection rates with the FCC in 2003.

The Order on Recons. required the filing of fraud protection tariffs with the FCC by January 15, 1997. *See* Order on Recons. P 163. Davel contends, and Qwest does not dispute, that Qwest filed *no* fraud protection **[*37]** tariffs with the FCC until 2003. During the period between 1997 and 2003, Davel paid Qwest for fraud protection under the rates specified in tariffs Qwest filed with the states. The district court correctly found that, accepting the allegations of the complaint as true, Davel had a cause of action against Qwest as soon as Qwest missed the federal filing deadline and Davel paid for fraud protection services based on the non-compliant rates on file with the state utility commissions. At that time, Davel could have brought any claim it had under [47 U.S.C. §§ 206-207](#) in district court or with the FCC.

We reject Davel's contention that its cause of action did not accrue until Qwest filed NST-compliant rates in 2003, because it had no knowledge until then that Qwest's rates were too high. The D.C. Circuit, affirming the FCC, rejected such a contention in similar circumstances in [Sprint Communications Co. v. FCC, 316 U.S. App. D.C. 168, 76 F.3d 1221, 1227-31 \(D.C. Cir. 1996\)](#) (rejecting application of a "discovery" rule of accrual where cause of action was predicated on "AT & T's failure to file and to charge cost-justified rates"). **[*38]** In that case, the plaintiff, Sprint, argued that it had no knowledge of its claim based on the payment of tariffed rates for telecommunications services until the defendant, AT&T, several years later, filed cost data indicating that the rates charged exceeded lawful levels. *Id.* at 1224-25. Affirming the FCC, the D.C. Circuit held that Sprint was on inquiry notice of the claim as soon as it had knowledge suggesting the rates might be improper. *Id.* at 1229-30.

We find the D.C. Circuit's reasoning on this issue particularly apposite in the circumstances of this case. As soon as Qwest failed to file fraud protection rates with the FCC, it was in

technical non-compliance with the Payphone Orders, and Davel was on inquiry notice that it might be paying excessive rates for fraud protection. n10 Its cause of action therefore accrued at that time. The fact that, until Qwest filed its new fraud protection rates in 2003, Davel was not in a position to determine the precise amount of the overcharges, or even whether the charges were excessive at all, does not change this result. *HN15*"Accrual does not wait until the injured party has access to or constructive knowledge of all the facts required [***39**] to support its claim. Nor is accrual deferred until the injured party has enough information to calculate its damages." *Sprint, 76 F.3d at 1229* (citation omitted). Rather, "once a plaintiff has [inquiry] notice [of its claim], it bears the responsibility of making diligent inquiries to uncover the remaining facts needed to support the claim." *Id. at 1230*. Once Davel was aware that Qwest had missed the federal filing deadline, it was obliged to make reasonable inquiries to determine any possible injury it may have suffered as a result. n11

----- Footnotes -----

n10 Indeed, as Davel recognizes, the Colorado Public Utilities Commission determined in 1999, based upon a complaint filed in March of 1998, that Qwest's fraud protection rates filed in that state were excessive. *See Colo. Payphone Ass'n v. U.S. West Commc'ns, Inc.*, 1999 WL 632854 (Colo. Pub. Util. Comm'n May 18, 1999). Thus, as in *Sprint*, publicly available information allowed parties similarly situated to Davel to discover their cause of action within a year of the new regulations coming into effect.

n11 We also find it of no moment that this case is before us on a motion to dismiss. Davel's own allegations charge that Qwest missed the federal filing deadline, and there is no reasonable possibility that it can prove that it was not aware of this omission until after 2002.

----- End Footnotes----- [***40**]

This analysis reflects a key difference between the damages claims concerning the fraud protection services and the claims based on the Waiver Order. On Davel's construction of the Waiver Order, the right to reimbursement under the Order came into existence only upon the filing of NST-compliant rates. On that interpretation, Davel had no right to reimbursement against Qwest until Qwest filed compliant rates, allegedly in 2002, and its cause of action for Qwest's alleged violation of the Waiver Order thus accrued thereafter, when Qwest failed to pay the reimbursements. In contrast, there was no reimbursement order applicable to the fraud protection services, so any cause of action necessarily accrued when Qwest failed to comply with the Payphone Orders and Davel was injured as a result.

