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May 25,2007

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

Subject: Docket No. CC 96-128

Dear Ms. Dortch:

Qwest's May 17,2007 ex parte letter ("Letter") is a classic attempt to obfuscate. But if one takes the time to distill the facts from the 83 pages of Qwest's misleading statements, half-truths, and unsupported conclusory statements, even Qwest's own Letter ***confirms*** what the Payphone Providers[1] have been saying from the outset: There are *no* state or Commission orders holding that Qwest complied with the new services test in states relevant to the Payphone Provider's Petition.

Because Qwest—unlike every other RBOC in this docket—failed to support its existing PAL rates by filing its costs with its state commissions by April 15,1997, res judicata does not and cannot protect Qwest from a finding that it failed to comply with the new services test or Section 276 of the Telecommunications Act ("Section 276"). The Payphone Providers file this letter to remind the Commission that Qwest can only attempt to distract from the material facts, not change them. Chief among them:

- No state commission orders support Qwest's self-serving claims that Qwest complied with the new services test and Section 276 before 2002.
- Qwest's dial around compensation "certification" is irrelevant to whether Qwest complied with the new services test and Section 276.
- Qwest did not file required cost support data with state commissions.
- Qwest only complied with the new services test rate requirements in 2002 and 2003 after losing a long litigation battle at the Commission.

[1] The Payphone Providers are 51 payphone service providers. These entities are identified in the Payphone Provider's September 11,2006 petition ("Petition") filed in this docket.

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Ultimately the issue of whether Qwest violated the new services test or Section 276 should be for the jury to decide in the Payphone Providers' *Davel Case* against Qwest, which is pending before the Ninth Circuit.* The Commission, by granting the Payphone Providers' Petition, will enable that process to move forward. The Payphone Plaintiffs will then have the opportunity to recover the benefits that Congress and this Commission intended them to receive over ten years ago.

A. Qwest Cannot Rely on the Defenses of Res Judicata and Collateral Estoppel. Unlike the Other RBOCs in This Docket.

Qwest attempts to hide the absence of any state or Commission orders upholding its claims by alleging that state regulators in nine of its fourteen states conducted "active and probing studies" of its payphone rates and that "[t]he remedies the states ordered should be left untouched." Letter, Memorandum Attachment at 10, 12. Simply put, there are no state commission "remedies" in states relevant to the Petition. The proceedings Qwest cites either did not involve the new services test or resulted in orders holding that Qwest's PAL rates violated it. Attachment **A** to this letter contains the Payphone Provider's specific replies to Qwest's mischaracterizations of these state proceedings.

Qwest has only itself to blame for not having a res judicata defense, because Qwest failed to file cost data or seek approval of its basic payphone access line ("PAL") rates under the new services test until 2002-2003. The only three states where Qwest made timely PAL filings in an effort to comply with the new services test and a final order was entered were Arizona, Montana, and Oregon.[3] Those three states are excluded from the Petition and the *Davel* case,[4] precisely to avoid any res judicata or estoppel issues.

As a result, Qwest situation is unquestionable and materially different from that of the other RBOCs, despite Qwest's best efforts to disguise that fact. This Commission may be wary of entering an order that is contrary to state commission orders with respect to other RBOCs, but it has no such issues with respect to Qwest. The

[2] The Payphone Providers are parties to a claim proceeding against Qwest before the Ninth Circuit, which is captioned *Davel Communications, et al. v. Qwest* (the "*Davel Case*"). The Petition describes the *Davel Case* in greater detail.

[3] 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.

[4] Except as to Qwest's "Fraud Protection" rates, which have not been addressed in this docket.

