

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

In the Matter of)
)
Implementation of the Pay Telephone) CC Docket No. 96-128
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)
)
Petition of Davel Communications, Inc., *et al.*)
for Declaratory Ruling)

OPPOSITION OF QWEST CORPORATION

Qwest Corporation (“Qwest”) hereby submits this opposition to a Petition for Declaratory Ruling filed by Davel Communications, Inc., *et al.* (“Davel”) in this docket on September 11, 2006.

In its Petition, Davel requests a declaratory ruling “reaffirming that the refund period in the *Waiver Order* runs from April 15, 1997 until the RBOC in question has effective, NST-compliant rates on file with state commissions and this Commission.”¹ Davel represents a group of payphone providers that have brought suit against Qwest demanding federal refunds for payphone access line rates on file between 1997 and 2003. As described in earlier *ex parte* presentations filed by Qwest,² Davel’s position is already under consideration in response to

¹ Davel Petition at 14.

² See Letter from Melissa E. Newman, Qwest to Marlene H. Dortch, FCC, dated Sept. 5, 2006, attaching letter from Robert B. McKenna, Qwest to Marlene H. Dortch, FCC, dated Sept. 5, 2006 (“Qwest Sept. 5 *Ex Parte* Presentation”); Letter from Melissa E. Newman, Qwest to Marlene H. Dortch, FCC, dated July 19, 2006, attaching letter from Robert B. McKenna, Qwest to Marlene H. Dortch, FCC, dated July 19, 2006; Letter from Lynn Starr, Qwest to Marlene H. Dortch, FCC, dated June 28, 2006, including attached letter from Robert B. McKenna, Qwest to Marlene H. Dortch, FCC, dated June 27, 2006; Letter from Lynn Starr, Qwest to Marlene H. Dortch, FCC, dated June 22, 2006, attaching letter from Robert B. McKenna, Qwest to Marlene H. Dortch,

numerous other petitions, and is totally without merit. Davel contends that the Federal Communications Commission's ("Commission" or "FCC") April 15, 1997 *Waiver Order*,³ in which incumbent local exchange carriers ("ILECs") that did not have effective compliant payphone access line ("PAL") tariffs on file by April 15, 1997, could obtain per call compensation from interexchange carriers ("IXCs") if they agreed to grant customers refunds for the period between April 15, 1997 and the effective date of their new tariffs. Qwest already had compliant tariffs, and did not take advantage of the waiver at all. Davel claims that this "waiver" constituted a permanent FCC "waiver" of the filed tariff doctrine in all states where ILECs provided PAL services, that it applied to all Regional Bell Operating Companies ("RBOCs") whether they took advantage of the waiver or not, and that it created a federal cause of action for massive "refunds" to the benefit of payphone service providers ("PSPs").

Davel's argument is frivolous and has been thoroughly dealt with on the record in this proceeding.⁴ Even if the Commission had intended to have the *Waiver Order* constitute a wholesale open-ended refund mechanism as described by Davel (which it clearly did not), the action by the Commission could not have accomplished the result that Davel desires. If the Commission had indeed intended to create federal refund rights, it would have required the filing of federal tariffs for PAL lines, suspended suspect tariffs with an accounting order, and followed the processes mandated by Section 204 of the Act. The Commission did not do so, and Davel's

FCC, dated June 22, 2006 ("Qwest June 22 *Ex Parte* Presentation"). These *ex parte* presentations are on the record in this proceeding and are incorporated herein by reference.

³ *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*").

⁴ In addition to the Qwest *ex parte* presentations, see references to other parties' submissions currently on the record in this docket. Qwest Sept. 5 *Ex Parte* Presentation at 9 and n.26.

demand for refunds (either from a court or by way of declaration by the Commission) quite plainly must fail.

However, Davel adds a new wrinkle in its instant Petition. In *Davel Communications, Inc. v. Qwest Corporation*,⁵ the Ninth Circuit Court of Appeals ruled that the dismissal of Davel's federal District Court complaint based on the filed tariff doctrine was erroneous. The dismissal was on motion whereupon all of the factual allegations of the Davel complaint were assumed to be true. The Ninth Circuit ruled that the filed tariff doctrine did apply to the litigation, but that the *Waiver Order* had constituted at least a partial waiver of the filed tariff doctrine.⁶ The Ninth Circuit remanded the case to the District Court, with instructions to refer the question of the scope of the *Waiver Order* to the FCC pursuant to the doctrine of primary jurisdiction.⁷ The Ninth Circuit left it to the discretion of the District Court whether to make this primary jurisdiction referral via dismissal or deferral of the pending litigation.⁸ The Court's mandate was issued on August 29, 2006.

At this time the District Court has not yet made any referral to the FCC. Instead Davel, on August 25, 2006, and again on September 8, 2006, filed a "Motion for Partial Stay Pending FCC Action and for Scheduling Conference."⁹ In that Motion, Davel proclaimed that only a very little piece of its lawsuit was covered by its position on the scope of the *Waiver Order*, and thus most of the case should proceed while the Commission acts on the primary jurisdiction

⁵ 2006 U.S. App. LEXIS 21098 (9th Cir. June 26, 2006).

⁶ *Id.* *16-*19.

⁷ *Id.* *28-*34.

⁸ *Id.* *35-*36.

⁹ The two motions appear to be identical except for the date.

referral.¹⁰ Qwest's response was filed yesterday, September 25, 2006.¹¹ A copy of Davel's Motion and Qwest's response are appended hereto (Attachments A and B, respectively). No action has been taken.

In Davel's Petition to this Commission, Davel takes the odd position that the Ninth Circuit "referred to this Commission the narrow issue of when the refund period ended."¹² Of course, the Ninth Circuit did no such thing, and, indeed, no longer exercises jurisdiction over the litigation. As the District Court, which does have jurisdiction over the case, has not yet acted, Davel does not know at this time on just which issues the District Court will seek FCC guidance. The very limited issue submitted by Davel in its Petition may or may not reflect the proper scope of the referral, depending on what the District Court chooses to do. In all events, the best thing to do with the Davel Petition is to simply fold it into the ongoing proceeding and deny it. Resolution of the issues already before the Commission in this docket will clear up any matters raised by Davel. The District Court itself will determine the proper scope of the referral, and Qwest will take appropriate action at that time.¹³ Given that Davel raises nothing new or novel -- that is, nothing not already on the record -- we believe that no special treatment need be given to

¹⁰ See Plaintiff Payphone Providers' Motion for Partial Stay Pending FCC Action and for Scheduling Conference Per Local Rule 16(a), Civil Action No. C03-3680P, at 4-5 (D. Wash. Sept. 8, 2006).

¹¹ Qwest Corporation's Opposition to Plaintiffs' Motion for Partial Stay; Renewed Request for Dismissal; and Request for Referral of Additional Issues to FCC, Civil Action No. C03-3680 MJP (D. Wash. Sept. 25, 2006).

¹² Petition at 7.

¹³ Any ruling by the FCC on the meaning of either its own orders or interpretation of ambiguous provisions of the Communications Act will, of course, be binding on the District Court. See *National Cable & Telecommunications Association, et al. v. Brand X Internet Services, et al.*, 125 Sup. Ct. 2688, 2699-2702 (2005).

Davel's Petition and the Commission can proceed quickly to resolution of the entire payphone access line rate issue.

However, there are several matters, some trivial and one quite serious, that are raised by Davel and merit a response.

First, and most significantly, Davel states (adding its own emphasis that is copied herein): "Qwest never made any cost filings in 1997 and only filed payphone services rates and costs with state commissions after 2002, which was five years after the *Waiver Order* issued."¹⁴ This statement, obviously intended to make it appear as if Qwest willfully ignored the Commission's directives,¹⁵ is simply inaccurate and is directly contradicted by the record before the Commission. Qwest has described the cost analysis that it conducted in 1997 to ensure that it complied with the New Services Test in prior *ex parte* presentations.¹⁶ More significantly, in Qwest's Sept. 5 *Ex Parte* Presentation, Qwest outlined in detail the state proceedings involving Qwest's payphone rates between 1996 and 2003, which clearly belies the statement that Qwest had made no filings regarding payphone rates.¹⁷ Simply stated, Davel's factual assertion that Qwest had made no payphone filings with state commissions between 1997 and 2002 is false. The allegation that Qwest "refused" to comply with the Commission's rules is reckless.

In a different vein, Davel repeatedly mischaracterizes the Ninth Circuit decision. For example, the Ninth Circuit held that, in the absence of the *Waiver Order*, and only to the extent authorized in the *Waiver Order*, the filed tariff doctrine did not constitute a defense to Davel's

¹⁴ Petition at 11.

¹⁵ *See id.* at 10, colorfully mischaracterizing Qwest's "refusal to implement the [New Services Test]."

¹⁶ *See* Qwest June 22 *Ex Parte* Presentation at 4-12.

¹⁷ *See* Qwest Sept. 5 *Ex Parte* Presentation at 15-16 and Exhibit 2.

claims.¹⁸ Bizarrely, Davel twists the decision until it is unrecognizable, claiming that it holds categorically that: “Petitioner’s claims for PAL rate refunds are not barred by the filed tariff doctrine. . . .”¹⁹ The Ninth Circuit made no such ruling.

Davel even further stretches this limited holding (based on assumed facts) into a claim that “the Ninth Circuit held that the *Waiver Order* required any RBOC that relied on the waiver granted in that order to refund to PSPs the amount by which the RBOC’s rates exceeded the allowable NST amount.”²⁰ The Ninth Circuit imposed no such requirement. Indeed, the questions of refunds, the jurisdiction to determine whether they should or could be ordered, and the lawfulness of Qwest’s PAL rates were expressly left open by the Ninth Circuit.

Davel also consistently misstates the contents of Commission Orders, including the *Waiver Order* on which its entire case now depends. For example, Davel claims that: “The *Waiver Order* emphasized that the NST compliance waiver period was ‘limited,’ and but (*sic*) the refund period was not limited. *Id.* ¶¶ 21, 23.”²¹ Whatever else the *Waiver Order* might have done or not done, it did not “emphasize” that the “refund period was not limited.” It is simply impossible to fairly characterize the *Waiver Order* in this fashion. And yet this allegation forms a key part of Davel’s argument.

