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September 18, 2006

VIA ELECTRONIC FILING

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W., TW-A325
Washington, DC 20554

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

Dear Ms. Dortch:

We represent 51 payphone service providers ("Payphone Providers") in 11 states who are suing Qwest in federal court (in the "*Davel*" case) for overcharging them for payphone services, in violation of the Telecommunications Act, this Commission's implementing orders and the Commission's New Services Test.¹

The Payphone Providers submit this letter in support of their Petition For Declaratory Ruling filed in this docket on September 11, 2006 ("Petition"), and to respond to Qwest's arguments presented in its September 6, 2006 *ex parte* filing in CC Docket No. 96-128 ("*Qwest Ex Parte*"). In the *Qwest Ex Parte* Qwest argues—without foundation—that it has no duty to refund to the Payphone Providers the amounts that Qwest overcharged them for payphone access line ("PAL") services in violation of the Commission's New Services Test. The Payphone Providers will not highlight all deficiencies of the *Qwest Ex Parte* but instead focus on the following:

- (1) Res judicata and collateral estoppel do not excuse Qwest's duty to pay refunds, despite Qwest's claims, because Qwest did not even file with state commissions, let alone obtain any orders approving its PAL rates before 2002,

¹ The case, which is proceeding before the Ninth Circuit, is captioned *Davel Communications, et al. v. Qwest*. A list of all 51 Payphone Providers is attached to their September 11, 2006, Petition in this docket.

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- (2) The Commission's 1997 *Waiver Order* ("*Waiver Order*"), which granting Qwest a temporary waiver of the New Services Test, limited the length of the waiver Qwest received to 45 days, not the length of the refund period,
- (3) The FCC should not subvert the Ninth Circuit's finding that the filed rate doctrine does not apply to the Petition nor claims under 47 U.S.C. § 276(a),
- (4) The FCC should reject Qwest's effort to try the *Davel* case before the FCC,
- (5) Qwest relied on the *Waiver Order* by collecting dial around compensation beginning April 15, 1997, which would have otherwise been illegal,
- (6) Had Qwest not violated the FCC's orders *ab initio*, the *Waiver Order's* refund obligation would not have been open-ended, and
- (7) The *Waiver Order* applied to tariffs filed before April 15, 1997.

I. Res Judicata And Collateral Estoppel Are Irrelevant

In its ex parte filing, Qwest argues that "the state proceedings . . . are totally dispositive of Davel's claims," which is essentially a claim that res judicata and collateral estoppel excuse Qwest from paying refunds. *See Qwest Ex Parte* at 3. Res judicata and collateral estoppel are irrelevant to Qwest. Qwest failed to file cost data or seek approval of its basic PAL rates under the New Services Test until 2002-2003, so there are no orders establishing res judicata or collateral estoppel prior to this time. This is proven by the fact that Qwest cites no such orders.²

Qwest's failure to make the NST filings the FCC required is a fatal flaw in Qwest's defenses to refunds and an important distinction between Qwest's behavior and that of the other RBOCs. Indeed, Qwest finally appears to realize the importance of this distinction between its position and that of the other RBOCs. In its September 5, 2006, ex parte filing, Qwest devotes several pages in a vain attempt to mislead the Commission into believing that Qwest *did* make the required filings between April 4 and May 19, 1997. *See Qwest Ex Parte* at 14-15. As to the relevant states, however, the fact remains, as alleged in the *Davel* complaint,³

² It is ironic that the *Qwest Ex Parte* at one point contends that only state commissions can determine whether Qwest's PAL rates complied with the New Services Test, but elsewhere contends that Qwest's own self-serving determination—not that of any state commission—that its pre-existing PAL rates complied should have the same res judicata effect as if there were a state decision.

³ This fact issue can be viewed either as Qwest's transparent attempt at slight of hand or, at the least, a disputed issue of fact. If the later, the Commission does not need to decide this question of fact. The

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that Qwest made no filings in an attempt to comply with the NST until many years later. Thus, to the extent Qwest complains that the *Waiver Order* created an “open-ended” refund requirement, it is a self-inflicted wound. Qwest could have (and should have) filed its cost studies with the states, as the Commission directed and the other RBOCs did, by May 19, 1997. Failing any state filing, lacking any state review, and in the absence of any final state orders, the defenses of res judicata and collateral estoppel are not in any way implicated as to the relevant Qwest states.⁴

Contrary to the impression the *Qwest ex parte* tries to convey, a close review of its Exhibit 2 establishes Qwest’s near complete disregard of its filing obligations under the *Payphone Orders* in Docket CC No. 96-128 (“*Payphone Orders*”) and the *Waiver Orders*. The three states where Qwest made timely PAL filings in an effort to comply with the NST or where the NST was litigated and a final orders entered were Arizona, Montana, and Oregon.⁵ Those three state are *excluded* from the *Davel* case, precisely to avoid any res judicata or estoppel issues. A summary is provided in the table attached as Exhibit 1 to this letter.

Qwest seems to be attempting to bootstrap the other RBOCs’ defenses of res judicata and collateral estoppel to apply equally to *inaction* by state commissions in Qwest’s territory. Plainly, the lack of action by a state commission or court does not create any bar to refunds. Nor does Qwest’s failure to file the required tariffs or cost support with the state commissions give Qwest a defense to its refund obligation.

II. The Waiver Order Limited The Length Of The Waiver Qwest Received To 45 Days, Not The Length Of The Refund Period

Qwest argues that the waiver in the *Waiver Order* is “limited” (*See Qwest Ex Parte* at 9 and n. 24), but in fact the “limited” nature of the waiver was that it severely limited the extent to which the Qwest could be in violation of the *Payphone Orders* and the preconditions Qwest had to meet in order to be allowed to violate the *Payphone Orders*. Likewise, the “brief duration” of the waiver was a restriction on how long Qwest could be in violation of the *Payphone Orders*. Neither provision was a limitation on Qwest’s obligation to pay refunds to the PSPs when Qwest final complied with the *Payphone Orders* beginning in 2002.

III. The FCC Should Not Subvert The Ninth Circuit's Finding That The Filed Rate Doctrine Is Not Relevant

Ninth Circuit has not referred fact questions to the Commission and the courts are perfectly capable of deciding the fact questions after discovery and trial.

⁴ Of Qwest’s 14 states, *Davel*’s complaint excludes requests for PAL refunds for Arizona, Montana, and Oregon.

⁵ In Oregon a final PUC order was entered in 2001, but overturned in 2004 by an appellate court because Qwest failed to comply with the New Services test. The case is still open on remand.

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Qwest asks the FCC to substitute its judgment for that of the Ninth Circuit on Qwest's "filed rate doctrine" defense. See *Qwest Ex Parte* at 8. The Commission should reject this request for sound legal and practical reasons, regardless of whether or not the Commission has the theoretical power to depart from the *Davel* holdings.⁶ The *Davel* decision is on all fours with the issue as teed up in the pending petitions. It is the only federal appellate decision on point. It is well-reasoned. The filed tariff doctrine is a judicially created doctrine that the courts are well-equipped to interpret and apply if appropriate.

The FCC should not issue an order conflicting with the Ninth Circuit's guidance.⁷ It is the best and only indication of how an appellate court views the law on the filed tariff defense.

IV. The FCC Should Reject Qwest's Effort To Try The Davel Case Before The FCC

Predictably, Qwest has already begun in what may become an all-out effort to shift the trial of as much of the *Davel* case as possible to the Commission. While the Commission's broad authority might permit it to opine on any number of issues relating to the *Waiver Orders*, the Payphone Providers urge the Commission to keep its decision narrow and focused on the issues and petitions that are actually before it. Qwest's motivation is self-evident. It has lost most of its defenses in the courts and now wants a second bite at the apple. And if it can't get a second bite at the apple, Qwest at least wants to try to get the FCC to decide as many of the remaining issues—including questions of fact—as possible.