Davel's fraud protection services claims are not, however, wholly barred. Qwest's tariff filing obligations were ongoing. Each time Davel paid the non-NST-compliant state-filed tariff, it was injured anew by Qwest's failure to file the required federal tariff. *See MCI Telecomms. Corp. v. Teleconcepts, Inc.*, 71 F.3d 1086, 1101 (3d Cir. 1995) (analogizing to installment contracts and [***41**] coming to a similar conclusion with respect to 47 U.S.C. § 415(a), the statute of limitations applicable to actions by carriers). Thus, while the district court was correct that the claim for any amounts paid as of May 15, 1997, expired on May 15, 1999, amounts paid under non-compliant tariffs within two years prior to the filing of the complaint are timely.

Accordingly, we hold that the fraud protection claims based on non-NST-compliant fraud protection rates paid within two years of the filing of Davel's complaint are timely. n12

----- Footnotes -----

n12 Because the parties have raised on appeal no other issues regarding the fraud protection claims, our decision on these claims is limited to the statute of limitations question. Qwest is free to raise other available defenses to these claims on remand.

- - - - - End Footnotes - - - - -

V. Conclusion

We **REVERSE** the dismissal of Davel's fraud protection claims with respect to fraud protection payments made pursuant to non-NST-compliant rates within the two-year period prior to **[*42]** the filing of the complaint and **REMAND** for further proceedings consistent with this opinion. We **VACATE** the dismissal without prejudice of Davel's Waiver Order claims and **REMAND** the case to the district court for a consideration whether a stay or dismissal without prejudice is the appropriate disposition pursuant to the primary jurisdiction doctrine.

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EXHIBIT 2

EXHIBIT 2

PUBLIC ACCESS LINE REVIEW BY STATE COMMISSIONS (IN NORMAL COURSE OR AS A RESULT OF PAYPHONE PROVIDER COMPLAINTS)

The following summarizes Qwest's payphone access line ("PAL") state tariff activity between 1997 and 2003.

State: Arizona

Proceedings: Docket No. T-01015A-97-0024, *et al.*, Decision No. 61304 (12-31-98).

Result: In 1997 and 1998 the Arizona Corporation Commission ("ACC") opened an investigation into the local exchange carrier rates for payphone services for Qwest (U S WEST) as a result of tariff revisions made in January 1997. The Arizona Payphone Association ("APA") was granted intervention in this investigation on Feb. 11, 1997. On Nov. 4, 1998, the ACC staff and the APA reached a settlement agreement. On Dec. 31, 1998, the ACC adopted this settlement agreement and ordered the reduction of Qwest's PAL rates (effective Jan. 8, 1999) to the level of its flat-rated business rate retroactive to Apr. 15, 1997. The ACC concluded that "[t]he rates and charges contained in the Agreement are just and reasonable and in compliance with all state and federal law."

On Mar. 30, 2001, the APA joined other parties and Qwest in a settlement of Docket No. T-01051B-00-369, which settled Qwest's rate case. The PAL rates were agreed to be set at the flat-rated business rate in that stipulation. This stipulation was approved by the ACC in its Decision No. 63487. In this decision the ACC approved PAL rates recommended by the APA as "just and reasonable."

On Feb. 10, 2003, Qwest filed tariff revisions to reduce rates for PAL services. This filing was opposed by Arizona Dialtone (a competitive local exchange carrier ("CLEC")) on the basis that the proposed rates were too low and were not just and reasonable for that reason. On Mar. 11, 2003 the ACC suspended the filing. On Nov. 14, 2003 the ACC staff filed a report recommending approval of the filing. On Dec. 9, 2003 the ACC issued its decision approving the filing on an interim basis pending a hearing. On Jan. 20, 2004, Qwest filed testimony and a confidential cost study in compliance with a procedural schedule. On Feb. 3, 2004, Arizona Dialtone filed a letter withdrawing from the hearing part of the proceeding. On Feb. 5, 2004, Qwest filed a Request for Order Vacating Hearing and Approving Permanent Rates ("the Motion"). On Feb. 6, 2004 APA filed its Joinder in Qwest's Motion. At a procedural conference on February 26, Qwest argued that the only party who had opposed Qwest's proposed rates had now indicated that it did not intend to participate at the evidentiary proceeding, thereby leaving no factual issues to be resolved. The APA joined in the Motion, indicating that it supported the staff report and that there was evidence in the proceeding to allow the interim rates to be made permanent. Staff joined in support of the Motion. In its Decision No. 66890 on Apr. 6, 2004, the ACC determined that sufficient evidence was contained in the record to find that the interim rates should be made permanent and not subject to true-up.