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regulatory slate is clean, and the Commission may grant the Payphone Providers' Petition without impacting any state orders.[5] Indeed, the Petition was designed that way. Once the Commission grants the Petition, then the District Court jury can decide the facts, apply the law, and decide whether the Payphone Providers are entitled to a refund under the new services test or to damages for Qwest's violation of Section 276.[6]

B. Qwest's Self-serving Conclusions, Not State Commission Orders, Are Qwest's Only Support.

What is the basis for Qwest's claim that it complied with the new services test and Section 276? It is merely Qwest's *own opinion.* Qwest's Letter overflows with its own strident claims that it has complied with the law, yet Qwest cites no tribunal that has ever agreed with these claims:

- "Qwest's payphone access line rates were always just and reasonable and in compliance with the FCC's rules." Letter, Memorandum Attachment at **3.** *There is no citation to a state or Commission order for this claim.*

- "Qwest has always complied with the Commission's Payphone Orders." Letter, Ex Parte Attachment at 1. *There is no citation to a state or Commission order for this claim.*

- "Qwest's compliance with the 'new services test' was consistent with both the Commission's rules and the common understandings within the industry at the time." Letter, **Ex** Parte Attachment at 1. *There is no citation to a state or Commission order for this claim.*

Qwest's Letter contains page after page of similar, self-serving claims portrayed as fundamental truths. There are no state or Commission findings relevant to the Petition to support them. Moreover, the Payphone Providers' Petition does not seek a ruling on whether these self-serving claims are true or false. This is **a** fact question that is not before the Commission and should be left to the District Court.

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[5] The Commission would have had authority to preempt state commission orders contrary to the Petition under Section 276, but no such orders exist in this case.

[6] *See, e.g., Global Crossing Telecommunications v Metrophone Telecommunications,* 127 **S.** Ct. 1513, 1516 (2007), affirming the Payphone Providers' right to sue for damages in Federal Court for violation of Chapter 201 of Title 47 of the U.S. Code.

Qwest's opinions about its own compliance with the new services test and Section 276 are irrelevant. Qwest claims that it is the final arbiter of whether it has complied with the new services test and Section 276, and that regulators cannot disturb its determination. The Commission already rejected this argument many times. The Commission delegated jurisdiction over new services test review to the states, not Qwest. For example, the Commission stated in the 1997 *Order on Reconsideration* that:

> We require LECs to file tariffs . . . in the intrastate jurisdiction[] . . . *States* must apply these [new services test] requirements . . . We will rely on the *states* . . . *[S]*tates may, after considering the requirements of this order, approve the existing tariffs.

Order on Reconsideration, 11 FCC Rcd 21,233 at ¶ 163 *("Order on Reconsideration")* (emphasis added). And in the 1997 *Waiver Order,* the Commission said:

> [T]he requisite [LEC] *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. . . .

In re Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of ***1996,*** *Order,* 12 FCC Rcd 21,370 ¶¶ 18, 23 (Apr. 15, 1997) *("Waiver Order")* (emphasis added).

In 1999, the Commission repeated that "[d]etermination of the sufficiency of the LEC's compliance . . . . is a function *solely* within the Commission's and state's jurisdiction." *In the Matter of Ameritech, Memorandum Opinion and Order,* 14 FCC Rcd 18643 at ¶ 27 (1999) *("Ameritech").*

In 2002, the Commission again stated that "under the new services test and our precedent, BOCs bear the burden of affirmatively justifying their overhead allocations." *In the Matter of Wisconsin Public Service Commission,* 17 FCC Rcd 2,051 at ¶ 56 (2002) *("Wisconsin Order").*

It is beyond dispute that this Commission never ceded its authority over the new services test or Section 276 compliance to Qwest. Qwest's own conclusions about those laws carry no weight. It was Qwest's duty to comply with those laws, and the Payphone Providers (the intended beneficiaries) had no duty to force Qwest to comply, although they attempted to do so as a result of Qwest's intransigence. None of the other RBOCs agree with Qwest's conclusions, as those RBOCs obtained state review and approval of their rates based on their required cost support findings. The

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Commission cannot justify any order in favor of Qwest on the basis of state commission deference, *as there is no state commission order to which it can defer.*

C. Qwest's Dial Around Compensation "Certification" Is Irrelevant to Whether Qwest Complied With the New Services Test and Section 276.