Davel’s logical, legal and factual presentations are simply neither accurate nor legally sustainable. Based on the record before the Commission in this docket, we respectfully request that the Petition for Declaratory Ruling be denied. The denial can be best accomplished in the

¹⁸ 2006 U.S. App. LEXIS 21098 at *18-*19.

¹⁹ Petition at 6.

²⁰ *Id.* (citation omitted).

²¹ *Id.* at 5.

context of the overall resolution of the payphone access line issues currently before this Commission.

The Davel Petition should be denied.

Respectfully submitted,

QWEST CORPORATION

By: /s/ Robert B. McKenna
Craig J. Brown
Robert B. McKenna
Suite 950
607 14th Street, N.W.
Washington, DC 20005
(303) 383-6650

Its Attorneys

September 26, 2006

ATTACHMENT A

The Honorable Marsha J. Pechman

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

DAVEL COMMUNICATIONS, INC., et al.,

Plaintiffs,

v.

QWEST CORPORATION,

Defendant.

Civil No. C03-3680P

PLAINTIFF PAYPHONE PROVIDERS'
MOTION FOR PARTIAL STAY
PENDING FCC ACTION AND FOR
SCHEDULING CONFERENCE PER
LOCAL RULE 16(a)

**Note on Motion Calendar:
September 29, 2006.**

ORAL ARGUMENT REQUESTED

I. OVERVIEW AND MOTION

The Ninth Circuit has reversed this Court's earlier order of dismissal, remanded the case for further proceedings; and referred to the Federal Communications Commission ("FCC") a narrow issue relating to a certain portion of plaintiffs' claims that are based on the Waiver Order¹. A copy of the amended opinion, issued on August 17, 2006, is attached hereto as Exhibit 1. Pursuant to Fed. R. App. P. 41(b), the mandate must issue within seven calendar days

¹ *In re* Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, *Order*, DA 97-805, 12 F.C.C.R. 21,370 (April 15, 1997). The Ninth Circuit has referred interpretation of the scope of this Waiver Order to the FCC.

1 of that opinion (*i.e.*, by no later than August 24, 2006). Therefore, as this Court now has
2 resumed jurisdiction, plaintiffs Davel Communications, Inc., *et al.* (“Payphone Providers”), ask
3 that this Court: (1) stay only those proceedings related to Payphone Providers’ claims that have
4 been referred to the FCC, and (2) enter the court’s standard scheduling order as to the Payphone
5 Providers’ remaining claims so that those independent claims can be litigated without further
6 delay.

7 The Ninth Circuit has reversed this Court’s dismissal as to all of the plaintiffs’
8 claims and causes of action, except for the portion of plaintiffs’ fraud protection claims that were
9 based on Qwest’s failure to file tariffs at the FCC and were more than two years old as of the
10 date the complaints were filed. The viability of plaintiffs’ independent claims does not rest upon
11 the FCC’s interpretation of the Waiver Order. Thus there is no need to stay those claims while
12 the FCC determines the scope of the Waiver Order. Further, the Ninth Circuit made it clear that
13 a stay, rather than dismissal, of the referred claims is the proper course of action here, because
14 any claims that were dismissed rather than stayed would likely be later barred by the applicable
15 statute of limitations.

16 **II. FACTUAL BACKGROUND**

17 The attached Ninth Circuit opinion sets forth the previous procedural background,
18 and generally describes plaintiffs’ claims. To summarize, plaintiffs generally seek damages,
19 including a refund of Qwest’s overcharges, for intrastate public access line rates (“PAL rates”)
20 and fraud protection rates that violated applicable Federal law. The Plaintiffs based their claims
21 not only on the Waiver Order, but also on Sections 201, 202, 276(a), and 416 of the
22 Communications Act.² Further, Plaintiffs asserted a common law claim for unjust enrichment.³
23 Although the Ninth Circuit reinstated all of the Plaintiffs’ claims and causes of action, the Court

24 ² Plaintiffs alleged in their First Cause of Action, that Qwest’s “failure violates the FCC’s Bureau Waiver
25 Order and 47 U.S.C. §§ 201, 202, 276(a), **and** 416.” *E.g.*, Davel Complaint, ¶ 20 (emphasis added). *See*
also Second Cause of Action and Davel Complaint, ¶ 24.

26 ³ *E.g.*, Davel Complaint, ¶¶ 25-27.

1 only referred to the FCC the claims that were based on the Waiver Order. Accordingly, most of
2 Plaintiffs' claims are not subject to dismissal regardless of how the FCC rules. Those claims can
3 and should finally begin to move forward.

4 This Court previously accepted Qwest's erroneous arguments for dismissal, and
5 dismissed all of the Payphone Providers' claims. A copy of this Court's order of dismissal is
6 attached as Exhibit 2. The Ninth Circuit reversed this Court's dismissal order as to all claims
7 and remanded for further proceedings. Exhibit 1.

8 To summarize, the Ninth Circuit held as follows:

- 9 1. The filed rate doctrine does not bar plaintiffs' claims;
- 10 2. Because the FCC would have to determine in the first instance the scope
11 of the Waiver Order (i.e., whether the right to refunds extended for only 45 days as found by the
12 district court, or would encompass the entire time Qwest had noncompliant rates on file), the
13 Payphone Providers' claims arising under the Waiver Order should be referred to the FCC
14 pursuant to the primary jurisdiction doctrine so that the FCC can explain the scope of the Waiver
15 Order;
- 16 3. The Payphone Providers' claims for refunds of alleged PAL rate
17 overcharges were not barred by the statute of limitations because the Payphone Providers could
18 not know they had a cause of action until Qwest filed compliant rates in July 2002; and
- 19 4. The Payphone Providers' claims for damages based on Qwest's failure to
20 file fraud protection tariffs with the FCC were partially barred by the applicable statute of
21 limitations because Qwest was required to file federal tariffs in 1997 and such tariffs were not
22 filed. Therefore, the Payphone Providers were on notice of their claims in 1997. However,
23 because this cause of action arose anew every time the Payphone Providers paid the unlawful
24 rate, the Payphone Providers could pursue any such claims that arose within two years prior to
25 the filing the lawsuit (i.e., from approximately November 25, 2001 onwards).

26

1 On August 17, the Ninth Circuit rejected Qwest's petition for reconsideration
2 (attached as Exhibit 3). Pursuant to Fed. R. App. P. 41(b), the appellate mandate issued on
3 Thursday, August 24, 2006, and this Court now has resumed jurisdiction.

4 **III. ARGUMENT**

5 **A. THE PAYPHONE PROVIDERS SHOULD BE ALLOWED TO PURSUE THEIR**
6 **INDEPENDENT CLAIMS WITHOUT DELAY.**

7 The plaintiff Payphone Providers filed their lawsuits on November 25, 2003, and
8 December 3, 2003 (and the two lawsuits were subsequently consolidated). The Payphone
9 Providers have already gone through one cycle of appellate review, and they will have to pursue
10 litigation of a portion of their claims before the FCC. Their remaining claims have been pending
11 for three years, in which time, the Payphone Providers have not been able to so much as serve an
12 interrogatory. As a matter of fundamental fairness, justice, and equity, the Payphone Providers
13 should be permitted to pursue without delay all of their claims that do not arise out of the Waiver
14 Order.⁴

15 As is clear from the Payphone Providers' complaints, as well as the Ninth
16 Circuit's opinion, Payphone Providers have independent claims for PAL rate refunds and fraud
17 protection overcharges that arise directly out of Sections 201, 207, 276 and other portions of the
18 Communications Act, plus a common law claim. Those damages claims exist regardless of the
19 FCC's interpretation of the Waiver Order, and therefore are not dependent upon the FCC's
20 interpretation of the Waiver Order. Those claims should be allowed to proceed expeditiously in
21 this Court while the FCC ponders the scope of its Waiver Order. Because discovery in the case
22 will, for the most part, relate to both the referred claim as well as the non-referred claims,
23 allowing discovery to move forward will likely enable this case to be tried in a normal

24
25 ⁴ Sadly, the old saw "justice delayed is justice denied" rings particularly true here. Owners of two of the
26 Plaintiff companies—Alan Lieberman, of National Public Phone Co., and Mark Schuster, of PMP of
Minnesota died during the pendency of the appeal.

1 timeframe, notwithstanding the FCC referral. Indeed, because of the overlap, there may not be
2 any need for further discovery after the FCC issues its ruling. Therefore, the case could be ready
3 for trial shortly after the FCC rules or after discovery is completed, whichever occurs later.

4 **B. THE COURT SHOULD STAY, RATHER THAN DISMISS, PLAINTIFFS'**
5 **CLAIMS ARISING OUT OF THE WAIVER ORDER.**

6 As discussed above, this case will need to be tried regardless of how the FCC acts
7 on the referred claim. Even if that were not true, dismissal of the referred claim would not be
8 appropriate in this case.

9
10 When a federal court refers a matter to a federal agency, "the judicial process is
11 suspended pending referral of such issues to the administrative body for its views." *United*
12 *States v. Western Pacific Railroad*, 352 U.S. 59, 63 (1956); *accord Reiter v. Cooper*, 507 U.S.
13 258, 268 (1993) (same). This circuit enforces the same rule, and will usually stay (rather than
14 dismiss) a case pending referral, especially where the plaintiff may be unfairly disadvantaged by
15 dismissal. *Syntek Semiconductor Co. Ltd. v. Microchip Technology, Inc.*, 307 F.3d 775, 782
16 (9th Cir. 2002). Where, as here, plaintiffs' claims might be barred by the statute of limitations if
17 the case is dismissed, the normal course is to stay, rather than dismiss. *Brown v. MCI Worldcom*
18 *Network Services*, 277 F.3d 1166, 1173 (9th Cir. 2002). As noted by the Ninth Circuit, the
19 Payphone Providers' claims arising out of the Waiver Order are probably subject to a two-year
20 statute of limitations. 47 U.S.C. § 415. Thus, were this Court to dismiss those claims, rather
21 than stay pursuit of those claims pending the outcome of FCC proceedings, the Payphone
22 Providers would likely lose any ability to pursue those claims (which would also render referral
23 moot).