Qwest's knows that Petitioners will be procedurally handicapped if their case is tried before the Commission. For starters, discovery at the FCC in declaratory proceedings is non-existent. Qwest knows that its factual assertions before the Commission need not meet standards of the Federal Rules of Evidence. Nor will they be subject to cross examination. Thus, for example, Qwest tries to give the Commission the false impression that the 11 state commissions actually received cost data and reviewed Qwest's PAL rates during the 45 day waiver period in 1997. Such *legerdemain* will be readily exposed after discovery and trial.

⁶ Petitioners do not concede that deference on the filed tariff doctrine would be appropriate here. Moreover, as the Commission might anticipate appeals from its decision, it might also expect that under the Hobbs Act an appeal regarding the Petitions could as likely be heard by the Ninth Circuit—perhaps the very same panel as in *Davel*—as any other circuit.

⁷ Qwest's claim that it "never challenged" the Ninth Circuit's holding on the filed rate doctrine is remarkable, considering that Qwest filed a strident petition for rehearing with the Court. Qwest's efforts to neutralize the utter rejection of its principle defense to the claims in *Davel* is a transparent attempt to evade the decision.

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The Commission's resources to address a fact-intensive contested matter are relatively limited. Finally, Qwest may hope that it can ride the coattails of the other RBOC defenses, such as *res judicata*, that are not factually applicable to Qwest.

V. **Qwest Relied On The Waiver Order By Collecting Dial Around Compensation, Which Would Have Otherwise Been Illegal**

Qwest claims that it did not rely on the *Waiver Order*. See *Qwest Ex Parte* at 8. The fact issue of whether Qwest "relied" on the *Waiver Order* is also not a matter that the Ninth Circuit referred to the Commission. The legal question of what constituted "reliance" on the *Waiver Order* is before the Commission, however. The only rational interpretation of the *Waiver Order* is that an RBOC "relied" on it by collecting dial-around compensation ("DAC") beginning on April 15, 1997, without first having NST-compliant rates in effect. To have begun collecting DAC before complying with the NST would have been unlawful. Therefore, an RBOC that did so must have been relying on the *Waiver Order*.

Qwest completely misconstrues what constitutes reliance. Under Qwest's theory because Qwest violated its filing obligations under the *Waiver Orders* and the *Payphone Orders*, Qwest cannot have relied on the second *Waiver Order*. Reduced to its simplest terms, Qwest's argument is that **its own violation** of the filing requirements of the *Waiver Order* **gives Qwest a defense** to the refund provisions of the *Waiver Order*. The idea that malfeasance or nonfeasance can create a defense is ludicrous.

If Qwest did not rely on the *Waiver Order*, then Qwest should not have collected the DAC and must now disgorge it. While that would accord some measure of justice to Qwest, which unlike the other RBOCs failed to even attempt to secure state approval of its existing PAL rates in 1997, it would result in a windfall to the interexchange carriers. Most importantly, it would leave the damaged parties—the PSPs—without a refund of the substantial overcharges they suffered for many years.

VI. **Had Qwest Not Violated The FCC's Orders, The Refund Obligation Would Not Have Been Open-Ended**

Qwest is faced with a self-inflicted wound. All Qwest had to do was comply with the Commission's explicit and repeated directives to file cost support for its PAL rates with the states by May 19, 1997 and ask the states to review its then-existing PAL rates for NST compliance. Qwest did so in Arizona, Montana, and Oregon⁸ and it is not being sued for PAL

⁸ Or those states otherwise had Qwest's PAL rates under review, e.g. in the Oregon general rate case.

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refunds for those states.⁹ The only reason the *Waiver Order* became open-ended for Qwest is that Qwest started collecting DAC on April 15, 1997—taking advantage of one aspect of the *Waiver Order*—but then failed to comply with the filing requirements by May 19 1997—ignoring the critically important condition precedent to collecting DAC. Qwest’s failure to file persisted for another five years.

VII. The Waiver Order Applied To Tariffs Filed Before April 15, 1997

Qwest argues the *Waiver Order* did not apply to tariffs filed before April 15, 1997. The exact opposite is true, based on the plain language of the order. It stated: “The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration, the Bureau Waiver Order and this Order become effective.” *Waiver Order*, ¶ 18 (emphasis added). Further, the order stated: “The RBOC Coalition and Ameritech have committed . . . to reimburse . . . customers . . . if newly tariffed rates, when effective, are lower than the existing rates.” *Id.*, ¶ 20 (emphasis added). These passages make two things clear. First, the existing PAL rates were subject to refund if Qwest began to collect DAC before the states approved them as being in compliance with the NST. Second, the refund obligation was open-ended to such time as the tariff filings required by the “Order on Reconsideration, the Bureau *Waiver Order*, and this Order become effective.” If such time became surprisingly long in Qwest’s case, it is because Qwest delayed five years in making the required filings.

Qwest’s real argument here is somewhat obfuscated. Recognizing that it is in a very weak position relative to the other RBOCs because of its failure to file with the states in 1997 as required, Qwest hints that it did not need to file anything because it secretly believed (based on a gross misapplication of the NST that the FCC completely discredited in the *Wisconsin Order*) that its existing rates complied with the NST. The unspoken foundation of this argument is that the FCC delegated review of the lawfulness of Qwest’s rates not to the states, but to Qwest itself. This is a strange argument even under normal ratemaking circumstances.¹⁰ But given that the NST was being implemented pursuant to Congress’ directive to end to RBOC’s discrimination against their competitors in the payphone industry, it is an absurd argument. If Congress had chosen to entrust Qwest to end its discrimination, it would not have directed the Commission to establish regulations to force Qwest to end that discrimination.

⁹ Qwest is not being sued in Oregon in the *Davel* case, but Oregon refunds are still before the Oregon PUC, which is awaiting FCC guidance.

¹⁰ And indeed, where it is now convenient for Qwest to make the argument, Qwest contends that only “State regulators . . . have the jurisdiction to determine the reasonableness of [Qwest’s] PAL rates. *See Qwest ex parte* at 17.

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Given that Qwest demonstrably charged PSPs PAL rates more than 3 times the lawful rate for more than 5 years after discrimination was to have ended, Congress' lack of trust in the RBOCs to do the right thing voluntarily was well-founded.

Apart from Congressional intent, it is also quite clear that this Commission never intended to delegate review for compliance with the NST and Section 276(a) to Qwest.¹¹ The Commission repeatedly and expressly delegated review to the states, requiring Qwest to file the necessary cost support for the states to do so. For example, in the *Reconsideration Order*¹² at ¶ 163, “[w]e require LECs to file tariffs . . . in the intrastate jurisdiction[] . . . States must apply these requirements . . . We will rely on the states . . . states may, after considering the requirements of this order, [approve the existing tariffs].” (emphasis added). And in the *Waiver Order*, ¶¶ 18, 23, the Commission said: “the requisite cost-support data must be submitted to the individual states . . . Because the LECs are required to file, and the states are required to review, intrastate tariffs . . . , the states' review of the intrastate tariffs [will ensure compliance with the NST]” (emphasis added).

