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EX PARTE

Filed electronically via ECFS

October 26, 2006

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

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

Dear Ms. Dortch:

On October 26, 2006, Lynn Starr, in person, and Bob McKenna and Glenda Weibel, by telephone, all of Qwest, met with Michelle Carey, Legal Advisor to Chairman Kevin Martin, to discuss the above-captioned proceeding.

We discussed payphone issues, including why refunds sought by private payphone providers are inappropriate. The attached document was used as a basis for our discussion.

This *ex parte* is being filed electronically pursuant to 47 C.F.R. §§ 1.49(f) and 1.1206(b).

Sincerely,

/s/ Lynn Starr

Attachment

Copy via email to:
Michelle Carey

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

October 26, 2006

I. Waiver Order

The “Waiver Order” cannot form the basis for federal “refunds.”

By its own terms.

By the terms of the ex parte that led to the Waiver Order.

And the FCC would not have authority to issue a Waiver Order such as desired by the Payphone Providers in any event.

It very clearly said that, for those ILECs that needed to file new tariffs in order to make the certifications necessary to obtain per call compensation, and these new tariffs charged a lower rate than the rate in effect on April 15, the carriers would in essence make the new rate retroactive to April 15.

And this was done.

The process of evaluating the rates for lawfulness beyond this very limited commitment was left to state regulators, who carried out their obligations.

The Payphone Providers’ entire case has now fallen into the Waiver Order bucket. In other words, the Payphone Providers now take the position that the Waiver Order, from its inception, spelled out the full scope and panoply of rights of Payphone Providers to argue their own versions of the “new services test” as it was applied by RBOCs to their intrastate payphone rates commencing in 1997. Unless they can somehow transform a very limited waiver of the rule against retroactive ratemaking into a massive restructuring of the entire federal and state tariff and jurisdictional structure, the Payphone Providers cases have evaporated.

This does not mean that they had no cases or real options. They did, and they often took advantage of their legal rights to challenge intrastate payphone rates (and, where the state declined to use its tariff processes, to bring federal action in Wisconsin). Sometimes they were successful (in 9 of Qwest’s 14 states, state proceedings prior to 2002 resulted in formal adjustment to payphone rates), and sometimes they were not. And very often they simply slept on their rights.

It is misleading of the Payphone Providers to contend that the Waiver Order must be read far beyond its terms or intent or the Payphone Providers will have had no opportunity to assert before proper authorities their own version of the “new services test” that governs payphone rates.

In Qwest’s case, reliance on the Waiver Order is even less persuasive:

- The Order did not apply to Qwest.
- Qwest’s certifications that its payphone rates were lawful were formally challenged before the FCC and these challenges were denied.

In the Waiver Order world posited by the Payphone Providers:

- They claim that a federal “refund” right was created if intrastate payphone rates did not comply with the Payphone Providers’ version of the FCC’s “new services test.”
- They claim that this right is enforceable even if the state regulators were not asked to set rates consistent with this version of the “new services test.”
- They claim that this right is enforceable even if the state regulators were asked to set rates consistent with this version of the “new services test” and declined to do so.
- At least some of the Payphone Providers seem to believe that the issue of the lawfulness of the filed intrastate payphone rates between 1997 and 2002 for each state must be decided by the FCC, which would also establish a lawful rate for each jurisdiction.
- Other Payphone Providers seem to believe that the issue of the lawfulness of filed intrastate payphone rates should be determined by a court.
- Still others seem to believe that the issue of the lawfulness of filed intrastate payphone rates should be determined by state commissions, subject to appeal to this Commission.
- In all cases the Payphone Providers vigorously seek to deny RBOCs the statutory protections provided by Section 204 of the Act whenever the FCC seeks to impose refund liability on a carrier.

II. Wisconsin Order

The Wisconsin Order was a rate order issued in a specific rate proceeding. To the extent that it established standards for applying the “new services test” that resulted in RBOC modifications to their intrastate PAL rates, it was not retroactive, nor could it have been (rate orders are, as a matter of law, prospective only).

The Wisconsin Order does not form a basis for refunds or determinations that pre-Wisconsin Order rates of any carrier were unlawful or unreasonable under the “new services test.” Far more analysis of the law of rates, jurisdiction and refunds would have been necessary.

Note, in the appeal of the Wisconsin Order, the FCC requested that the appeals be dismissed because the Wisconsin Order did not cause injury to any carrier, disavowed that the Wisconsin Order could be used as a finding that rates were unlawful. Instead the FCC argued that it was applicable only when new rates were filed. The Court found that the impact on new rates was sufficient to support an appeal.

III. Oregon

Oregon has two proceedings ongoing examining Qwest’s Payphone Access Line rates.

These proceedings are an example of how the process is supposed to work—state regulators evaluating intrastate rates consistent with federal standards.

The Oregon Commission has asked the FCC for advice on the meaning of the Waiver Order. It has not asked for anything else. There is no reason or authority to justify the FCC becoming involved in the Oregon proceeding.

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