24 Although the Ninth Circuit recognized that the issue of stay versus dismissal is a
25 matter for the trial court's discretion, and thus remanded it to this Court to decide the issue in the
26 first instance, its opinion suggests that it would regard any dismissal as an abuse of discretion:

1 “Whether to stay or dismiss without prejudice a case within an
2 administrative agency’s primary jurisdiction is a decision within the
3 discretion of the district court. *Reiter*, 507 U.S. at 268-69 . . . The factor
4 most often considered in determining whether a party will be disadvantaged
5 by dismissal without prejudice is whether there is a risk that the statute of
6 limitations may run on the claims pending agency resolution of the
7 threshold issue.” *Syntek*, 307 F.3d at 782; *Brown*, 277 F.3d at 1173. Also
8 where the court suspends proceedings to give preliminary deference to the
9 administrative agency but further judicial proceedings are contemplated,
10 then jurisdiction should ordinarily be retained via a stay of proceedings,
11 not relinquished via dismissal. *N. Cal. Dist. Council of Hod Carriers,
12 Bldg. & Constr. Laborers, AFL-CIO v. Opinski*, 673 F.2d 1074, 1076
13 (9th Cir. 1982).

8 Slip Op. at 7058-59.

9
10 In short, although this court has putative discretion to dismiss, the Ninth Circuit
11 has made it obvious that the preferred course of action here should be a stay of the Payphone
12 Providers’ Waiver Order claims pending FCC action. Moreover, it would make no sense to
13 dismiss these claims when (1) other independent claims will be going forward before this Court
14 and (2) the FCC’s action will likely result in further litigation before this Court.

15 **IV. CONCLUSION**

16 Thus, this Court should (1) convene a scheduling conference with the parties
17 pursuant to Local Rule 16(a) and thereafter enter a scheduling order for pursuing any and all of
18 the Payphone Providers’ claims that are independent of the Waiver Order, and (2) stay without
19 dismissal plaintiffs’ claims arising under the Waiver Order pending FCC action.
20
21
22
23
24
25
26

1 DATED this 8th day of September, 2006.

2 MILLER NASH LLP

3
4 /s/ Brian W. Esler

5 Brian W. Esler

6 WSB No. 22168

7 Brooks Harlow

8 WSB No. 11843

9 Greg Montgomery

10 WSB No. 7985

11 Attorneys for Plaintiffs/
12 The Payphone Providers

1 I hereby certify that on September 8, 2006, I electronically filed the PLAINTIFF
2 PAYPHONE PROVIDERS' MOTION FOR PARTIAL STAY PENDING F.C.C. ACTION with
3 the Clerk of the Court using the CM/ECF system which will send notification of such filing to
4 the attorneys of record for defendant Qwest Corporation and sent copies by electronic email and
5 first class mail to:

6 James R. Murray
7 Jeffrey I. Tilden
8 GORDON MURRAY TILDEN LLP
9 1325 Fourth Avenue, Suite 1800
Seattle, Washington 98101
jmurray@gmtlaw.com
jtilden@gmtlaw.com

10 Douglas P. Lobel
11 David A. Vogel
12 COOLEY GODWARD LLP
13 11951 Freedom Drive
Reston, Virginia 20190-5656
dlobel@cooley.com
dvogel@cooley.com

14
15 /s/ Brian W. Esler

16 Miller Nash LLP
17 4400 Two Union Square
601 Union Street
Seattle, Washington 98101-2352
18 Telephone: (206) 622-8484
19 Fax: (206) 622-7485
Email: brian.esler@millernash.com

ATTACHMENT B

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DAVEL COMMUNICATIONS, INC.,
a Delaware corporation,

Plaintiff,

v.

QWEST CORPORATION,
a Colorado corporation,

Defendant.

NO. C03-3680 MJP

QWEST CORPORATION'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL STAY;
RENEWED REQUEST FOR
DISMISSAL; AND REQUEST FOR
REFERRAL OF ADDITIONAL ISSUES
TO FCC

**NOTED ON MOTION CALENDAR:
September 29, 2006**

I. INTRODUCTION

As a result of the Ninth Circuit's remand of one narrow question and one other small claim, *see* Opinion (as amended), Aug. 17, 2006 ("Opinion"), Qwest Corporation ("Qwest") herein respectfully sets forth its recommendations as to how this litigation should proceed.

Qwest opposes the motion of Plaintiffs Davel Communications, Inc. *et al.* (collectively "Davel") to "stay" their claims; instead, Qwest submits that the Court should again dismiss those claims without prejudice, just as this Court concluded before the appeal.

The Ninth Circuit fully agreed with the Court that the "filed rate doctrine" applies to Qwest's Tariffs filed at 11 state agencies for Public Access Line ("PAL") services, and normally

1 bars any challenge to those rates. Opinion at 9741. The Ninth Circuit found, however, that the
2 FCC's 1997 Waiver Order effectively suspended the filed rate doctrine for new PAL tariffs for a
3 45-day period in 1997. The Ninth Circuit thus concluded that the lawsuit presents the threshold
4 question of whether the FCC would now, under current considerations, deem the suspension of
5 the filed rate doctrine to apply beyond the 45-day period in 1997. If so -- and only if so -- then in
6 theory Davel's claim might not be barred by the filed rate doctrine. Id. at 9744-45. To resolve
7 that potentially dispositive question, the Ninth Circuit concluded that a narrow issue of the
8 "scope" of the Waiver Order should be referred to the FCC under the "doctrine of primary
9 jurisdiction." Id. at 9749.

10 Pending the FCC's resolution of this threshold issue, the Ninth Circuit held that this
11 Court has discretion to decide whether to dismiss or stay Davel's claims. Id. at 9754. Before the
12 appeal, the Court dismissed the claims. No reason exists to change the Court's original
13 conclusion. The FCC currently is hearing **five** petitions that likely will result in an industry-wide
14 order on PAL rates. Id. at 9751-52 & n.8. Davel's claims will sink or swim with the rest of the
15 industry; this lawsuit is essentially superfluous.

16 Unphased by the Ninth Circuit's bottling up of its case, Davel brazenly misrepresents the
17 Ninth Circuit's Opinion and argues that it has "independent" causes of action challenging
18 Qwest's Tariffed rates, separate from the issue being referred. That is wishful thinking. The
19 Ninth Circuit's Opinion supports this Court's initial decision that the filed rate doctrine requires
20 dismissal of the suit except if the FCC concludes, after referral, that the Waiver Order effectively
21 suspended the filed rate doctrine beyond May 1997. Therefore, the threshold issue that the Ninth
22 Circuit referred to the FCC is dispositive of **all** of Davel's challenges to Qwest's Tariffed rates
23 for PAL services.

24 The Ninth Circuit also remanded a subset of Davel's claims, concerning "Fraud
25 Protection" services. Other than the statute of limitations, the Ninth Circuit held that it was not
26 ruling on any of Qwest's defenses to that claim, particularly the filed rate doctrine. Id. at 9757 &
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

1 n.12. Because these Fraud Protection claims are barred by the filed rate doctrine, the Court
2 should permit Qwest to file a dispositive motion on these claims and thereby avoid an
3 unnecessary waste of time and effort on claims that cannot exist in this Court.
4

5
6 Finally, Qwest respectfully submits that the threshold issue referred to the FCC raises a
7 related, potentially dispositive issue that the FCC should also address -- but which Qwest could
8 not previously raise on its initial Rule 12 motion. The Waiver Order only applied to carriers that
9 "relied" on it and filed new tariffs within an effective date of April 15, 1997. The FCC did not
10 explain what it meant by "reliance." Qwest contends it did not rely on the Waiver Order in 1997
11 and thus the refund does not apply to Qwest. However, because Davel alleged in its Complaint
12 that Qwest did rely on the Waiver Order, Qwest could not challenge this issue in its Rule 12
13 motion, and the Ninth Circuit had no occasion to address it. This reliance issue is equally
14 threshold, so the Court should also refer to the FCC the question of whether carriers that did not
15 file new tariffs with an effective date of April 15, 1997, were covered by the Waiver Order at all.
16
17
18
19
20
21
22

23 II. PROCEDURAL BACKGROUND

24 A. THIS COURT GRANTED QWEST'S MOTION TO DISMISS THE LAWSUIT

25 Davel demands refunds for rates it paid Qwest for "Public Access Line" ("PAL")
26 services, which rates were set forth in Qwest's Tariffs on file with various state public utility or
27 service commissions ("State Commissions") from 1997 to 2002. The FCC's 2002 Wisconsin
28 Order revised the guidance provided to state regulators for evaluating PAL rates for compliance
29 with the FCC's "New Services Test," resulting in the "Baby Bell" carriers (currently Qwest,
30 Verizon and AT&T) reducing their rates in 2002 and 2003. Qwest moved to dismiss Davel's
31 lawsuit because the Court cannot award any refunds from a filed Tariff unless there has been a
32 determination by the appropriate agency that the Tariffed rates are "unreasonable."
33
34
35
36
37
38
39
40

41 In granting Qwest's motion to dismiss, this Court recognized that the crux of the lawsuit
42 -- whether Qwest's filed Tariffs complied with the FCC's rate-making regulations -- was an issue
43 that could only be decided in the first instance by an agency. The Court stated:
44
45

1 Plaintiffs would have the net result of altering the rates for 1997-2002. This is
2 impermissible under the filed rate doctrine. Therefore . . . the filed-rate doctrine
3 relegates that particular factual issue to the agency, not a district court.
4

5 Order, July 28, 2004 (“Order”), at 7. The Court thereby applied the well-established filed rate
6 doctrine that a federal court cannot award any refunds under a filed tariff. Id. at 5, citing AT&T
7 v. Central Office Tel., Inc., 524 U.S. 214 (1998). The Court also thereby invoked the “doctrine
8 of primary jurisdiction” in stating that the administrative agency “is the only forum for
9 challenging the reasonableness of a filed rate.” Order at 5, citing, e.g., Hargrave v. Freight
10 Distrib. Serv., Inc., 53 F.3d 1019 (9th Cir. 1995). The doctrine permits the Court to “suspend”
11 the lawsuit so that the parties can file a petition at the appropriate agency. Reiter v. Cooper, 507
12 U.S. 258, 268 n.3 (1993).
13
14
15
16
17
18