Finally, Qwest incorporates by reference and earlier argument that refunds would violate Section 204 of the Communications Act.¹³ First, this appears to be a back door attempt to recoup the filed rate doctrine defense that the Ninth Circuit has eviscerated. Second, the provisions of Section 204 only apply to tariffs filed at the Federal level (“Whenever there is filed with the Commission any new or revised charge . . .”). Third, even assuming, for sake of argument, that Section 204 applied to a state filing, Qwest is trying to apply it to a non-filing. Again, Qwest complains about a self-inflicted wound. It was Qwest that had both the obligation to file rates, or at least cost studies with the states, by May 19, 1997. It was Qwest that failed to do so until 2002. Finally, the FCC should not be dissuaded by the alleged difficulty of

¹¹ Qwest argues that the Reconsideration Order did not require refiling of existing tariffs if the RBOC believed they complied with the NST. The orders are not clear on this precise question. However, just because the RBOC might not have needed to file a new tariff, that did not excuse the filing of cost support with the states. The orders unambiguously delegated review of Qwest's PAL tariffs for compliance with the cost-based requirements of the NST. The states could not do that without Qwest first submitting cost support for the existing rates. Qwest never did that, of course. Moreover, there is not ambiguity in the requirement that the RBOCs submit cost support to the states.

¹² *Order on Reconsideration*, 11 FCC Rcd. 21,233 at ¶ 163 (“*Order on Reconsideration*”);

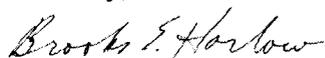
¹³ *Qwest ex parte* at 17, note 51.

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calculating the refunds that Qwest owes to the PSPs. The issue of damages has not been referred to the Commission. This is a procedural boogeyman that should not distract the Commission from the narrow issue that has been referred.

Sincerely,



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Exhibit 1

Arizona	N/A (not part of the Payphone Providers' claim).
Colorado	Qwest admits it made no filings pursuant to the NST by May 19, 1997. On complaint, the Colorado PUC kept case open for further FCC guidance. After FCC rejected Qwest's interpretation of the NST and filed NST-based rates, PSPs filed suit within 2 years of Qwest's filing of compliant tariffs
Idaho	Qwest admits it made no filings pursuant to the NST until 2002.
Iowa	Qwest admits it made no filings pursuant to the NST until 2002
Minnesota	Qwest admits it made no filings pursuant to the NST until 2002.
Montana	N/A (not part of the Payphone Providers' claim).
Nebraska	Qwest admits it made no filings pursuant to the NST until 2002.
New Mexico	Qwest admits it made no filings pursuant to the NST until 2002. ¹⁴
North Dakota	Qwest admits it made no filings pursuant to the NST until 2002.
Oregon	N/A (not part of the Payphone Providers' claim). However, both Qwest's PAL rates, which have been under review in Oregon since 1996, and PAL refunds are still awaiting final orders. The Oregon PUC awaits Commission guidance on refunds.
South Dakota	Qwest admits it made no filings pursuant to the NST until 2002. ¹⁵

¹⁴ The case Qwest cites had to do with whether payphone subsidies had been removed from access charge rates

¹⁵ Only Qwest's "Smart PAL" rates were at issue there. Smart PAL rates are not part of the *Davel* case.

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Utah	Qwest admits it made no filings pursuant to the NST until 2002.
Washington	Qwest admits it made no filings pursuant to the NST until 2003. ¹⁶
Wyoming	Qwest admits it made no filings pursuant to the NST until 2002.

¹⁶ The case Qwest cited was a general rate case and there was no consideration by Qwest or the WUTC of the NST, which had not been adopted by the time the WUTC issued its substantive ruling (in the WUTC's Fifteenth Order, not the 24th Order Qwest cites).

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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of,

Implementation of the Pay Telephone
Reclassification and Compensation Provisions
of the Telecommunications Act of 1996

Petition of Davel Communications, Inc., et al.
for Declaratory Ruling

Case No. CC Docket No. 96-128

REPLY TO OPPOSITION OF QWEST
CORPORATION TO PETITION OF
DAVEL COMMUNICATIONS, INC.,
ET AL. FOR DECLARATORY RULING

Qwest's Opposition to the petition filed by the Petitioners Davel Communications, et al.¹ ("Payphone Providers") falsely claims that the Ninth Circuit in the *Davel* case held that "the filed tariff doctrine did not constitute a defense to Davel's claims" except to the extent that those claims were covered by the Waiver Order.² Contrary to Qwest's wishful thinking, the Ninth Circuit specifically amended its opinion to make clear that neither the Payphone

¹ A complete list of the 51 Petitioners is attached as Exhibit A to the Petition.

² See Qwest Petition at 5-6. *Davel Communications et al. v. Qwest*, United States Court of Appeals for the Ninth Circuit, Slip Op. No. 04-35677 (Aug. 17, 2006) ("Davel Case"); *In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, Order*, 12 FCC Rcd 21,370 (Apr. 15, 1997) ("Waiver Order").

Providers' independent statutory claims for PAL rate refunds³ (which claims remain pending in the United States District Court for the Western District of Washington) nor its referred Waiver Order refund claims were barred by the filed rate doctrine. The Ninth Circuit did so in part by adding the following paragraph in response to Qwest's Petition for Panel Rehearing (Ex. A):

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

Slip Op., at 9732 (emphasis added). Only as a "related reason" for its new, broader holding did the Ninth Circuit also state that enforcement of the filed rate doctrine would be antithetical to the Waiver Order itself. Slip Op., at 9732-33.

The Ninth Circuit clarified and broadened its filed rate holding in response to the very arguments that Qwest now urges upon this Commission – i.e., that the filed-rate doctrine still applies to state filings, that the doctrine was only temporarily suspended by the Waiver Order, that the suspension was only for 45 days, and/or that this Commission can independently determine whether or not the filed-rate doctrine should apply to the Payphone Provider's claims. *See, e.g.*, Ex. A (Qwest's Petition for Panel Rehearing), at 1-3, 7-10, 13-16.

³ Those claims include damages claims under Section 206 of the Communications Act, which arise under, *inter alia*, Sections 201 and 276 of the Act, and which Congress specifically authorized injured plaintiffs such as the Payphone Providers to bring in federal court. 47 U.S.C. § 207. Ex. B (Davel's Reply in Support of Motion for Partial Stay).

The Ninth Circuit's consideration and rejection of Qwest's arguments is now the "law of the case," and bars Qwest from relitigating these issues again – either in court, or before this Commission. *United States v. Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000). In short, the filed rate doctrine is not at issue **at all** in the Payphone Provider's Petition, and should play no role in this Commission's decision. The only issue before the Commission is the narrow issue that the Ninth Circuit ordered referred to this Commission – i.e., whether the refund period is for only 45 days, or lasts until Qwest can show that it had on file with the states the required cost studies and NST-compliant PAL tariffs.

Although Qwest complains that the Payphone Providers' allegations are "reckless" (Opposition, at 5), Qwest itself provides no actual evidence to refute those charges. Indeed, deconstructing Qwest's carefully worded paragraph regarding compliance at page 5 of its Opposition, it becomes obvious that Qwest has carefully avoided answering those allegations. Thus, Qwest describes "the [internal] cost analysis that it conducted in 1997"⁴ – but cannot state that it provided any such cost studies to any state commissions, as required by this Commission's various Payphone Orders. Qwest claims to have outlined in detail the "state proceedings involving Qwest's payphone rates" – but cannot point to any state proceedings in any of the 11 states covered by the *Davel* litigation that actually involve the PAL rates at issue in that litigation. Qwest then refutes a charge the Payphone Providers never made – that Qwest "made no payphone filings with state commissions between 1997 and 2002." It is undisputed that Qwest made state commission filings before 2002. The question at the heart of the *Davel* litigation is whether Qwest ever filed **NST-compliant PAL rates** with any of the relevant states.