State: Colorado

Proceedings: Docket No. 98F-146T, Decision No. C99-497, complaint against U S WEST Comm. Inc., by the Colorado Payphone Association (“CPA”). Original Decision adopted May 4, 1999, on Reconsideration adopted July 14, 1999 (Decision No. C99-765).

Result: The Colorado Public Utilities Commission (“CO PUC”) reviewed PAL rates and associated PAL features on a complaint filed by the CPA. The CO PUC disagreed with CPA’s assertion that costs should be based on Total Element Long Run Incremental Cost (“TELRIC”) based prices for unbundled network elements (“UNEs”). However, it agreed with the CPA that U S WEST’s PAL and feature rates were priced too high and ordered a PAL reduction to the price of a two-way trunk service (similar to a flat-rated business line). The CO PUC found that “the price to cost ratios for PAL service, as indicated in USWC’s fully allocated cost study, are excessive.” The CO PUC also required that if the price of two-way trunks were to be lowered that the PAL rates follow that same pricing. Additionally, the CO PUC ordered that “if the FCC issues future specific directives regarding the pricing of payphone service USWC will be directed to submit appropriate and timely filings with this Commission to comply with such directives.” This last provision resulted in the issuance on Apr. 24, 2002 by the CO PUC staff of a letter to Show Cause why the CO PUC should not take action against Qwest regarding the Federal Communications Commission’s (“Commission” or “FCC”) *Order*, FCC 02-25 released Jan. 31, 2002 (“*Wisconsin Order*”). Qwest filed revised tariff sheets with the CO PUC on June 11, 2002. On July 10, 2002, the CO PUC approved Advice Letter 2922 that reduced the rates for PALs and fraud protection with an effective date of July 15, 2002.

State: Idaho

Proceedings: General rate group revisions each year 1997-2001.

Result: Minor rate changes due to de-averaging and expansion of local free calling areas caused PAL rates to change slightly each of the years 1997, 1998, 1999, 2000 and 2001.

Effective Dec. 13, 2002, Qwest reduced its PAL rates in a manner that reflected the guidelines in the Commission’s *Wisconsin Order*.

State: Iowa

Proceedings: Docket No. INU-99-1 (July 30, 1999).

Result: The docket was established on complaints from Pay Phones Concepts, Inc. regarding the prices of PALs. Specifically, the company alleged that the rates exceeded the Commission’s “new services” test. The Iowa Utilities Board (“IUB”) initiated a generic investigation that included multiple local exchange carriers in Iowa. The Iowa Payphone Association filed comments questioning whether U S WEST’s PAL rates were sufficient¹ to “cover all the costs of providing pay phone service.” The IUB declined “the Complainant’s invitation to initiate a further investigation into payphone line rates. Each of the rate-regulated LECs has made at least a *prima facie* showing that its existing rates for a pay telephone line are consistent with the applicable FCC requirements....” The IUB concluded that “(t)here does not appear to be any reasonable basis for further investigation.”

¹ These allegations suggested that Qwest’s PAL rate was *too low* to recover its forward looking costs.

Qwest made reductions in its PAL rates in 1998 and 2000 as part of general rate proceedings.

On Oct. 3, 2002, Qwest filed with the IUB a proposed tariff reflecting further reductions in PAL rates pursuant to its application of the guidelines in the Commission's *Wisconsin Order*. The IUB suspended the request on Oct. 30, 2002, but on a reconsideration request by Qwest, the Board reversed its suspension and allowed the proposed rates to become effective on Nov. 7, 2002 (Docket No. TF-02-509).

State: Minnesota

Proceedings: Docket No. P-421/C-95-1036 (Nov. 27, 1996) and Docket No. P-421/C-98-786 (Feb. 4, 1999 and Reconsideration denied Aug. 2, 1999).