19 In unsuccessfully opposing Qwest’s motion, Davel encouraged this Court to extend the
20 FCC’s 1997 Waiver Order, to require Qwest to pay refunds from 1997 to 2002. The Court
21 rejected Davel’s argument, finding that the plain language of the Waiver Order provided a refund
22 only for a limited 45-day period in April-May 1997:
23
24
25

26 Plaintiffs contend that . . . Qwest waived the right to claim the doctrine as a
27 defense in its April 10, 1997 letter to the FCC, which the FCC incorporated into
28 the 1997 Waiver Order. This argument is unpersuasive. . . . Qwest and the other
29 RBOCs . . . requested a 45-day extension to file new . . . rates and in exchange
30 promised to reimburse or provide credit to customers if the 45-day late rates were
31 lower than the rates that had been charged over those 45 days. Thus . . . this
32 waiver extended only to the rates charged in that 45-day period.
33

34 Order at 7.

35 **B. THE NINTH CIRCUIT REMANDED FOR THE NARROW QUESTION OF**
36 **WHETHER TO STAY THE CASE PENDING A REFERRAL TO THE FCC**
37

38 The Ninth Circuit affirmed the Court’s reasoning, but concluded that the scope of the
39 Waiver Order presented a threshold question that the FCC needed to resolve under the doctrine
40 of primary jurisdiction in order to determine if Davel has a claim.
41

42 The Ninth Circuit fully endorsed the filed rate doctrine, holding that the Court cannot
43 award damages under a filed tariff. Opinion at 9741. However, the Ninth Circuit noted that the
44

1 filed rate doctrine had been waived by those carriers who relied on the Waiver Order. Id. at
2 9739. While the Ninth Circuit fully agreed with this Court that the Waiver Order on its face only
3 presented a 45-day waiver, id. at 9739 & 9751, the Ninth Circuit concluded it would be prudent
4 to obtain the FCC's express judgment of whether the waiver of the filed rate doctrine provided in
5 the Waiver Order could or should extend beyond the 45-day period. Id. at 9750-51. If the
6 refund period is limited to 45 days in 1997, the filed rate doctrine would bar Davel's challenges.
7 Thus, the Ninth Circuit concluded that the "scope" of the Waiver Order should be referred to the
8 FCC.
9

10 Referral of the threshold "scope" question is only the first of a two-phase analysis,
11 however. The Ninth Circuit agreed with this Court that only the agencies have authority to
12 determine whether Qwest's rates are "reasonable," id. at 9743, but the Ninth Circuit concluded
13 that a determination of whether it was necessary to refer **those** issues was premature. Id. at 9744
14 n.5. The Ninth Circuit Opinion thus presages **two** phases of referrals – the first one on the
15 "scope of the Waiver Order" to the FCC, then (only if Davel prevails there) a second round of
16 referrals either to the FCC or to the State Commissions on the rate-reasonableness issues.
17

18 By referring the narrow threshold "scope" issue to the FCC, the Ninth Circuit held that
19 this Court needs to determine whether to (1) dismiss without prejudice, or (2) to stay the PAL-
20 rate claims during the pendency of the referral. Id. at 9754 & 9757. This Court's Order did not
21 expressly explain why it was dismissing instead of staying Davel's claims.
22

23 Separately, the Ninth Circuit also held that Davel's claims for "Fraud Protection"
24 services are not time-barred for the two-year period before Davel filed the lawsuit.¹ Davel
25 contended that Qwest failed to have "Fraud Protection" services set forth in its federal Tariff, but
26 instead had them only in its state-filed Tariffs, prior to 2002 and 2003. The Ninth Circuit
27
28
29
30
31
32
33

34
35
36
37
38
39
40
41
42
43 ¹ "Fraud Protection" is one type of PAL service, which Davel claims Qwest had to provide under a
44 federal Tariff but that Davel further claims Qwest provided prior to 2002 only in state Tariffs. Because
45 Davel raises these separate federal-versus-state claims about the Fraud Protection rates, for the purposes
of this lawsuit Qwest will address PAL rates and Fraud Protection rates as separate and distinct subjects.

1 expressly noted, however, that it was not ruling on **any other** defenses to this claim, including
2 the filed rate doctrine argument. Id. at 9757 n.12.
3

4 III. ARGUMENT

5 6 **A. THE COURT SHOULD DISMISS ALL OF DAVEL'S CHALLENGES TO** 7 **QWEST'S TARIFFED RATES FOR PAL SERVICES** 8

9 This Court should dismiss, not stay, Davel's PAL-rate claims, as a federal court in Utah
10 did concerning identical claims. The Court also should easily reject Davel's nonsensical
11 argument that it has numerous causes of action "independent" of the issue being referred.
12

13 14 **1. The Court Should Dismiss Davel's Claims, Which Are Likely To Be The** 15 **Subject Of A Forthcoming Industry-Wide Ruling From The FCC** 16

17 The Ninth Circuit noted the well-established rule that a Court has discretion to either stay
18 proceedings or to dismiss them without prejudice, upon a referral of issues to the FCC. Opinion
19 at 9754 & 9757. This Court initially decided to dismiss the claims, and now Davel's motion for
20 a "partial stay" seeks the Court to reverse itself and stay the claims.
21
22

23 Qwest respectfully submits that this Court's initial decision to dismiss the case remains
24 appropriate. As the Ninth Circuit recognized, the FCC currently is considering no less than **five**
25 petitions from the industry to consider whether Verizon and AT&T should issue refunds
26 pursuant to the Waiver Order as a result of their similar reductions of PAL rates in 2002.
27 Opinion at 9751-52. Both Davel and Qwest have submitted informal "ex parte" comments to the
28 FCC on these proceedings, independent of this lawsuit by Davel, with the expectation that the
29 FCC's rulings will have an industry-wide effect.² With the likelihood that the FCC will
30 adjudicate the issues for all parties nationwide to effectuate Congress's requirement for uniform
31 nationwide rules on these PAL rates (see 47 U.S.C. § 276(c)), Davel's own lawsuit becomes
32 superfluous. No reason exists for it to remain filed but stayed.
33
34
35
36
37
38
39
40
41
42

43
44 ² Qwest filed its comments on June 22, 2006; Davel filed ex parte comments on July 6, 2006. The FCC
45 rules permit participants in the industry to comment on pending proceedings that may have an effect on
their interests. 47 C.F.R. § 1.415.

1 Davel goes so far as to misrepresent that the Ninth Circuit “made it obvious” that the
2 “preferred” option would be to stay the case due to statute of limitation considerations. Motion
3 at 5-6. Davel’s inference that the Ninth Circuit is implicitly commanding this Court to stay the
4 case is illogical -- why would the Ninth Circuit have not just ordered a stay, instead of remanding
5 the issue to this Court for this Court’s discretion. Opinion at 9757.
6
7

8
9 The best proof that dismissal, not a stay, is appropriate is the judgment of Hon. Ted
10 Stevens of the District of Utah, who expressly rejected a request to stay an identical claim
11 against Qwest in TON Serv., Inc. v. Qwest Corporation, No. 1:04CV00035 TS (appeal now
12 docketed at Tenth Circuit as No. 06-4052). Following this Court’s initial opinion, Judge Stevens
13 dismissed TON’s lawsuit presenting the identical demand for refunds under the very same
14 Tariffs at issue here. Hearing Transcript, Aug. 15, 2005, at 3-5 attached hereto as Exhibit 1.³
15 TON moved for reconsideration on several grounds, including that a stay and not dismissal was
16 appropriate. Motion for Reconsideration at 7-10 attached hereto as Exhibit 2. At the argument
17 for reconsideration, Judge Stevens asked for argument solely on the point of whether these
18 claims should be stayed or dismissed. Even after hearing TON’s argument -- which is essentially
19 the same one that Davel presents here -- Judge Stevens concluded that it was appropriate for the
20 claims to be dismissed and not stayed, id. at 5.
21
22
23
24
25
26
27
28
29

30 Given the pending proceedings at the FCC, no reason exists to change the Court’s initial
31 determination that Davel’s claims should be dismissed without prejudice.
32
33

34 **2. All Of Davel’s Challenges To Qwest’s Tariffed PAL Rates Should Be Stayed**
35 **Or Dismissed, Despite Davel’s Nonsensical Argument To The Contrary**
36

37 Davel tries to avoid the Ninth Circuit’s direction to stay or dismiss its PAL-rate claims,
38 by arguing that its lawsuit should immediately proceed with numerous other “independent”
39 causes of action. Davel is merely attempting, once again, to evade agency analysis of its claims
40 that the law categorically mandates.
41
42
43
44
45

³ All exhibits referred to herein are attached to the Declaration of James R. Murray, filed herewith.