Qwest alleges that its dial around compensation ("DAC") certifications constituted state or Commission approval of its payphone rates. The Commission rejected this argument long ago. This Commission held in 1999 that Qwest's DAC certifications were only sufficient to allow Qwest to receive DAC from IXCs and did not establish Qwest's compliance with the new services test or Section 276. *Ameritech,* 14 FCC Rcd 18643 at ¶ 12 (1999). DAC certifications like Qwest's were merely an unsubstantiated "assertion" by a carrier that it satisfied the new services test, "not . . . a demonstration of proof of the facts being asserted:"

> The Bureau stated that certification does not require a LEC to prove to the IXC payor that such LEC has satisfied each payphone compensation prerequisite. In reaching that conclusion, the Bureau examined the use of the ordinary meaning of the term "to certify" -- the formal assertion in writing of some fact -- and found that in the context of payphone compensation, the ordinary meaning of the term "certification" signifies an assertion or representation by the certifying party, *not, as Defendants' assert, a demonstration of proof of the* facts *being asserted.*

Id. at ¶ 16. Qwest's certification did not substitute for its obligation to comply with the new services test and Section 276:

> We [the FCC] emphasize that a LEC's certification letter *does not substitute* for the LEC's obligation to comply with the requirements as set forth in the Payphone Orders. The Commission consistently has stated that LECs must satisfy the requirements set forth in the *Payphone Orders,* subject to waivers subsequently granted, to be eligible to receive compensation. Determination of the sufficiency of the LEC's compliance, however, is a function *solely* within the Commission's and state's jurisdiction.

Id. at ¶¶ **16,** 27 (emphasis added). Qwest's "assertion" was sufficient to receive dial around compensation but not to prove compliance with the new services test.[7] The

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Indeed, Qwest's self-serving "certification" was demonstrated to be false and was swept aside on several occasions. For example, the WUTC rejected Qwest's claims that it had removed payphone subsidies from

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Commission explained this long ago, and Qwest's insistence on repeating this claim is disingenuous at best.

D. Qwest Did Not File the Required Cost Support Data With State Commissions.

Qwest claims that it did not need to file cost support data with state commissions justifying its payphone rates. This is wrong, and Qwest conceded that point over a decade ago. As the *Wisconsin Order* and the *Waiver Order* noted:

> [T]he "RBOC Coalition *concedes* that the Commission's payphone orders . . . mandate that the payphone services a LEC tariffs at the state level are subject to the new services test and that the requisite *cost-support* data must be submitted to the individual states." *Id.* at 21378, para. 18 (emphasis added).

Wisconsin Order at n.74. This concession was made by the RBOC Coalition (which included Qwest's predecessor US WEST) in 1997. Qwest cannot retract that concession now.

E. Qwest Onlv Complied With the New Services Test Rate Requirements After Losing a Long Litigation Battle.

In the end, Qwest finally complied with the rate-setting requirements of the new services test in 2002 and 2003. Why did it finally comply with section 276, albeit five years late? The reason is that in 2002 Qwest (and the other RBOCs) lost their long battle against the new services test. The Commission issued the *Wisconsin Order* in 2002, sweeping away Qwest's spurious objections to application of the new services test. The D.C. Circuit upheld the *Wisconsin Order* on appeal. *See New England Public Comm. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

Qwest argues that it carefully analyzed its payphone rates soon after the Commission required it to do so, but it is impossible to believe that Qwest properly applied the new services test during the years 1997 through 2002, prior to the issuance of the *Wisconsin Order*. During that time, Qwest as a member of the LEC Coalition maintained that it had virtually unlimited flexibility in setting payphone rates:

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its intrastate access rates on complaint by MCI and AT&T. *MCI Telecommunications Corp. v. Qwest*, 1999 W.L. 359773 at *18 (WUTC 1999). Likewise, the Oregon Court of Appeals held that Qwest had failed to properly follow the new services test in Oregon, one of the few states where Qwest actually **filed** cost studies and litigated the issue. *NPCC v. PUC.* 100 P.3d 776,778-779 (Or. App. 2004).