⁴ Of course, Qwest has never produced that alleged internal cost analysis to this Commission, to any state commission or to the plaintiffs in *Davel*.

It is that question that Qwest resolutely refuses to answer. Qwest's stubborn silence on that issue speaks volumes about the veracity of the Payphone Providers' federal court complaint.

The Petitioners will not individually address the remaining baseless claims in Qwest's Opposition but will instead note the telling fact that Qwest's Opposition contains *not a single quotation from any source* to support Qwest's contorted view of the NST, the FCC's Payphone Orders in this Docket, the Waiver Order and the Ninth Circuit order in the *Davel* case. The Commission should not accept Qwest's reinterpretation of the law or the facts when Qwest itself can cite nothing in support.

DATED this 5th day of October, 2006.

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EXHIBIT A

Qwest's Petition for Panel Rehearing

No. 04-35677

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

DAVEL COMMUNICATIONS, INC., ET AL.,

Plaintiffs-Appellants,

versus

QWEST CORPORATION,

Defendant-Appellee.

On Appeal From the United States District Court
For the Western District of Washington
The Honorable Marsha Pechman
District Court Case No. C03-3680P

**APPELLEE QWEST CORPORATION'S
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Pursuant to Fed. R. App. P. 40 and Circuit Rule 40-1, Defendant/Appellee Qwest Corporation (“Qwest”) respectfully requests rehearing of the Court’s June 26, 2006 Opinion (the “Opinion”).

Two crucial aspects of the Opinion should be modified so that the Court does not conclusively decide either disputed factual issues or the FCC’s intentions:

I. The Opinion held that the Waiver Order “supersedes” the filed tariff doctrine with respect to Qwest’s intrastate tariffs at issue, but the Opinion does not expressly acknowledge that this legal conclusion is predicated on a disputed fact. *See* Opinion at 7049. Whether the Waiver Order actually applied to Qwest’s tariffs is a factual question, depending on whether Qwest relied on the relief in the Waiver Order. Davel alleged in its Complaint that Qwest did so, and Qwest could not contest this allegation in its Rule 12 motion; but Qwest will vigorously contest this fact in the lawsuit and has already done so before the FCC. Davel, however, has already told the FCC that this Court has foreclosed Qwest from contesting this key fact, a result the Court could not have intended. The Court should modify the Opinion to clarify that its conclusion about the Waiver Order “superseding” the filed tariff doctrine is without prejudice to Qwest if Qwest successfully controverts Davel’s factual allegations.

II. In concluding that the Waiver Order “supersedes” the filed tariff doctrine, the Opinion analyzes the effect of the Waiver Order without deferring to the FCC’s superior expertise and to existing FCC proceedings already addressing the same issue. Opinion at 7055-57. By choosing to address the issue before the FCC does, the Opinion presages a potential nationwide schism, with AT&T, Verizon and some Qwest customers subject to the FCC’s rule but, Davel will argue, with Appellants subject to this Court’s analysis. This would perversely create the very lack of uniformity that primary jurisdiction was intended to avoid. *Id.* at 7054-55. Qwest will argue, on the other hand, that the FCC’s analysis will supersede the Opinion pursuant to *National Cable & Telecomms. Ass’n v. Brand X*, ___ U.S. ___, 125 S. Ct. 2688 (2005) (“Brand X”), effectively rendering the Opinion merely advisory. To avoid both problems, the Court should refer to the FCC the question of whether in 1997 the FCC intended to render the filed tariff doctrine inapplicable to the relevant tariffs.

In addition to these two issues, the Opinion substantively misapprehends both the Waiver Order and regulatory law in two respects, each of which independently led to an incorrect conclusion. The Court should modify its Opinion and, for either reason, affirm the judgment of the District Court:

III. The FCC does not have the power to decide in Davel’s favor the issue the Court refers to it, whether the “scope” of the refund in the Waiver Order.

The Opinion held that in 1997 the FCC contemplated only a limited refund. Opinion at 7043-44. Thus, the Opinion openly seeks the FCC's determination whether, based on *current* policymaking considerations, the Waiver Order should *now* be given an unlimited scope for years 1997 through 2002. The rule against retroactive ratemaking prohibits the FCC from now deciding to grant a refund to 1997. Although Congress provided narrow procedures that would allow the FCC to change a rate retroactively and order refunds, the FCC did not avail itself of these procedures. The Court's finding that in 1997 the FCC did not contemplate an open-ended refund resolves the merits of Davel's claims. Because the right to an open-ended refund did not exist in 1997, and one cannot now be created, the Court should affirm the District Court's judgment.

IV. Separately, the Opinion misapprehended the Waiver Order in stating that the Waiver Order "superseded" the filed tariff doctrine. At most, the Waiver Order "superseded" the filed tariff doctrine for a 30-day period if at all. No basis exists to conclude that the Waiver Order effectuated a silent rescission of the filed tariff doctrine in perpetuity. Rather, other aspects of the Waiver Order, and an FCC Order issued after the Opinion was released, demonstrate that the FCC expects these tariffs to be enforced like all other tariffs. The Court should conclude that the filed tariff doctrine is fully applicable here and accordingly affirm the District Court's judgment.

For these reasons, Qwest respectfully requests that the Panel grant Qwest's petition for rehearing.

SUMMARY OF ORDER AND SUBSEQUENT DEVELOPMENTS

The Opinion essentially consists of four holdings. First, the Waiver Order supersedes the filed rate doctrine, so the filed rate doctrine does not apply to Qwest's duly filed intrastate tariffs – a conclusion asserted unconditionally, without acknowledging that contested facts could affect that analysis. Opinion at 7048-49. Second, under the primary jurisdiction doctrine, the threshold issue of “the scope of the Waiver Order” should be referred to the FCC. *Id.* at 7054-57. Third, in referring this issue, the district court should consider whether to stay or dismiss the case without prejudice. *Id.* at 7058.¹ The Opinion also held that, until the FCC determines whether any refund is available for the period of 1997 through 2002, it is premature to determine whether it is appropriate to refer other issues to the FCC or state public utility/service commissions (“State Commissions”). *Id.* at 7057 n.8.

After the Court issued the Opinion, on July 7, 2006, the FCC issued a new order in the *Wisconsin* matter. *See In re Wisconsin Public Serv. Comm'n*, Order on Recon., ___ FCC Rcd. ___, 2006 WL 18809955 (July 7, 2006) (“*Wisconsin*

¹ Fourth, and not at issue in this Petition, the statute of limitations does not bar certain of Davel's claims.

IP). Rejecting the Wisconsin Public Service Commission's request that the FCC review payphone access line ("PAL") tariff rates of two Wisconsin carriers, the FCC ordered that State Commissions must initially hear all challenges to PAL tariff rates. *Id.* at *1-2. The FCC held that its "action is consistent with the Commission's previously stated view that payphone line rates should, to the extent possible, be reviewed by the appropriate state commission." *Id.* at *2.