1 Davel argues that it has raised claims under various sections of the Communications Act
2 (§§ 201, 202, 276 and 416) and also under common law, and that these claims are “independent”
3 of any claims under the Waiver Order. Motion at 2, 3 & 4. Davel states, “The viability of
4 [Davel’s] independent claims does not rest upon the FCC’s interpretation of the Waiver Order.
5 Thus, there is no need to stay those claims while the FCC determines the scope of the Waiver
6 Order.” Id. at 2. Davel then concludes, “most of [Davel’s] claims are not subject to dismissal
7 regardless of how the FCC rules” on the issue the Ninth Circuit referred to the FCC. Id. at 3.
8 Davel thus argues that litigation of these “independent” claims should proceed.
9

10 Davel’s argument is nonsensical. None of these claims can stand unless the FCC finds
11 that it effectively suspended the filed rate doctrine beyond May 1997. It is axiomatic that **no**
12 damages can be awarded under **any** theory that would have the effect of changing or resetting the
13 rate in a filed Tariff. Opinion at 5, citing Evanns v. AT&T Corp., 229 F.3d 837 (9th Cir. 2000).
14 This is a straightforward application of the filed rate doctrine. Id. Therefore, if the filed rate
15 doctrine applies to Qwest’s Tariffs, then Davel has no cause of action, regardless of how it
16 characterizes its claim. Consequently, the only way Davel has **any** claim here is if the FCC rules
17 in Davel’s favor on the referred issue. Davel’s wishful contention that the “independent” claims
18 “do not rest” on the Waiver Order, and “are not subject to dismissal” no matter how the FCC
19 rules, is just another example of Davel’s “just say anything” approach in this lawsuit.
20

21 Furthermore, Davel still cannot avoid the ultimate result that this Court initially
22 recognized, and that the Ninth Circuit postponed for the time being: Only the State
23 Commissions or the FCC can decide whether Qwest’s Tariffed rates complied with the
24 governing regulations, or if they did not, what alternate rates would have been compliant.
25 Opinion at 9733 n.5. Only two months ago, the FCC reaffirmed its long-standing requirement
26 that State Commissions should have the initial opportunity to review and rule on PAL rates in
27 state-filed tariffs. See In re Wisc. Pub. Serv. Comm’n, Order on Recon., __ FCC Rcd. __, 2006
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

1 WL 18809955 (July 7, 2006). Exactly as this Court realized in 2004, Order at 6-7, these ultimate
2 issues must be decided by the State Commissions. The law recognizes no other option.
3

4 Davel's attempt to divorce the Waiver Order question from its various causes of action
5 are just its most recent attempt to avoid the State Commissions. Davel begs the Court to allow
6 its claims to go forward "[a]s a matter of fundamental fairness, justice and equity." Motion at 4.
7 Its plea for "justice" is ironic, because this lawsuit's very existence owes itself to Davel's
8 intentional refusal to comply with the very FCC directives that it cites as the cornerstone of its
9 lawsuit. The FCC expressly stated in 1997 (and repeated itself in 2002) that **all** challenges to
10 tariffed rates must first be decided by the State Commissions. See In re Implementation of the
11 Pay Tel. Reclassification & Comp. Provisions of the Telecomms. Act of 1996, Com. Car. Bur.,
12 Docket No. 96-128, Order on Recon., 11 FCC Rcd. 21233, 21307-310 ¶¶ 162-63 (1996); In re
13 Wisc. Pub. Serv. Comm'n, Mem. Op. & Order, 17 FCC Rcd. 2051, 2056 ¶ 15 (2002).
14

15 Throughout this litigation and appeal, Davel has cited to many portions of the FCC's orders, but
16 conspicuously fails to mention this important requirement. Davel ignored its opportunity to
17 initiate state proceedings from 1997 until almost the very end of 2003, when it filed this federal
18 lawsuit. Now, even after the Ninth Circuit's express ruling, Davel continues to beseech this
19 Court to ignore the required State Commission process. Davel has only itself to blame for the
20 "three year delay" in its case.
21

22 Davel's obvious disdain of the State Commissions is palpable but provides no excuse to
23 ignore the immutable rule that **all** challenges to tariffed rates **must** be decided by the
24 administrative agencies. Brown v. MCI Worldcom Network Servs., Inc., 227 F.3d 1166, 1171
25 (9th Cir. 2002) (law "reserv[es] the evaluation of [rates] to the FCC").
26

27 **B. THE COURT SHOULD PERMIT QWEST TO MOVE TO REFER THE "FRAUD**
28 **PROTECTION" CLAIMS TO THE FCC**
29

30 When it moved to dismiss Davel's entire lawsuit in 2004, Qwest argued that the entire
31 case -- including the Fraud Protection claims -- should be dismissed under the filed rate doctrine
32
33
34
35
36
37
38
39
40
41
42
43
44
45

1 and the doctrine of primary jurisdiction, **and also** that the Fraud Protection claims could be
2 dismissed on the alternative statute of limitations theory. See Qwest Motion at 20-23.
3

4 The Ninth Circuit believed, however, that Qwest's **only** ground for moving on the Fraud
5 Protection claims was the statute of limitations. Opinion at 9754. The Ninth Circuit reinstated
6 the Fraud Protection claims, limited to the two-year period before the lawsuit. Id. at 9756-57.
7
8 The Ninth Circuit expressly recognized that Qwest retains all of its other defenses, including the
9 filed rate doctrine. Id. at 9757 n.12.
10
11

12
13 The Court therefore needs to address how the Fraud Protection claims should proceed at
14 this stage. Davel did not address this issue in its Motion. Qwest respectfully submits that the
15 Court should permit Qwest to file a dispositive motion on the Fraud Protection claims, so that no
16 effort is wasted on claims that are obviously subject to the same problem as Davel's main cause
17 of action on the PAL rates in general.
18
19

20
21 The Fraud Protection claims are equally subject to referral to the FCC. Davel's claim
22 that Qwest failed to file rates for its Fraud Protection services in its **federal** Tariff, but instead
23 provided the services pursuant to its **state** Tariffs, begs the question of whether the allegedly-
24 required federal tariff would have set forth different rates for these services. Davel has no cause
25 of action unless it suffered "actual damages" as a result of Qwest's alleged violations. 47 U.S.C.
26 § 206; Conboy v. AT&T Corp., 241 F.3d 242, 250-51 (2d Cir. 2001) (plaintiff under Act must
27 "allege and prove specific damages flowing from violations"); accord Aeronautical Radio, Inc. v.
28 FCC, 642 F.2d 1221, 1235 n.34 (D.C. Cir. 1980) (only "actual" damages available under Act).
29
30 This Court certainly is not the proper forum to determine whether the lack of federal tariffs
31 "damaged" Davel. To prove actual damages, Davel will have to show how much the rates it paid
32 for Fraud Protection from 1997 to 2002 would have been lower if the rates were set forth in
33 federal Tariffs, instead of in state Tariffs. In this respect, the Fraud Protection claims are
34 identical in nature to Davel's challenges to Qwest's PAL rates.
35
36
37
38
39
40
41
42
43
44
45

1 Therefore, to put the Fraud Protection issues on the same procedural footing as the
2 overall PAL rate issues, the Court should permit Qwest to file a dispositive motion invoking the
3 filed rate doctrine and doctrine of primary jurisdiction so that the Court can refer Davel's Fraud
4 Protection claims to the FCC.
5
6

7
8 **C. THE COURT SHOULD REFER AN ADDITIONAL THRESHOLD ISSUE**
9 **DIRECTLY RELATED TO THE "SCOPE" OF THE WAIVER ORDER THAT**
10 **QWEST WAS NOT ABLE TO PRESENT IN ITS RULE 12 MOTION**

11
12 When seeking the FCC's authority on the "scope" of its Waiver Order, a related issue is
13 raised that Qwest could not argue on its Rule 12 motion. Qwest respectfully submits that the
14 Court should also refer this issue to the FCC, so that the entire threshold question of the meaning
15 and applicability of the Waiver Order can be resolved in one referral proceeding.
16
17

18
19 The Waiver Order provided the rate refund to customers in "exchange" for the
20 permission of certain carriers to file their new PAL rates up to 45 days late. Waiver Order, 12
21 FCC Rcd. 21370, 21379. The Ninth Circuit recited this quid pro quo, stating that the refund in
22 the Waiver Order only applies to carriers that "**relied**" on the Waiver Order's extension.
23
24 Opinion at 9739. The plain language of the Waiver Order suggests that a carrier has no
25 obligation to pay refunds if it did not file tariffs within the 30-day period after April 15, 1997.
26
27 Not surprisingly, Davel disagrees with this reading of the Waiver Order.
28
29

30
31 Therefore, whether the Waiver Order applies to Qwest's Tariffs depends not only on the
32 "scope" of the time period in the Order, but also on whether Qwest "relied" on the Order.
33
34 Davel's Complaint alleged that Qwest did rely on it. See Amended Complaint, ¶ 12. Therefore,
35 in its Rule 12 motion, Davel's factual assertion had to be assumed to be true. The Ninth Circuit
36 thus had no opportunity or reason to address the "reliance" issue.
37
38

39
40 However, in reality Qwest did **not** "rely" on the extension because Qwest's incumbent
41 PAL rates had been analyzed prior to April 1997 and already complied with the regulatory test.
42
43 Thus, Qwest did not need to file new rates by April 1997, and Qwest formally represented this
44 position to the FCC at the time with approval from the FCC. See Ameritech III, v. MCI
45

1 Telecomms. Corp., File Nos. E-98-51 et al., Mem. Op. & Order, 1999 WL 1005080, ¶¶ 12-20
2
3 (Com. Car. Bur. Nov. 8, 1999) (describing and approving Qwest's (then US WEST) two 1997
4 self-certifications that Qwest complied with PAL requirements). Thus, contrary to the factual
5 allegation in the Complaint, the parties have a very real dispute about whether Qwest "relied" on
6 the Waiver Order – and if Qwest did not, then the refund in the Waiver Order would not apply to
7
8 Qwest, and Davel's lawsuit must fail.
9

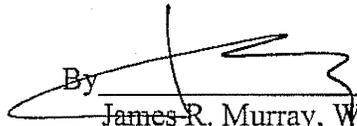
10
11 This "reliance" issue is just as threshold to the lawsuit as the "scope" issue that the Ninth
12 Circuit referred to the FCC. The Court should refer to the FCC the question of what the FCC
13 meant by "reliance" in the Waiver Order. The answer could well be dispositive of Davel's
14 claims against Qwest. For efficiency's sake, because the "scope" issue is already set for referral
15 to the FCC, the Court should conclude that the "reliance" issue also should be referred. It would
16 make no sense to hold the reliance issue back, because if the FCC answers the "scope" issue in
17 Davel's favor, then the Court will have to confront the "reliance" issue anyway and that could
18 require a second referral to the FCC.
19
20
21
22
23
24

25 IV. CONCLUSION

26
27 For these reasons, Qwest respectfully submits that the Court should: (1) deny Davel's
28 motion for a stay of its PAL-rate claims, but instead dismiss them without prejudice; (2) permit
29 Qwest to file a dispositive motion concerning the Fraud Protection claims, and suspend all other
30 litigation on those claims; and (3) enter an order referring to the FCC the issue of what the
31 Waiver Order meant in conditioning its refund provision on carriers that "relied" on the
32 extension described in the Waiver Order.
33
34
35
36

37
38 DATED this 25th day of September, 2006.
39

40
41 **GORDON MURRAY TILDEN LLP**

42
43 By 

44 James R. Murray, WSBA #25263
45

QWEST CORPORATION'S (1) OPPOSITION TO PLAINTIFFS' MOTION FOR
PARTIAL STAY, (2) RENEWED REQUEST FOR DISMISSAL, AND (3)
REQUEST FOR REFERRAL OF ADDITIONAL ISSUES TO FCC - 12
No. C-03-3680P

GORDON MURRAY TILDEN LLP
1325 Fourth Avenue, Suite 1800
Seattle, WA 98101-2510
Phone (206) 467-6477
Fax (206) 467-6292

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

COOLEY GODWARD LLP
Douglas Lobel, Pro Hac Vice
David Vogel, Pro Hac Vice
COOLEY GODWARD LLP
11951 Freedom Drive
Reston, Virginia 20190
Tel: (703) 720-7000
Fax: (703) 720-7399
E-mail: dlobel@cooley.com
Counsel for Defendant QWEST CORPORATION

302990v1+RE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DAVEL COMMUNICATIONS, INC., a
Delaware corporation,

Plaintiff,

v.