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> The Coalition asserts that BOCs have *virtually unlimited flexibility* in determining the overhead component of payphone line service rates because "the amount of overhead costs that are recovered in the rate does not affect whether the rate is based on costs." The LEC Coalition argues that any overhead loading a BOC might choose is "reasonable" for purposes of the new services test so long as it is justified by "some plausible benchmark."

Wisconsin Order, 17 FCC Rcd 2,051 at ¶ 55. The Commission rejected this argument and noted that "[w]e have *not* simply accepted any "plausible benchmark" proffered by an BOC. *Id.* at ¶ 56.

Even if Qwest analyzed its rates under the new services test at some point between 1997 and 2002, the fact that its payphone rates plummeted after issuance of the *2002 Wisconsin Order* demonstrates that Qwest was analyzing its rates in the wrong way.[8] The 2002 *Wisconsin Order* clarified the requirements that Qwest should have been following all along and did not make new law. This Commission has repeatedly stated that the *Wisconsin Order* did not alter or amend the new services test and simply explained Qwest's long-standing duties.[9]

It is not credible for Qwest to argue in this proceeding that it was correctly complying with the new services test from 1997 through 2002, when the Commission and the D.C. Circuit specifically rejected the rate setting methodology that Qwest used (which involved "unlimited flexibility" in setting payphone rates) during that period.

In the end, the Commission does not have to determine whether Qwest complied with the new services test or Section 276 to resolve the Payphone Petitioner's Petition. The Petition simply asks to Commission to clarify legal issues pertaining to the 1997 *Waiver Order*. The issue of whether the Payphone Petitioners have stated facts

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[8] The Payphone Providers have described Qwest's dramatic (and belated) rate reductions in previous ex parte filings and will not reiterate those points here. *See Payphone Providers' Ex Parte of July 21, 2006, Docket CC No. 96-128.*

[9] The Commission stated that "[i]n the [Wisconsin] Order released today . . . *[t]he Commission affirmed* its earlier conclusion that the payphone provisions of the 1996 Act require Bell Operating Companies to set their intrastate payphone line rates in compliance with the Commission's new services test and clarified certain aspects of how the March 2000 Order applied that test. *Today's Order thus confirms the Commission's earlier decisions regarding pricing of intrastate payphone lines . " FCC Releases Payphone Orders, 2002* FCC LEXIS 537 (emphasis added).

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sufficient to support their claim is ultimately for the jury in the Ninth Circuit *Davel Case*.

CONCLUSION

Qwest gambled that its unreasonable view of the new services test would prevail, and Qwest lost that gamble. Qwest's interpretation was so extreme that other RBOCs did not adopt it. This Commission should not protect Qwest from the consequences of its own decisions and failures to follow the law and the Commission's orders. Accordingly the Commission should grant the Payphone Plaintiffs Petition and so that the *Davel Case* can move forward.

Sincerely,

Brooks E. Harlow
David L. Rice

cc w/encl: Don Stockdale
Al Lewis
Deena Shetler
Randy Clarke
Dan Gonzalez
Nick Alexander
Scott Bergmann
Scott Deutchman
Ian Dillner
John Hunter
Tom Navin
Pam Arluk

Attachment A

The following is a state by state review of Qwest's belated rate reductions. It is beyond reasonable dispute that Qwest did not comply with the new services test rate reductions. In most cases, Qwest by its own admission (in Exhibit 2 to its May 18, 2007 Ex Parte Filing) did not complete new services test rate reductions until 2002, five years after the new services test requirements were put in place.

- Colorado - Qwest admits that it did not reduce its PAL, rates until July 15, 2002, in response to the 2002 *Wisconsin Order* and a show cause order from the Colorado Public Utilities Commission ("CPUC"). The Colorado PUC previously held that Qwest's "PAL and features rates were priced too high and ordered a PAL reduction," by Qwest's own admission. Exhibit 2 at 2; *See Colorado Payphone Ass'n. v. U S West*, 1999 WL 632854.