Results: In its investigation of PAL rates in 1996 (Minnesota Independent Payphone Association ("MIPA") complaint filed Oct. 5, 1995), the Minnesota Public Utilities Commission ("MN PUC") granted the requests of the payphone providers and ordered Qwest (U S WEST) to unbundle features (not UNEs) from its PAL service so that those retail feature services became available to be purchased individually, and ordered Qwest (U S WEST) to provide flat-rated business service to payphone providers that preferred that service² to connect payphones to the network. Also, the MN PUC ordered Qwest to offer its flat-rated business lines to payphone companies at the CLEC wholesale discount of 21.5%. (The MN PUC had previously ordered that the discount was not available for PAL service.)

Members of the MIPA filed complaints on June 9, 1998 alleging that Qwest had not made a new feature (ANI ii 70) available with flat-rated business services used with payphones. They asked that Qwest be ordered to refund the difference between the rate for PAL service with the ANI ii 70 feature and the new unbundled ANI ii 70 service, or in the alternative, allow the wholesale discount of 21.5% on PAL service (which includes the ANI ii 70 feature). On Feb. 4, 1999, the MN PUC ordered Qwest to convert all flat-rated business services used with payphones to PAL service within 90 days, and offer the 21.5% discount to payphone providers for its PAL service.

Effective Dec. 3, 2002, Qwest further reduced its PAL rates in order to reflect the guidelines specified in the Commission's *Wisconsin Order*.

State: Montana

Proceedings: Docket No. D96.12.220, Order No. 5965c (Aug. 26, 1998).

Result: In Qwest's (U S WEST's) general rate restructure, the issue of PAL rates was discussed at length. The Northwest Payphone Association ("NWPA") intervened and took an active role in the proceedings. The Montana Public Service Commission's ("MT PSC") final order devoted approximately half of its text to the topic (32 of 59 paragraphs). The MT PSC concluded that the company's PAL rates and its payphone features satisfy the Commission's "new services" test. On Oct. 1, 1998, the NWPA filed in Montana's First Judicial District Court, Lewis and Clark County, contesting the MT PSC's decision. On Jan. 19, 1999, U S WEST and NWPA submitted for approval by the MT PSC an agreement settling judicial review proposing new tariffs with

² Flat-rated business line rates were lower than PAL rates and were previously unavailable to payphone providers for connection to payphones. At the payphone providers' request, the MN PUC eliminated this restriction.

lower PAL and feature rates. On Jan. 20, 1999 the MT PSC approved the agreement and PAL rates were reduced.

Qwest's PAL rates were further lowered as the result of general rate proceedings in 2000 and 2001.

Effective Dec. 10, 2002, Qwest further reduced its PAL rates to reflect the guidelines in the Commission's *Wisconsin Order*.

State: Nebraska

Proceedings: Application No. C-2112/PI-30 and Application No. C-2696/PI-57

Results: The Nebraska Public Service Commission ("NE PSC") opened Docket No. C-2112/PI-30 on Aug. 31, 1999 following an earlier investigation (*see* discussion below). Having heard explanations of technical issues regarding service quality, the NE PSC closed this docket on Mar. 19, 2002 and deferred pricing issues to a new Docket No. C-2696/PI-57 which would "review payphone pricing for ALL carriers in light of the release of the FCC's Wisconsin Order."

Effective Dec. 3, 2002, Qwest reduced its PAL rates in a manner that reflected the guidelines set forth in the Commission's *Wisconsin Order*.

On May 4, 2004, concluding docket number C-2696/PI-57, the NE PSC ordered "that payphone rates are appropriately priced in light of today's competitive environment in the state of Nebraska."

State: New Mexico

Proceedings: Docket No. 97-69-TC, In the Matter of Compliance with Federal Regulation of Payphones, Order dated Aug. 21, 1997.

Result: The New Mexico Commission conducted a review of all incumbent rates for payphone services in New Mexico to determine if subsidies existed in intrastate rates for those services. The New Mexico Commission concluded that "U S WEST's tariff is just and reasonable and in compliance with all legal requirements." (Decision at 54.)