QWEST CORPORATION, a Colorado
corporation,

Defendant.

NO. C03-3680 MJP

[PROPOSED] ORDER GRANTING
QWEST CORPORATION'S
(1) OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL STAY,
(2) RENEWED REQUEST FOR
DISMISSAL; AND (3) REQUEST
FOR REFERRAL OF ADDITIONAL
ISSUES TO FCC

**Noted on Motion Calendar:
September 29, 2006**

THIS MATTER having come before the Court upon Qwest Corporation's Opposition to
Plaintiffs' Motion for Partial Stay; Renewed Request for Dismissal; and Request for Referral of
Additional Issues to FCC, the Court having reviewed the files and records herein, now, therefore,
it is hereby

ORDERED, ADJUDGED AND DECREED that Plaintiffs' Motion for Partial Stay is
DENIED; Defendants' Renewed Request for Dismissal; and Request for Referral of Additional
Issues to FCC is hereby GRANTED, and:

ORDER GRANTING QWEST CORPORATION'S (1) OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL STAY, (2) RENEWED
REQUEST FOR DISMISSAL; AND (3) REQUEST FOR REFERRAL OF
ADDITIONAL ISSUES TO FCC - 1
No. C03-3680 MJP

GORDON MURRAY TILDEN LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
Phone (206) 467-6477
Fax (206) 467-6292

1 It is hereby ORDERED that Plaintiffs' claims on PAL rates are dismissed without
2
3 prejudice; and
4

5 It is further ORDERED that Qwest is given three weeks from the date of this Order to file
6
7 a dispositive motion on Plaintiffs' Fraud Protection claims; and
8

9 It is further ORDERED that, within 60 days of the date of this Order, Plaintiffs shall file
10
11 a petition or complaint with the FCC, as they deem appropriate under the FCC's rules of
12
13 procedures, that seeks the FCC's ruling on two questions:
14

15 (1) Whether the refund in the FCC's 1997 Waiver Order applies to tariffs filed
16
17 after May 19, 1997; and
18

19 (2) Whether the refund in the FCC's 1997 Waiver Order applies to carriers
20
21 that did not file PAL tariffs between April 15, 1997 and May 19, 1997.
22

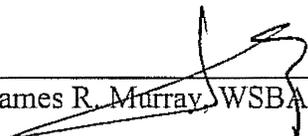
23 The parties shall keep the Court informed from time to time of the status of the FCC
24
25 proceedings, and shall promptly report the FCC's final determination of those issues.
26
27

28 DATED this _____ day of _____, 2006.
29
30
31

32 THE HONORABLE MARSHA J. PECHMAN
33

34 Presented by:

35 **GORDON MURRAY TILDEN LLP**
36
37

38
39 By  _____
40 James R. Murray, WSBA #25263
41
42
43
44
45

1
2 **COOLEY GODWARD LLP**
3 Douglas Lobel, Pro Hac Vice
4 David Vogel, Pro Hac Vice
5 COOLEY GODWARD LLP
6 11951 Freedom Drive
7 Reston, VA 20190
8 Tel: (703) 720-7000
9 Fax: (703) 720-7399
10 E-mail: douglas_lobel@cooley.com
11 Attorneys for Defendant Qwest Corporation
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

ORDER GRANTING QWEST CORPORATION'S (1) OPPOSITION TO
PLAINTIFFS' MOTION FOR PARTIAL STAY, (2) RENEWED
REQUEST FOR DISMISSAL; AND (3) REQUEST FOR REFERRAL OF
ADDITIONAL ISSUES TO FCC - 3
No. C03-3680 MJP

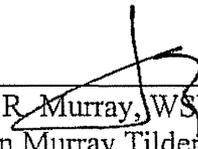
GORDON MURRAY TILDEN LLP
1001 Fourth Avenue, Suite 4000
Seattle, WA 98154
Phone (206) 467-6477
Fax (206) 467-6292

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2006 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Counsel for Plaintiffs

James L. Phillips
Brooks E. Harlow
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101
Telephone: (206) 622-8484
Facsimile: (206) 622-7485


James R. Murray, WSBA #25263
Gordon Murray Tilden LLP
1325 Fourth Avenue, Suite 1800
Seattle, WA 98101-2510
Telephone: (206) 467-6477
Facsimile: (206) 467-6292
E-mail: jmurray@gmtlaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE

DAVEL COMMUNICATIONS, INC., a
Delaware corporation,

Plaintiff,

v.

QWEST CORPORATION, a Colorado
corporation,

Defendant.

NO. C03-3680 MJP

DECLARATION OF JAMES R.
MURRAY IN SUPPORT OF
QWEST CORPORATION'S
OPPOSITION TO PLAINTIFFS'
MOTION FOR PARTIAL STAY

**Noted on Motion Calendar:
September 29, 2006**

James R. Murray declares as follows:

1. I am a lawyer with Gordon Murray Tilden LLP and am one of the lawyers responsible for this litigation. I have personal knowledge of the facts set forth below and am competent to testify.

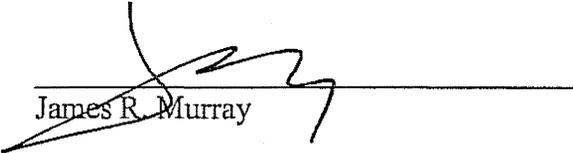
2. Attached hereto as Exhibit 1 is a true and correct copy of a hearing transcript dated August 15, 2005 in TON Services, Inc. v. Qwest Corporation, et al., Case No. 1:04-CV-35TS, U.S. District Court, District of Utah, Northern Division.

3. Attached hereto as Exhibit 2 is a true and correct copy of a Memorandum in Support of Plaintiff's Motion for Reconsideration and to Alter or Amend the Judgment, or in the

1 Alternative to Stay Action in TON Services, Inc. v. Qwest Corporation, et al., Civil No.
2
3 1:04CV00035 TS, U.S. District Court, District of Utah, Central Division.
4
5
6

7 I swear under penalty of perjury under the laws of the State of Washington that the
8
9 foregoing is true and correct.

10 Signed this 25th day of September, 2006, at Seattle, Washington.
11
12
13

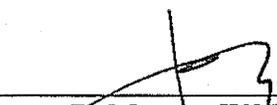
14
15 
16 James R. Murray
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36
37
38
39
40
41
42
43
44
45

CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2006 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Counsel for Plaintiffs

James L. Phillips
Brooks E. Harlow
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101
Telephone: (206) 622-8484
Facsimile: (206) 622-7485



James R. Murray, WSBA #25263
Gordon Murray Tilden LLP
1325 Fourth Avenue, Suite 1800
Seattle, WA 98101-2510
Telephone: (206) 467-6477
Facsimile: (206) 467-6292
E-mail: jmurray@gmtlaw.com

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH
NORTHERN DIVISION

TON SERVICES, INC., a Utah)	
corporation,)	
Plaintiff,)	
vs.)	Case No.
QWEST CORPORATION, a Colorado)	1:04-CV-3579
corporation, QWEST COMMUNICATIONS)	
CORPORATION, a Delaware corporation,)	
and UNIDENTIFIED CORPORATIONS I-X,)	
Defendants.)	

BEFORE THE HONORABLE TED STEWART

August 15, 2005

Motion Hearing

Court's Ruling

REPORTED BY: Patti Walker, CSR, RPR, CP
350 South Main Street, #146, Salt Lake City, Utah 84101

A P P E A R A N C E S

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

For the Plaintiff: Floyd Jensen, Esq.
 999 South 1200 East, #100
 Salt Lake City, Utah 84105

For the Defendant: David Vogel, Esq.
 ARNOLD & PORTER
 1600 Tysons Blvd., #900
 McLean, Virginia 22102

 Greggory Savage, Esq.
 HOLME ROBERTS & OWEN
 299 South Main, #1800
 Salt Lake City, Utah 84111

1 SALT LAKE CITY, UTAH; MONDAY, AUGUST 15, 2005; 2:30 P.M.

2 (Proceedings not transcribed.)

3 THE COURT: Counsel, the Court is going to rule as
4 follows: Before the Court is a motion to dismiss or in the
5 alternative to refer to regulatory agencies filed by the
6 Qwest entities, hereinafter referred to as Qwest.

7 Of chief dispute of the parties is the question
8 whether TON's complaint alleges improper conduct by Qwest or
9 whether TON is challenging the tariffed rates charged by
10 Qwest from 1997 to 2002.

11 TON has argued that the Court should assume as
12 true, at least for the current motion, that Qwest's 1997 to
13 2002 rates failed to comply with the FCC required New
14 Services Test. While the Court finds that this certainly is
15 alleged in the complaint, this is not dispositive as TON
16 would suggest. The Court finds that the question of whether
17 Qwest's 1997 to 2002 rates complied with the New Services
18 Test is a mixed question of fact and law. The Court is not
19 compelled to accept questions of law alleged in the
20 complaint as true. Indeed, it is axiomatic that questions
21 of law are reserved for the Court.