ARGUMENT

I. The Court Should Modify Its Opinion To Make Clear That Qwest Is Free To Factually Contest Whether The Waiver Order Applies To Qwest's Tariffs

The Opinion's analysis that the filed tariff doctrine does not apply to Qwest's PAL tariffs is premature and does not consider the procedural posture of Qwest's Rule 12(b)(6) motion. The Opinion held the filed tariff doctrine does not apply because the Waiver Order "supersedes" the filed tariff doctrine. Opinion at 7049. The basis for this conclusion is that the Waiver Order purported to "depart" from the filed tariff doctrine to permit the filing of new tariffs, in which case a refund would be available to customers for the "waiver period." *Id.* This analysis applies to Qwest only if it is factually established that Qwest *relied* on the relief granted in the Waiver Order by *filing amended tariffs* with lower rates during the Waiver Order's "limited" extension period. *Id.* at 7044 (refund only applies "[i]f a local exchange carrier relied on the waiver). If not established, the

Opinion would be incorrect in concluding that the filed rate doctrine is inapplicable to Qwest's tariffs. Opinion at 7049.²

Davel alleged in its First Amended Complaint that Qwest was one of the carriers that sought and relied on the relief granted in the Waiver Order. *See* E.R. 0004. Because this is an appeal of a dismissal under Rule 12(b)(6), this Court must assume this factual allegation to be true — but only to determine if Davel has stated a valid claim. Opinion at 7046. When reviewing disposition of a Rule 12 motion, the Court cannot decide a legal issue that depends on resolving a contested fact. *E.g., Knevelbaard Dairies v. Kraft Foods, Inc.*, 232 F.3d 979, 989 (9th Cir. 2000) (antitrust claim depended on disputed facts thus legal issue could not be resolved in either party's favor on Rule 12 motion). In fact, all of Qwest's compliant tariffs for the services at issue were filed and effective before April 15, 1997, and the Waiver Order's extension of that deadline did not apply to these preexisting tariffs.

As a result, it is premature for this Court to hold that the Waiver Order "supersedes" application of the filed tariff doctrine to Qwest's tariffs, even if the

² Qwest has contested this fact in a recent *ex parte* filings to the FCC. *See* Qwest *Ex Parte* to FCC, filed June 22, 2006, at 16-18 (arguing to FCC why Waiver Order does not apply to Qwest). Qwest respectfully requests that this Court take judicial notice of the relevant filings of Qwest and Davel to the FCC as part of the FCC proceedings, which are available from the FCC's website. Qwest is concurrently filing a separate request in this respect.

FCC intended that the Waiver Order have such an effect on the carriers who filed new tariffs during the waiver period. The Opinion should state that, at best, Davel might be able to claim that the filed tariff doctrine does not apply to Qwest's tariffs based on the factual allegations in the Complaint. But the Court should modify the Opinion to state that it cannot now determine whether the Waiver Order "supersedes" the filed tariff doctrine as it applies to Qwest's filed tariffs, because that issue depends on a contested threshold fact.

II. The Court Should Refer To The FCC The Issue Of Whether The FCC Intended The Waiver Order To Supersede The Filed Tariff Doctrine

The Opinion refers the "scope" of the Waiver Order to the FCC, but it does not refer — and instead decides — that the FCC intended the Waiver Order to "supersede" the filed tariff doctrine. Opinion at 7049. This issue too should have been referred to the FCC, which has primary jurisdiction to interpret ambiguities in its orders that would have significant policy-making effect on industry, just as the Opinion did on the "scope" of the Waiver Order. *See* Opinion at 7057. Because it is highly unlikely that the FCC intended to dismantle one of the most venerable of all telecommunications law doctrines without discussion, at best one could say the Waiver Order is ambiguous in its silence on this issue. *E.g., National Fed. of the Blind v. FTC*, 420 F.3d 331, 337 (4th Cir. 2005) (when interpreting statute, court

presumes authors are aware of existing law and will not infer abrogation or inconsistency with existing law without “clear manifestation” of such intent).

Failing to refer the issue of the FCC’s intent to the FCC could result in consequences this Court undoubtedly did not contemplate. Davel will argue — and indeed has already argued to the FCC since this Opinion was issued³ — that it is “law of the case” between Davel and Qwest that the FCC intended to supersede the filed tariff doctrine with regard to the tariffs at issue. If the FCC were to conclude that the filed tariff doctrine fully applies to PAL tariffs (which is highly likely, *see* Part IV, *infra*), the FCC would decide the issue for all customers of AT&T and Verizon and some customers of Qwest; but Davel will argue that Davel and the other Appellants here are subject to this Court’s differing analysis. The Opinion recognizes the importance of national uniformity, Opinion at 7054-55, yet the Opinion’s analysis of the filed tariff doctrine could undermine that very policy. Congress required uniform national treatment of Qwest and the other Bell operating companies, *see* 47 U.S.C. § 276, and the Communications Act requires all of Qwest’s customers to be treated equally without price discrimination, *see* 47 U.S.C. § 202(a) (and corresponding sections in every single state, *see* Qw. Brief at 21 n.6).

³ *See* Davel *Ex Parte* to FCC, filed July 6, 2006. Qwest attaches a copy of this *ex parte* to its concurrently filed Request for Judicial Notice as Attachment C.

Moreover, if the FCC decides the question differently from this Court's analysis, Qwest will argue that under *Brand X*, the FCC has authority to change a rule committed to its discretion even if an appellate court has previously resolved the issue in a contrary way. *See Metrophones Telecomms., Inc. v. Global Crossing Telecomms., Inc.*, 423 F.3d. 1056, 1070 (9th Cir. 2005) (applying *Brand X* and holding 2003 FCC order reversed conclusion of Ninth Circuit that Section 276 of Communications Act did not provide cause of action to payphone owners for underpaid compensation of 800-number calls from long-distance carriers), *cert. granted*, ___ U.S. ___, 126 S. Ct. 1329 (2006). The existing proceedings at the FCC likely make the Opinion, on this issue, at best advisory. Because a contrary conclusion by the FCC would abrogate any "law of the case" between Qwest and Davel, and because Davel undoubtedly will disagree and will contest this conclusion, substantial uncertainty and wasted judicial and regulatory resources would be avoided by referring the question.

These arguments, and the existence of multiple proceedings at the FCC already addressing the exact same question, could bog down this and other Courts for years and further delay a conclusion to this quagmire. Instead, the Court should refer to the FCC the question of whether it intended the filed tariff doctrine to apply to the PAL tariffs from 1997 to 2002, without running any risk of creating "law of the case" that conflicts with the law established for the entire

industry. No reason exists for this Court to step into the fray with a result affecting only one carrier and a tiny subset of the payphone service provider industry, where the FCC is resolving the same issue for the entire industry. As the Opinion notes, the doctrine of primary jurisdiction was created so courts would defer these kinds of highly technical policymaking decisions to expert regulators better suited to address the questions on a nationwide basis. Opinion at 7050-51.

For these reasons, the Court should vacate its discussion on pages 7048 and 7049 of the Opinion and instead refer to the FCC the question of whether the FCC intended the Waiver Order to supersede the filed tariff doctrine.

III. The Prohibition Against Retroactive Ratemaking Precludes The FCC From Resolving The Issue That The Court Referred To The FCC

The FCC has no authority to decide in Davel's favor the one issue that the Opinion did refer to the FCC: whether the Waiver Order's "scope" should include a refund from the period of 1997 through 2002. Given the Opinion's conclusion that in 1997 the FCC did not intend to provide an unlimited refund, Opinion at 7043-44, the Court should affirm the District Court's judgment.

Under the primary jurisdiction doctrine, the FCC would have the power to interpret any *ambiguity* in the 1997 Waiver Order regarding its intention, *at the time*, to award *prospective* relief in the form of then-future rate changes in tariffs. Qw. Brief at 38-39. However, the Opinion concludes that the FCC, when

it wrote the Waiver Order in 1997, was not contemplating a refund beyond 30 days. Opinion at 7055-56. Davel’s arguments to this Court use loose language in the Waiver Order, *see id.* at 7055, to open the door for the FCC to now construct a *new* policy based on *current* considerations — “beyond issues of initial FCC intent,” *id.* — that would have the effect of providing refunds for the period of 1997 through 2002.