As part of general rate proceedings in 1998, 1999, and 2000 Qwest's PAL rates resulted in lower rates.

Effective Dec. 13, 2002, Qwest further reduced its PAL rates in a manner that reflected the guidelines in the Commission's *Wisconsin Order*.

State: North Dakota

Proceedings: General rate group revisions each year 1997-2000.

Result: Rate group consolidations, and calling area changes caused Qwest (U S WEST) to reduce PAL rates each of the years 1998, 1999, and 2000.

Effective Dec. 3, 2002, Qwest further reduced its PAL rates in a manner that reflected the guidelines in the Commission's *Wisconsin Order*. Effective Jan. 30, 2003, additional reductions were made to the PAL rates.

State: Oregon

Proceedings: UT 125/Phase II (Reconsideration denied Jan. 8, 2002).

Result: In the rate case, the Oregon Public Utilities Commission (“OR PUC”) approved Qwest’s (U S WEST’s) PAL rates as compliant with the Commission’s “new services” test at the level of the flat-rated business rate. This decision was upheld by the Circuit Court of the Third Judicial District in Oregon but overturned by the state Circuit Court on appeal. The issue has been remanded to the Oregon Commission who is investigating the issue. Qwest’s position is that the proceeding is entirely prospective. Payphone provider intervenors claim otherwise. The Oregon Commission has written to the FCC for assistance on the so-called “waiver” issue, whereby payphone providers claim that certain Bell Operating Companies waived their federal- and state-filed tariff and retroactive ratemaking defenses in perpetuity in 1997 when some of those companies filed new “dumb” PAL tariffs between April 4 and May 19, 1997.

Effective Mar. 17, 2003, Qwest reduced its PAL rates in a manner that reflected the guidelines in the Commission’s *Wisconsin Order*.

State: South Dakota

Proceedings: Revision to Qwest (“U S WEST”) tariff, TC97-006 (Smart PAL).

Results: The South Dakota Public Utilities Commission (“SD PUC”) opened an investigation of Qwest’s (“U S WEST’s”) “smart” PAL tariff at the request of a payphone provider. The SD PUC held a hearing and heard testimony from interested parties. After reviewing the evidence, the SD PUC reviewed the margins for “basic” PAL and “smart” PAL service and noted that the margins were the same and concluded that “the prices and terms and conditions contained in the Smart PAL tariff are fair and reasonable.” The SD PUC also opened another proceeding at the request of AT&T and MCI to consider the subsidies that may have been included in local rates (*see* discussion below).

Effective Dec. 2, 2002, Qwest reduced its PAL rates in a manner that reflected the guidelines in the Commission’s *Wisconsin Order*.

State: Utah

Proceedings: Docket No. 97-049-08 (General Rate Case), Docket No. 01-049-43 (2001 Price Cap), Docket No. 02-049-36 (2002 Price Cap), Docket No. 03-049-30 (2003 Price Cap), Docket No. 04-049-62 (2004 Price Cap).

Results: From the General Rate Case with reductions in PAL rates in 1998 and annual reductions in Price Cap rates for PALs in 2001 through 2004, Qwest has reduced its PAL rates in a manner that reflected the guidelines in the Commission’s *Wisconsin Order*.

State: Washington

Proceeding: Docket No. UT-950200 (Rate Case).

Results: In its Twenty-fourth Supplemental Order (Jan. 30, 1998) the Washington Utilities and Transportation Commission (“WUTC”) approved Qwest’s (U S WEST’s) compliance tariffs which included reductions in its PAL rate. The WUTC found that the PAL rate was “lower as a result of this order than if was as a result of the earlier imputation docket, which found no price squeeze at the then-current business line rate.” (Fifteenth Supplemental Order.)

Effective Aug. 28, 2003, Qwest further reduced its PAL rates in a manner that reflected the guidelines in the Commission's *Wisconsin Order*.

State: Wyoming

Proceedings: Docket No. 70000-TR-99-480 (1999 Price Plan).