22 In turning to the question of whether Qwest's 1997
23 to 2002 rates complied with the New Services Test, the Court
24 notes that no administrative agency has made this
25 determination upon which the Court may rely and the issue

1 whether these rates and associated filed tariffs comply with
2 the Federal Communications Commission's regulations is a
3 question within the primary jurisdiction of state public
4 service or regulatory commissions or the Federal
5 Communications Commission. That proposition comes from
6 Reiter v. Cooper, 207 U.S. 258, United States Supreme Court
7 decision from 1993.

8 Additionally, while the case of Davel
9 Communications, Inc. v. Qwest Corporation, a case referred
10 to by both counsel in their memorandums, granting
11 defendant's motion to dismiss, in Washington, a 2004 case,
12 is not binding upon this Court. The Court finds the ruling
13 in that case persuasive and the claims before the Court
14 nearly identical to those addressed in the case before this
15 Court. Further, the Court finds that the relief sought by
16 plaintiff violates the filed tariff doctrine because such
17 relief would amount to different rates than those set in
18 Qwest's tariffs, which is impermissible. The authority for
19 that is AT&T Co. v. Central Office Telephone, Inc., 524 U.S.
20 214, U.S. Supreme Court decision from 1998.

21 Moreover, the Court notes that both parties
22 apparently agreed that there are proceedings before the
23 Federal Communications Commission currently, which would
24 impact greatly on this case, that is that a path -- if the
25 FCC grants the relief sought by the petitioners in that

1 case, that a path would be laid out for seeking refunds for
2 the 1997 to 2002 period. Qwest's reply even recognizes that
3 if the Federal Communications Commission, quote, grants the
4 petition, TON will get whatever relief the Federal
5 Communications Commission orders, including reparations, end
6 of quote. That comes from page 10 of Qwest's reply. The
7 Court finds that the Federal Communications Commission is
8 much better suited to make that determination than this
9 Court and that this Court should respect the jurisdiction of
10 that federal agency.

11 In effect, all of TON's claims rest on the
12 proposition that a refund was owed to TON. This boils down
13 to the determination of whether Qwest's rates from 1997 to
14 2002 were reasonable and lawful. Regardless of how
15 plaintiff dresses up its claim, this Court cannot escape
16 that conclusion. The Court will not interfere with the
17 appropriate state and federal agencies by allowing plaintiff
18 to make an end-run around the established administrative
19 remedies.

20 The Court, therefore, will dismiss TON's complaint
21 without prejudice and allow TON to determine how to best
22 pursue an administrative decision that will resolve whether
23 Qwest owes TON a refund due to the tariffs on file in the
24 respective states from 1997 to 2002.

25 Mr. Vogel, I would request that you prepare an

1 order reflecting the Court's ruling, please submit it to Mr.
2 Jensen for his approval as to form and then to this Court
3 for its execution.

4 Counsel, are there any questions?

5 Mr. Jensen?

6 MR. JENSEN: No, Your Honor.

7 THE COURT: Mr. Vogel?

8 MR. VOGEL: No, Your Honor.

9 THE COURT: Thank you. Court will be in recess.

10 (Whereupon, the proceeding was concluded.)

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

REPORTER'S CERTIFICATE

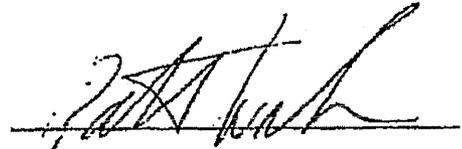
I, Patti Walker, a certified shorthand reporter for the United States District Court, District of Utah, do hereby certify:

That the foregoing proceedings were taken before me at the time and place set forth herein, and were taken down by me in shorthand and thereafter transcribed into typewriting under my direction and supervision;

That the foregoing pages contain a true and correct transcription of my said shorthand notes so taken.

In witness whereof, I have hereunto subscribed my name.

Dated this 18th day of August 2005.



Patti Walker, CSR, RPR, CP
146 United States Courthouse
350 South Main Street
Salt Lake City, Utah 84101
364-5440

characterized the issue of compliance with the NST as a "mixed question of fact and law." August 15, 2002 Hearing Tr. at 3 (attached hereto). The Court noted that no administrative agency has made the determination on NST-compliance of Qwest's pre-2002 PAL rates, and concluded that such issue was "within the primary jurisdiction of state public service or regulatory commissions or the [FCC]." *Id.* at 4, citing *Reiter v. Cooper*, 524 U.S. 214 (1998). The Court further noted that "both parties apparently agreed that there are proceedings before the [FCC] currently, which would impact greatly on this case." Tr. at 4. Yet instead of referring the case to the FCC under the doctrine of primary jurisdiction, and staying the case pending the referral or pending the FCC's action on the petitions presently under consideration, the Court dismissed the case without prejudice, to "allow TON to determine how to best pursue an administrative decision that will resolve whether Qwest owes TON a refund due to the tariffs on file in the respective states from 1997 to 2002." *Id.* at 5.

Notwithstanding the dismissal *without prejudice*, the Court inconsistently also found that "the relief sought by plaintiff violates the filed tariff doctrine because such relief would amount to different rates than those set in Qwest's tariffs, which is impermissible." *Id.* at 4, citing *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998). The Court's holding is not supported by *Central Office*, and turns the filed rate doctrine on its head. That doctrine is designed to prevent rate discrimination, yet its application here would perpetuate and insulate Qwest's own discrimination against independent payphone service providers ("PSPs"), forcing PSPs to pay premium rates for PAL service while Qwest paid only its internal costs to provide the same service to its own payphone operations. Moreover, it would also result in a direct violation of 47 U.S.C. § 276(a), which expressly prohibits such discrimination. Under these circumstances, the

filed rate doctrine is not just inapplicable—it is preempted by federal law. *See* 47 U.S.C. § 276(a), (c).

ARGUMENT

I. THE COURT MUST ACCEPT THE ALLEGATION THAT QWEST'S PRE-2002 PAL RATES DID NOT COMPLY WITH THE NEW SERVICES TEST.

The Court improperly disregarded TON's allegations that Qwest's pre-2002 PAL rates did not comply with the FCC's New Services Test ("NST") and incorrectly concluded that the issue of NST-compliance was a mixed question of fact and law. In a Rule 12(b)(6) motion, allegations of fact in the complaint must be accepted as true. *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997) (on a motion to dismiss, all factual allegations of a complaint are accepted as true, and viewed in the light most favorable to the nonmoving party). TON has alleged that Qwest failed to file cost studies to support its pre-2002 PAL rates as being NST-compliant. *See* Am. Compl. ¶ 22. There is no issue of law involved in that allegation. Yet the filing of supporting cost data is an essential requirement of the NST:

Each tariff filing submitted by a local exchange carrier specified in Sec. 61.41(a) (2) or (3) of this part that introduces a new service or a restructured unbundled basic service element (BSE) . . . *must be accompanied by cost data* sufficient to establish that the new service or unbundled BSE will not recover more than a reasonable portion of the carrier's overhead costs.

47 C.F.R. § 61.49(g)(2) (1996) (emphasis added). Without cost data, Qwest's pre-2002 PAL rates could not and did not comply with the NST, whatever the rates may have been and whether or not they were "reasonable." Thus the Court should have accepted as true the allegation that Qwest's pre-2002 rates were not NST-compliant. On that basis, the Court should have held that the Amended Complaint stated a claim upon which relief can be granted, because the failure to

timely file NST-compliant rates constitutes violations of 47 U.S.C. § 201(b) (unreasonable practice), § 276(a) (discrimination against independent PSPs), and/or § 416(c) (failure to obey a Commission order).

II THE COURT MISAPPLIED THE FILED RATE DOCTRINE.

The filed rate doctrine is designed to assure that everyone pays the same rates for the same regulated service. Yet in this case, denial of TON's claims on the basis of the filed rate doctrine would achieve the exact opposite result, assuring that the rates TON and other independent PSPs paid for PAL service would be substantially higher than the amounts Qwest paid for the same service furnished to its own payphone operations (i.e. its internal costs only). Moreover, application of the filed rate doctrine would result in a direct violation of 47 U.S.C. § 276(a), which prohibits Qwest from discriminating in favor of its own payphone service.

The Court cited *AT&T Co. v. Central Office Telephone, Inc.*, 524 U.S. 214 (1998), in support of its conclusion that the relief sought by TON "violated the filed tariff doctrine because such relief would amount to different rates than those set in Qwest's tariffs, which is impermissible." Tr. at 4. However, *Central Office* did not hold that the filed tariff doctrine prevents refunds of unlawful rates. In *Central Office*, the Supreme Court specifically noted that the purpose of the filed rate doctrine is "to prevent unjust discrimination." 524 U.S. at 222 (quoting *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915)). Further, the court stated that "the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that anti-discriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'" *Id.* at 223 (quoting *MCI*

Telecommunications Corp. v. American Tel. & Tel. Co., 512 U.S. 218, 229 (1994)). On that basis, the court held that state-law contract and tort claims were pre-empted by the filed rate requirements of 47 U.S.C. § 203, where the claims were based on actions ancillary to the provision of tariffed service. There was no question whether the filed tariff itself was unreasonable or unlawful. Hence the court was not presented with a fact situation similar to the one at bar, where the carrier's filed rates were in conflict with an express statute or an FCC order.

Where a carrier's filed rates are in conflict with a statute or FCC order, as in this case, the filed rate doctrine provides no protection to the carrier, and refunds are permissible. More applicable to this case than *Central Office* is the Supreme Court's decision in *Ariz. Grocery Co. v. Aichison, Topeka & Santa Fe Ry. Co.*, 284 U.S. 370, 384-85 (1932). In *Arizona Grocery*, the court distinguished between a rate set by the carrier and allowed to go into effect by the Commission, and a rate set by the Commission prospectively, and later found to be erroneous. The court held that refunds may be granted where the carrier-filed rate is found to be unreasonable:

[T]he system now administered by the Commission is dual in nature. As respects a rate made by the carrier, its adjudication finds the facts and may involve a liability to pay reparation.

....
[T]he great mass of rates will be carrier-made rates, as to which the Commission need take no action except of its own volition or upon complaint, and may in such case award reparation by reason of the charges made to shippers under the theretofore existing rate.