The Opinion’s invitation to the FCC to rethink the Waiver Order under current considerations, if accepted, invites the FCC to engage in prohibited retroactive ratemaking. The FCC generally has no power to decide retroactively that a refund is appropriate for earlier time periods. As the Supreme Court stated, “[n]ot only do the courts lack authority to impose a different rate than the one approved by the Commission, but the Commission itself has no power to alter a rate retroactively.” *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 (1981).

Congress provided narrow circumstances under which the FCC may retroactively order refunds from a tariffed rate, but the FCC did not follow the procedures necessary to invoke that power here. For example, the FCC can issue a “suspension and accounting order,” informing a carrier that its tariffed rates are under review and allowing the FCC at a much later time to revise the rates and order refunds. 47 U.S.C. § 204(a)(1). Without following this procedure, the FCC can correct unreasonable rates only on a prospective basis. *E.g.*, *Verizon Tel. Cos.*

v. FCC, ___ F.3d ___, No. 04-1331 & 04-1332, 2006 WL 1676161 (D.C. Cir. June 20, 2006) (no customer refunds for prior periods when FCC does not issue suspension order); *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478, 1482 (D.C. Cir. 1992) (suspension order process protects carrier's interest by letting it "realize that the FCC's objections are well taken, or not worth a fight," and the carrier might "seek to bring itself within compliance and obviate the whole process"). Here, the FCC issued no suspension order to Qwest, so the FCC cannot now retroactively declare that Qwest's tariffs are not subject to the filed tariff doctrine.⁴

As a result, the issue the Opinion refers to the FCC is not one the FCC has authority to resolve, other than to conclude "no refund." The FCC cannot now decide what it *should* have done in 1997. Because the Court has already concluded that the FCC did not intend in 1997 for the Waiver Order to grant an unlimited right to a refund, Opinion at 7043-44, Davel cannot obtain such refund, nine years later, without violating the rule against retroactive ratemaking. Therefore, the Court should affirm the District Court's dismissal.

⁴ The FCC has no statutory authority to set aside retroactively a state tariff. Furthermore, in Section 276 Congress directed the FCC to regulate the RBOCs' PAL rates. If the FCC had required federal tariffs (as it initially did, until it reversed itself six months later), the FCC would be barred from retroactively revising rates outside of Section 204 procedures. The FCC cannot end-run Congress's deliberate limitations on its authority by choosing to have the tariffs filed at State Commissions in order to avoid application of Section 204.

IV. The Court Misapprehends Well-Established Regulatory Law And The Waiver Order In Concluding That The Filed Tariff Doctrine Does Not Apply

Finally, the Opinion's conclusion that the Waiver Order supersedes the filed tariff doctrine misapprehends the Waiver Order and regulatory law. The Court should vacate this portion of the Opinion and instead conclude that the filed tariff doctrine applies to all PAL tariffs, so Davel has no cause of action for a refund in federal court. This conclusion is a second reason, independent of the foregoing argument, to affirm the District Court's judgment

The Opinion held that the Waiver Order is "not consistent with a strict application of the filed-rate doctrine." Opinion at 7049. The Opinion noted that statutes or regulations can be enforced even if the effect is to avoid the filed tariff doctrine. *Id.* at 7048.⁵ On that basis, the Opinion concluded that the filed tariff doctrine does not apply to the PAL rates the FCC required to be filed. *Id.* at 7049. This novel conclusion does not follow from the Waiver Order or from the authorities the Opinion cites.

⁵ None of the cases the Opinion cites for this proposition is even remotely similar to the circumstances here, that is, where an agency purportedly required the filing of tariffs but did not intend the filed tariff doctrine to apply to them. In *Verizon Del., Inc. v. Covad Comm'ns Co.*, 377 F.3d 1081 (9th Cir. 2004), the FCC exercised a statutory "forbearance" authority to remove certain services from tariffs into a detariffed regime. *Verizon Del.* recognized that "forbearance" required specific FCC findings in order to invoke the statutory power. *Id.* at 1989. The FCC has never invoked that authority here, however (even if it could).

If the Waiver Order is deemed to have any effect at all on the filed tariff doctrine,⁶ at most one could say that the Waiver Order superseded the filed tariff doctrine for the “limited” and “brief” duration of the relief granted in the Waiver Order — a 30-day period in April and May, 1997. Nowhere in the Waiver Order does any language suggest that the FCC intended that the filed tariff doctrine would not apply to filed tariffs after that “limited” and “brief” period. Indeed, the Opinion itself acknowledges that the FCC did not contemplate the Waiver Order to apply to tariffed rates after this period. Opinion at 7043-44. Modifying or, as the Opinion holds, superseding the filed tariff doctrine for 30 days does not mean the doctrine is thus rendered inapplicable in perpetuity.

Many other facets of the Waiver Order demonstrate that the FCC fully intended the filed tariff doctrine (particularly as articulated by state law) to apply to the PAL tariffs at issue. The FCC did not “detariff” PAL services, as it has done with other kinds of communication services, but required tariffs to be filed. Opinion at 7047-48. No language in the Waiver Order, nor any precedent, supports concluding that the FCC requires tariff filings but does not intend that the filed tariff doctrine apply to those tariffs. The conclusion that these filed tariffs are not covered by the filed tariff doctrine creates a *sui generis* tariff, the first ever

⁶ Qwest disagrees that the Waiver Order is inconsistent with the filed tariff doctrine for even the 30-day period, but that issue is not relevant to the instant appeal because Davel is not seeking a 30-day refund.

created in over a century of regulatory law before the FCC, the Interstate Commerce Commission, the Federal Energy Regulation Commission, and others. Surely such a novel and unique quasi-“tariff” would have been initiated with more analysis and legal support than appears in the Waiver Order. Further, because no industry member challenged the Waiver Order, it is reasonable to conclude that no carrier or customer read the Waiver Order to depart from a century of the filed-tariff regime that lies at the “heart” of the industry. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 229, 231 (1994).

The Opinion’s conclusion is further undermined by subsequent events. In the subsequently-released *Wisconsin II* order, rather than indicating that the filed tariff doctrine would *not* apply, the FCC once again expressly required state tariff procedures to apply to the tariffs at issue here. State filed tariff doctrines are as longstanding and entrenched as federal filed tariff doctrines; under the dichotomy created by Section 2 of the Communications Act of 1934, 47 U.S.C. § 152, states have traditionally enjoyed primary authority over intrastate communications. It would be highly irregular for the FCC to rely upon existing and well-established state tariff mechanisms as a matter of “federal-state comity,” but intend that the most fundamental pillar of those mechanisms — state filed tariff doctrines — would not apply. *See In re Wisconsin Public Serv. Comm’n*, Mem. Op. & Order, 17 FCC Rcd. 2051, 2056 ¶ 15 (2002). The Court should not

conclude that the FCC intended to abrogate the existing state-law filed tariff doctrines without clear evidence of that intention. *National Fed. of the Blind*, 420 F.3d at 337. The Opinion offers no support, either in the text of the Waiver Order or elsewhere, for the conclusion, that the FCC deferred to only a portion of state laws and procedures and did so *sub silencio*. Given the Waiver Order's brevity, such a conclusion cannot be correct.

For these reasons, the Court should vacate its discussion on pages 7048 and 7049 of the Opinion, and instead conclude that the filed tariff doctrine is fully applicable to Qwest's state-filed tariffs. The District Court therefore appropriately dismissed Davel's claims as barred by the filed tariff doctrine. The Court should not remand this matter, but should instead affirm the District Court's judgment.