Results: Qwest (U S WEST) reduced its PAL rates among other rates in its 1999 Price Plan proceeding. As required by the Wyoming Telecom Act, Qwest's (U S WEST's) rates are based upon Total Service Long Run Incremental Cost ("TSLRIC") studies approved by the Wyoming Commission. In its decision of September 16, 1999, the Wyoming Commission found that Qwest's (U S WEST's) PAL rates were in "full compliance with the TSLRIC pricing requirements of the Wyoming Telecommunications Act of 1995" (paragraph 135). And the Wyoming Commission concluded that prices for "Public Access Line pricing...constitute well reasoned and proper applications of the Act and the evidence to reach an acceptable pricing result" (paragraph 141).

Effective Dec. 13, 2002, Qwest further reduced its PAL rates in a manner that reflected the guidelines in the Commission's *Wisconsin Order*.

REVIEW OF SUBSIDIES BY STATE COMMISSIONS (AS THE RESULT OF IXC ACCESS COMPLAINTS)

State: Washington

Proceedings: Docket No. UT-970658, multiple Orders culminating in the Seventh Supplemental Order Approving U S WEST Communications, Inc., Compliance Tariff Filings and Directing Refunds, May 1, 2002.

Result: The WUTC found in its Fourth Supplemental Order, (Sept. 11, 1998), on the basis of a complaint filed by AT&T and MCI that Qwest (U S WEST) had subsidies related to its payphone operations coming from its intrastate switched access common carrier line rates in the amount of \$874,076 per year. Upon receipt of the Court of Appeals of the State of Washington Decision (Unpublished) on July 9, 2001 affirming the WUTC action (No. 46317-9-1), the Commission ordered Qwest to reduce its intrastate switched access common carrier line rates and refund excess billings back to April 15, 1997 to interexchange carrier ("IXC") customers. Qwest complied and made the appropriate refunds and rate reductions.

State: Utah

Proceeding: Docket No. 97-999-05 (Aug. 19, 1997).

Result: On April 14, 1997, MCI and AT&T requested that a generic investigation by the Utah Public Service Commission ("UT PSC") determine whether all Utah local exchange carriers had complied with the Commission's payphone requirements. The UT PSC denied the request noting that the Commission's requirement was placed on the local exchange carriers, not state commissions; that if there were issues with individual state tariffs of the local carriers the IXCs could file complaints against each carrier; and instructed the two IXCs to approach the Commission if they believed that the local exchange carriers' rates were not in compliance with the Commission's *Payphone Orders*. There is no indication that further action was taken on this issue by MCI and AT&T.

State: South Dakota

Proceedings: TC97-039.

Result: The SD PUC opened an investigation at the request of AT&T and MCI to determine compliance by all South Dakota ILECs with the Commission's *Payphone Orders*. The SD PUC solicited comments from all parties. On May 4, 1998, the SD PUC closed the docket. The SD PUC relied upon the Commission's *Order* in Docket 96-128, (Mar. 9, 1998) that "there are no state or federal certification requirements once LECs have certified" that they are in compliance with the Commission's *Payphone Orders*. There is no record of subsequent filings on the matter by AT&T or MCI.

State: Wyoming

Proceeding: Docket No. 70000-97-325 *et al.*, General Order 79 (Sept. 17, 1997)

Result: The proceeding was initiated by complaints filed by AT&T and MCI on Apr. 11, 1997. After an evidentiary proceeding with witnesses from six local exchange carriers and the two IXCs, the Wyoming Public Service Commission concluded that there were no subsidies in the local carriers' intrastate rates related to payphone matters and that the PAL rates complied with the law and were approved.

State: Nebraska

Proceedings: Application No. C-1519, Order (Aug. 3, 1999).

Result: An emergency petition was filed by MCI and AT&T regarding the compliance by Qwest (U S WEST) with *Orders* from the Commission on payphone matters. On Jan. 20, 1999 the Commission ordered rate rebalancing for U S WEST that resulted in increases in basic services and reductions in intrastate switched access rates. On Aug. 3, 1999, the Commission accepted a stipulation between U S WEST, AT&T and MCI that stated that the parties had resolved their issues and that the emergency petition should be dismissed. The Commission, however, continued to investigate prices for PALs and established a new docket for that investigation. On Aug. 31, 1999, the Commission opened Application No. C-2112/PI-30 to investigate technical and pricing issues for payphone services. This further proceeding is described above in the section dealing with Nebraska's PAL rates.