284 U.S. at 388, 390. As expressed in the more recent case of *Maislin Industries v. Primary Steel, Inc.*, 497 U.S. 116, 128-29 (1990),

The filed rate doctrine, however, contains an important caveat: The filed rate is not enforceable if the [regulatory agency] finds the rate to be unreasonable. . . . As we explained in *Arizona Grocery, supra*, although the filed rate is the legal rate, the Act

“did not abrogate, but [rather] expressly affirmed, the common-law duty to charge no more than a reasonable rate In other words, the legal rate was not made by the statute a lawful rate—it was lawful only if it was reasonable. Under [the Act] the shipper was bound to pay the legal rate; but if he could show that it was unreasonable he might recover reparation.”

The facts of the present case are so egregious as to establish that Qwest’s five-year delay in filing NST-compliant rates was unreasonable as a matter of law. Qwest was forbidden by statute from discriminating in the provision of local access service to independent PSPs. *See* 47 U.S.C. § 276(a). By regulation, Qwest was required to implement that prohibition by filing NST-compliant PAL rates by April 15, 1997. *See* 47 C.F.R. § 64.1301(a). Qwest failed to do so for five years after the FCC-imposed deadline—a deadline that Qwest requested to be extended, on the promise to pay refunds and not to assert the filed rate doctrine. In the meantime, Qwest collected hundreds of millions of dollars in dial-around compensation to which it was not entitled. Under these circumstances, the conclusion is inescapable that Qwest’s dilatory avoidance of its statutory and regulatory duties was unreasonable. Furthermore, a rate that conflicts with the requirements of a federal statute and its implementing regulation must be held to be unreasonable as a matter of law. Under 47 U.S.C. § 201, an unreasonable rate or practice is declared to be unlawful. Accordingly, because Qwest’s pre-2002 rates were unlawful, the filed rate doctrine does not shield Qwest from liability for refunds.

III THE COURT’S DECISION DENIES PLAINTIFF THE RIGHT TO PURSUE ITS CLAIMS FOR VIOLATION OF THE COMMUNICATIONS ACT IN COURT UNDER 47 U.S.C. § 207.

The Court held that by pursuing claims in federal court for violation of provisions of the Communications Act, the Amended Complaint makes “an end-run around the established

administrative remedies." August 15, 2005 Hearing Tr. at 5.¹ Apparently the court believes that TON is required to seek remedies at the FCC before it can pursue its claims in court. This is in conflict with 47 U.S.C. § 207, which gives TON the right to pursue its claims for violation of the Communications Act in federal court or before the FCC, *at TON's election*. Section 207 provides:

Any person claiming to be damaged by any common carrier subject to the provisions of this chapter may either make complaint to the Commission as hereinafter provided for, or may bring suit for the recovery of the damages for which such common carrier may be liable under the provisions of this chapter, in any district court of the United States of competent jurisdiction; but such person shall not have the right to pursue both such remedies.

Thus TON is entitled to file its claim in federal court without first seeking relief from the FCC. The Court's order of dismissal denies TON this statutory right. *See Brown v. MCI Worldcom Network Services*, 277 F.3d 1166, 1173 (9th Cir. 2002) ("The [Communications Act] does not require that a plaintiff exhaust his administrative remedies before proceeding to federal court . . . Under 47 U.S.C. § 207, plaintiffs may elect to proceed either before the FCC or in district court.")

IV. THE COURT SHOULD STAY, NOT DISMISS, THIS CASE PENDING ACTION BY THE FCC.

If, as the Court has concluded, an issue exists requiring the expertise of regulatory agencies, including the FCC, under the doctrine of primary jurisdiction, the Court should stay, rather than dismiss, this case pending action by the FCC, since a dismissal would result in an

¹ The Court never expressly held that it lacked jurisdiction to adjudicate TON's claims. Likewise, the Court did not articulate the legal basis or cite any authority for its implied conclusion that TON was required to pursue administrative remedies in lieu of or as a prerequisite to court action.

unfair disadvantage for TON, because the applicable statute of limitations may have the effect of barring any claims that TON could file with the FCC.² See *Brown*, 277 F.3d at 1173:

We note that because the two-year statute of limitations for [appellant's] federal action has expired, see 47 U.S.C. § 415, [appellant] may be "unfairly disadvantaged" in the event the district court does not retain jurisdiction pending resolution by the FCC.

Case law supports a stay rather than dismissal in the circumstances of this case. See *Crystal Clear Communications, Inc. v. Southwestern Bell Tel. Co.*, 415 F.3d 1171, 1174 n. 2 (10th Cir. 2005) (under the primary jurisdiction doctrine, "the judicial process is suspended pending referral of the issues to the administrative body for its views") (quoting *United States v. Western Pacific R.R. Co.*, 352 U.S. 59, 64)³; *American Tel. & Tel. Co. v. PAB, Inc.*, 935 F. Supp. 584, 591-92 (E.D. Pa. 1996) ("Because plaintiff's underlying claims are collection actions that the FCC will not ordinarily entertain, the case will be placed in civil suspension to preserve any of AT&T's collection remedies that may become appropriate in light of the FCC decision."); *American Tel. & Tel. Co. v. The People's Network, Inc.*, Civ. A. No. 92-3100 (AJL), 1993 WL 248165, at *15 (D.N.J. Mar. 31, 1993) ("[T]he majority of courts have indicated that a stay of the

² Qwest filed its NST-compliant rates in April 2002. 47 U.S.C. § 415(b) provides a two-year statute of limitations. If the statute of limitations began to run when Qwest filed its NST-compliant rates, the statute would have run in April 2004. TON filed its complaint in this case in February 2004, which was within the two-year period commencing April 2002. But if TON had to begin a new case in the FCC now, it would be well outside that two-year window. TON does not concede that its claims would be barred by the statute of limitations, but anticipates that Qwest would certainly make such an argument before the FCC. There is a real risk that the FCC or a reviewing court could hold that TON's claims are barred by the statute of limitations.

³ In *Crystal Clear Communications*, payphone owners sued the local exchange carrier, alleging anticompetitive practices in the provision of PAL service. The district court stayed the case pending referral to the FCC and the Oklahoma Corporate Commission. The Tenth Circuit held that the stay order was not appealable.

Federal court action [as opposed to dismissal] is the more appropriate course of action.”).

Even the case cited by the Court requires a stay rather than a dismissal. As stated in *Reiter v. Cooper*, 507 U.S. 258, 268 (1993), when a claim properly cognizable in court contains some issue within the special competence of an administrative agency, the primary jurisdiction doctrine “requires the court to enable a ‘referral’ to the agency, *staying further proceedings so as to give the parties opportunity to seek an administrative ruling.*” (emphasis added). The court concluded that primary jurisdiction permits dismissal without prejudice only “if the parties would not be unfairly disadvantaged.” *Id.* at 268. Here, a dismissal undeniably creates an unfair disadvantage to TON, because the two-year statute of limitations may have already run. *See* 47 U.S.C. § 415(b). Therefore, the Court should stay, rather than dismiss, this case to permit TON to file its claims with the FCC without requiring TON to run the risk of losing its claims because of a statute of limitations defense.

As a practical matter, of course, TON’s filing of its claims with the FCC would simply replicate the issues raised by the three petitions currently before the FCC, which present precisely the same issues regarding Bell Operating Companies’ violation of the Communications Act by virtue of their refusal to refund excess PAL rates. A simple stay, without requiring TON to file its claims with the FCC, would permit the FCC to complete its work and render its opinion on those issues, which would then provide authoritative guidance to this Court, under the *Chevron* doctrine. *See Chevron U.S.A. Inc. v. National Resources Defense Council*, 467 U.S. 837 (1984); *National Cable & Telecommunications Ass’n v. Brand X Internet Services*, 125 S. Ct. 2688, 2699 (2005) (“If a statute is ambiguous, and if the implementing agency’s construction is reasonable, *Chevron* requires a federal court to accept the agency’s construction of the statute,

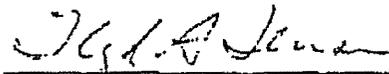
even if the agency's reading differs from what the court believes is the best statutory interpretation.") Such a stay would not burden this Court, would avoid an unnecessary appeal to the Tenth Circuit, would avoid the unnecessary expense and delay to both parties that would be entailed in filing a petition with the FCC that would duplicate three pending petitions, would avoid an unfair disadvantage to TON, and would comply with the Supreme Court's directive in *Reiter*. Accordingly, if the Court does not reconsider its decision on the merits, it should follow the lead of its sister court, the District Court for the Western District of Oklahoma, in *Crystal Clear Communications*, and stay this case pending the FCC's ruling on the existing petitions before it.

CONCLUSION

For the foregoing reasons, the Court should grant TON's motion for reconsideration, and alter or amend the judgment of dismissal, or in the alternative the Court should stay this action pending action by the FCC on the three current petitions, or on a primary jurisdiction referral of issues in this case.

DATED this 22nd day of September, 2005.

FLOYD ANDREW JENSEN PLLC



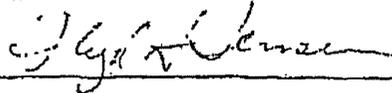
Floyd A. Jensen
Attorney for TON

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of September, 2005, a true and correct copy of the foregoing **MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR RECONSIDERATION AND TO ALTER OR AMEND THE JUDGMENT, OR IN THE ALTERNATIVE TO STAY ACTION** was served upon the following by United States mail, postage prepaid:

David A. Vogel
ARNOLD & PORTER LLP
Suite 900
1600 Tysons Boulevard
McLean, VA 22102-4865

Blaine J. Benard
Holme Roberts & Owen, LLP
299 S. Main Street, Suite 1800
Salt Lake City, UT 84111-2263



CERTIFICATE OF SERVICE

I, Ross Dino, do hereby certify that I have caused the foregoing **OPPOSITION OF QWEST CORPORATION** to be filed via ECFS with the Office of the Secretary of the FCC in CC Docket No. 96-128; and served via First Class United States Mail, postage prepaid, on the following party:

Brooks Harlow
David Rice
Brian Esler
Miller Nash LLP
4400 Two Union Square
601 Union Street
Seattle, WA 98101-2352

/s/ Ross Dino
Ross Dino

September 26, 2006