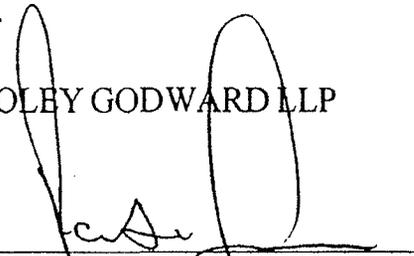
CONCLUSION

Because Qwest has demonstrated that the Court should rehear the matters addressed in its Opinion, Qwest respectfully requests alternatively that the Court: (1) affirm the District Court's Order (for the reasons stated in Parts III and IV, *supra*); (2) modify its analysis of the Waiver Order's effect on the filed tariff doctrine to state that it depends on a contested issue of fact (*see* Part I, *supra*); and/or (3) refer to the FCC the issue of whether the FCC intended in 1997 for the

Waiver Order to “supersede” the filed tariff doctrine beyond the limited period of the extension at issue there (*see* Part II, *supra*).

Dated: July 17, 2006

COOLEY GODWARD LLP

By: 

Patrick P. Gunn
Douglas P. Lobel
David A. Vogel
Lori R.E. Ploeger

Attorneys for Defendant-Appellee
QWEST CORPORATION

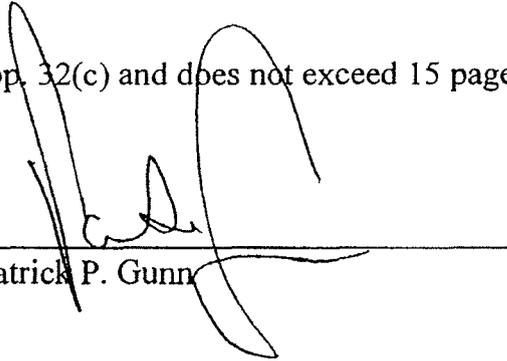
**CERTIFICATE OF COMPLIANCE PURSUANT TO
CIRCUIT RULES 35-4 AND 40-1**

I certify that pursuant to Circuit Rule 35-4 or 40-1, the attached petition for panel rehearing is:

 X Proportionately spaced, has a typeface of 14 points or more and contains 3947 words (petitions and answers must not exceed 4,200 words).

 Monospaced, has 10.5 or fewer characters per inch and contains words or lines of text (petitions and answers must not exceed 4,200 words or 390 lines of text).

 In compliance with Fed. R. App. 32(c) and does not exceed 15 pages.

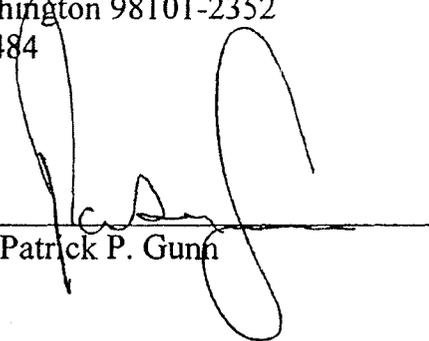


Patrick P. Gunn

CERTIFICATE OF SERVICE

I certify that on July 17, 2006, copies of the foregoing APPELLEE
QWEST CORPORATION'S PETITION FOR PANEL REHEARING were served
via electronic mail and first class mail on the following:

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Patrick P. Gunn

EXHIBIT B

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

The Honorable Marsha J. Pechman

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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'
REPLY IN SUPPORT OF 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

Plaintiffs Davel Communications, et al ("Payphone Providers") reply as follows:

A. QWEST IS TRYING TO REARGUE ISSUES IT ALREADY LOST ON APPEAL.

Defendant Qwest Corporation mischaracterizes both the law and the facts. This Court dismissed plaintiffs' PAL rate claims because it believed they were "barred under the filed-rate doctrine." Ex. 2, at 1. The Ninth Circuit reversed. Qwest now wrongfully suggests that opinion *only* held that the FCC's Waiver Order abrogated the filed-rate doctrine. *E.g.*, Response at 1-2, 4-5, 8-9. The Ninth Circuit's August 17 amended opinion forecloses that interpretation.

The Ninth Circuit specifically amended its opinion to make clear that neither Davel's independent claims for PAL rate refunds (arising under, *inter alia*, §§ 201 and 276 of the

1 1996 Communications Act) nor its referred Waiver Order refund claims were barred by the filed
2 rate doctrine, in part by adding the following paragraph:

3 In *Reiter*, the Supreme Court held that the claim that a carrier's rates were
4 not "reasonable," as required by Interstate Commerce Act, was not barred
5 by the filed-rate doctrine. 507 U.S. at 266. Davel's complaint arises under
6 §§ 201 and 276 of the 1996 Act. Section 201 is nearly identical to the
7 provision of the Interstate Commerce Act at issue in *Reiter*, requiring
8 telecommunications rates to be just and reasonable. Section 276 adds the
9 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 therefore are not precluded by the filed rate doctrine.***

10 Slip Op., at 9732 (emphasis added). Only as a "related reason" for its new, broader holding did
11 the Ninth Circuit also state that enforcement of the filed rate doctrine would be antithetical to the
12 Waiver Order itself. Slip Op., at 9732-33.

13 The Ninth Circuit clarified and broadened its filed rate holding in response to the
14 very arguments that Qwest now urges upon this Court – i.e., that the filed-rate doctrine still
15 applies to state filings, that the doctrine was only temporarily suspended by the Waiver Order,
16 that the suspension was only for 45 days, and/or that the FCC should be allowed, in the first
17 instance, to determine whether or not the filed-rate doctrine should apply to the Payphone
18 Provider's claims. *See, e.g., Ex. 3 (Qwest's Petition for Panel Rehearing)*, at 1-3, 7-10, 13-16.
19 The Ninth Circuit's consideration and rejection of Qwest's arguments is now the "law of the
20 case," and bars Qwest from relitigating these issues again before this Court. *United States v.*
21 *Lummi Indian Tribe*, 235 F.3d 443, 452 (9th Cir. 2000).

22 This Court previously also ruled that "[p]laintiffs' claim regarding fraud
23 protection rates is time barred under the applicable statute of limitations,"¹ and thus never
24 actually ruled upon the applicability of the filed rate doctrine to those claims. *Ex. 2*, at 1. As a

25 _____
26 ¹ Plaintiffs actually assert "claims" for fraud protection refunds, including statutory claims under the
Communications Act, and a common law claim for unjust enrichment.

1 prudential matter, the Ninth Circuit also clarified that it was not deciding issues upon which this
2 Court had not yet ruled – e.g., the applicability of the filed rate doctrine to plaintiff's fraud
3 protection rate claims. Slip Op., at 9733, n. 6.

4 The appellate court's caution in reviewing a Rule 12(b)(6) dismissal does not
5 detract from the breadth of its main holding regarding the inapplicability of the filed rate doctrine
6 here. If or when Qwest ever moves for dismissal of the plaintiff's fraud protection claims, the
7 Payphone Providers will reply. Unless those claims are dismissed,² however, plaintiffs must be
8 allowed to pursue those claims, along with their independent claims for PAL rate overcharges.

9 **B. CLAIMS SOLELY RELATING TO THE WAIVER ORDER SHOULD BE**
10 **STAYED, NOT DISMISSED.**

11 Regarding the issue of the stay, Qwest is still unable to find a single reported case
12 in which a court has dismissed (rather than stayed) an action that was referred to an agency when
13 the plaintiff was in danger of losing its claim due to the running of the statute of limitations.³
14 That absence of authority for dismissal speaks volumes about the weakness of Qwest's position.
15 Based both on the law of this circuit, and the direction in *Davel*, a limited stay of *only* the
16 Payphone Providers' referred Waiver Order claims is warranted.