- Idaho – Qwest admits that it did not reduce its PAL rates until 2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 2. Previous PAL adjustments concerned "de-averaging" and "local free calling areas" by Qwest's own admission and were not related to the new services test.

- Iowa – Qwest admits that it did not reduce its PAL rates until 2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 3. Previous PAL adjustments were not related to the new services test. The Iowa Utilities Board ("IUB") proceeding cited by Qwest (Exhibit 2 at 2) is irrelevant. *See Re Payphone Services*, 1999 WL 686075 (Iowa U.B.). In that case, a payphone service provider asked the IUB to conduct a generic proceeding to determine whether the PAL rates of several ILECs, including Qwest, met the new services test. The IUB refused to do so because it did not want to conduct "single-service rate cases" for the ILECs and because the payphone service provider's request was "non-specificand unsupported." *Id.* **at** *3. The IUB's ruling was based on procedural deficiencies of the payphone service provider's request and did not find that Qwest's PAL rates met the new services test.

- Minnesota – Qwest admits it did not reduce its PAL rates until December 3, 2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 3. The proceeding cited by Qwest in its Exhibit 2 is irrelevant. The relevant order from the Minnesota Public Utilities Commission ("MPSC") does not mention the new services test at all. *Re Minnesota Independent Payphone Ass'n.*, 1999 WL **713632** (Minn. PUC). Instead, that case addressed whether Qwest must provide PAL at a discount to resellers, whether Qwest must unbundle "Automatic Number Identification service" and whether Qwest must discontinue providing "one-party flat-rate service" to payphone service providers. *Id.* at **1-2. Those issues are irrelevant to this case.

- Nebraska – Qwest admits it did not reduce its PAL rates until December 3, 2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 3. The Nebraska Public Service Commission ("NPSC") order referenced by Qwest contained no substantive conclusions at all. *Re Provisioning of Payphones in the State of Nebraska*, 2002 WL 1058387 (Neb. PSC). The order requested comments to address the impact of the *Wisconsin Order* without resolving any issues or expressing preliminary determinations. Id. at *2.

- New Mexico - Qwest admits it did not reduce its PAL rates until December 13,2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 4. The previous "general" rate reductions by Qwest had nothing to do with the new services test, which Qwest does not contest.

- North Dakota - Qwest admits it did not reduce its PAL rates until December 3,2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 4. The previous rate reductions by Qwest concerned "rate group consolidations" and "calling area changes" by Qwest's own admission, not the new services test.

- South Dakota - Qwest admits it did not reduce its Basic PAL rates until December 2,2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 5. The previous rate reductions by Qwest related to Smart PAL, which is a service not relevant to this proceeding. The Payphone Providers purchase Basic PAL, not Smart PAL.

- Utah – Qwest did not reduce its PAL rates until 2002, in response to the 2002 Wisconsin order. Exhibit 2 at 2. The previous rate adjustments by Qwest had nothing to do with the new services test.

- Washington – Qwest admits it did not reduce its PAL rates until August 28, 2003, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 5. The previous rate adjustments by Qwest did not involve the new services test, which Qwest does not contest.

- Wyoming - Qwest admits it did not reduce its PAL rates until December 13, 2002, in response to the 2002 *Wisconsin Order*. Exhibit 2 at 6. The previous rate adjustments by Qwest involved the Wyoming Telecom Act, not the new services test, which Qwest does not contest.

In every case, Qwest did not reduce its rates until 2002, five years after it was required to do so. Arizona, Oregon and Montana are irrelevant to the Petition, as the Payphone Providers' Petition does not involve those states. The Payphone Petitioners nevertheless note that the Oregon Court of Appeals overturned an Oregon Public Utilities Commission ("OPUC") order that approved Qwest's payphone rates. The Court of Appeals concluded that the OPUC did not correctly apply the new services test to Qwest's rates.