17 Further, the only issue before the Court is whether the referred Waiver Order
18 claims should be dismissed or stayed – not whether any of the Payphone Provider's other claims
19 can be dismissed (or referred). *E.g.*, Slip Op., at 9753-54. As pointed out by the Ninth Circuit,
20 the normal course is to stay claims, such as the Payphone Providers' claims here, that might be
21 barred by the statute of limitations if they are dismissed. Slip Op., at 9753-54.

22 _____
23 ² As will be shown when Qwest must actually rely on evidence, not allegation, the fraud protection rate
24 claims are equally exempt from the filed-rate doctrine. Indeed, the *Davel* decision itself is the best
precedent on how to deal with that issue.

25 ³ The unreported oral ruling from the *Ton v. Qwest* case (Murray Decl., Ex. 1) is hardly persuasive
26 authority for dismissal, especially as the ruling is on appeal. Judge Stevens relied heavily on this Court's
(now superseded) order dismissing plaintiffs' claims in making his decision. Judge Stevens did not have
the advantage of considering the *Davel* decision, as that decision did not issue until almost a year later.

1 Qwest now also implores this Court to refer the non-issue of whether Qwest
2 "relied" upon the Waiver Order. Response, at 11-12. Procedurally, such a "request" is improper,
3 since it denies Davel the right to respond fully. *See* Fed. R. Civ. P. 7(b); CR 7(e)(4).

4 Qwest's "request" is also misleading and pointless. As required by the Ninth
5 Circuit's opinion, the Payphone Providers' have already filed a petition with the FCC to
6 determine whether the Waiver Order's refund obligation extends for only 45 days, or for the
7 entire period Qwest was in non-compliance. Esler Decl., Ex. 4. Both Qwest and the Payphone
8 Providers have also filed "ex parte" comments on issues surrounding the Waiver Order, in which
9 Qwest has already raised the red-herring of reliance. Esler Decl., Ex. 5, 6.

10 Since the legal issue of the scope of the Waiver Order is already before the FCC,
11 there is no point to referring any further issues surrounding that Order. However, to the extent
12 that Qwest seeks to have the FCC determine factual issues regarding Qwest's alleged non-
13 reliance, those issues are not before the FCC, nor should they be. Such factual development is
14 the province of this Court, and is a task to which the FCC is uniquely unsuited.

15 As to the "facts" Qwest alleges, the Payphone Providers look forward to putting
16 Qwest to its proof. However, despite a request by the Payphone Providers (Esler Decl., Ex. 7) to
17 confer "as soon as practicable" to develop a plan to discover those facts as required by Fed. R.
18 Civ. P. 26(f), Qwest has refused because "it is Qwest's position that discovery will *never* be
19 conducted." Esler Decl., Ex. 8 (emphasis added). Qwest's intransigence proves the Payphone
20 Provider's point – that an LR 16(a) scheduling order from this Court, which clearly orders Qwest
21 to begin providing the discovery expected in every civil case, is necessary. Esler Decl., Ex. 9.

22 **C. THE PLAINTIFFS' OTHER CLAIMS SHOULD PROCEED.**

23 As pointed out by the Ninth Circuit, Qwest "emphatically stated" that the
24 plaintiffs had unambiguous private rights of action to proceed in federal court to pursue these
25 damages claims. Slip Op., at 9743 n.3. Qwest undoubtedly insisted that the Payphone Providers
26 had such private rights of action (even independent of the Waiver Order) because it hoped to

1 create a *res judicata* defense against any later contrary decision by the FCC if this Court's
2 dismissal of such claims was affirmed. Having lost on appeal, Qwest should now be judicially
3 estopped from arguing, as it attempts to do at pages 6-9, that the Payphone Providers have no
4 such independent claims. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001).

5 Regardless, plaintiffs clearly pleaded claims for refunds independent of the
6 Waiver Order. Obviously, one such claim is plaintiff's claim for fraud protection rate refunds.
7 Even Qwest admits that those claims have nothing to do with the Waiver Order, and have not
8 been referred. Response, at 9-11. Qwest itself has not moved for a stay of these claims. Since
9 no party seeks to stay these claims, they must proceed.

10 As Qwest tacitly acknowledges, plaintiffs have also pleaded causes of action
11 under §§ 201, 202, 276, 407 and 416 of the Communications Act for damages stemming from
12 Qwest's PAL rate overcharges. Those claims are not barred by the filed rate doctrine. Slip Op.,
13 at 9732. Those claims are not barred at all by the statute of limitations. Slip Op., at 9756. Those
14 claims have not been referred.

15 Qwest's only argument seems to be that those statutory claims are intertwined
16 with the Waiver Order, such that they must succeed or fail based on the FCC's interpretation.
17 Nothing could be further from the truth. Congress, not the FCC, gave the Payphone Providers
18 the statutory right to sue for damages for Qwest's unlawful, discriminatory PAL rates.

19 Congress explicitly stated that, should Qwest violate any provision of the
20 Communications Act, it "shall be liable to the person or persons injured thereby for the full
21 amount of damages sustained in consequence of any such violation," including for all attorneys
22 fees spent in pursuing those damages. 47 U.S.C. § 206. Congress also authorized suit for such
23 damages in this Court: "Any person claiming to be damaged by any common carrier subject to
24 the provisions of this chapter . . . may bring suit for the recovery of the damages . . . in any
25 district court in the United States . . ." 47 U.S.C. § 207.

1 Congress, not the FCC, commanded that "[i]t shall be unlawful for any common
2 carrier [such as Qwest] to make any unjust or unreasonable discrimination in charges, practices .
3 . . . or services . . . or to make or give any undue or unreasonable preference or advantage" to itself
4 or anyone else. 47 U.S.C. § 202(a). The Payphone Providers allege that Qwest discriminated
5 against them, and in favor of itself, by charging the Payphone Providers higher, non-NST-
6 compliant rates while continuing to subsidize its own operations in violation of the law.

7 In Section 276, Congress again reiterated that subsidies and preferences for
8 Qwest's own payphone operations were illegal. 47 U.S.C. § 276(a). Congress, not the FCC,
9 specifically mandated that Qwest's rates be NST-compliant to eliminate such subsidies or
10 preferences. 47 U.S.C. § 276(b)(1)(C).

11 Thus, the Payphone Providers' damages claims would exist even if the FCC never
12 issued its Waiver Order, and regardless of the scope of that Order. The Ninth Circuit held those
13 claims are not barred by any defense Qwest has raised thus far. These claims are properly
14 brought in this Court, and there is no just reason to delay their pursuit any longer.

15 This Court should grant the plaintiff's motion, stay (but not dismiss) all claims
16 arising out of the Waiver Order, and order Qwest to conduct a Rule 26 conference, to provide
17 initial disclosures, to cooperate in preparing a scheduling order, to attend a scheduling
18 conference and to take all other steps required of civil litigants in this District.

19 DATED this 29th day of September, 2006.

20 MILLER NASH LLP

21 /s/ Brian W. Esler

22 Brian W. Esler
23 WSB No. 22168
24 Brooks Harlow
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26 Greg Montgomery
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Attorneys for Plaintiffs/
The Payphone Providers

PLAINTIFF PAYPHONE PROVIDERS' REPLY IN SUPPORT OF
MOTION FOR PARTIAL STAY PENDING FCC ACTION - 6

Civil No. 03-3680P
SEADOCs:248361.1

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CERTIFICATE OF SERVICE

I, Diane M. Bulis, do hereby certify that I have caused the foregoing REPLY TO 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:

Robert B. McKenna
Craig J. Brown
Suite 950
607 14th Street, N.W.
Washington, DC 20005

s/ Diane M. Bulis _____

October 5, 2006