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Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., Room TW-325
Washington, DC 20554

Re: CC Docket No. 96-128 – *Effect of TON Services v. Qwest*

Dear Ms. Dortch:

The American Public Communications Council (“APCC”) urges the Commission to consider in this proceeding the very recent decision of the 10th Circuit in *TON Services, Inc. v. Qwest Corp.* (10th Cir., No. 06-4052, slip. op., July 23, 2007) (“*TON Services*”) a copy of which is attached. *TON Services* confirms this Commission’s obligation to mandate refunds as the statutory federal remedy for any Bell Operating Company’s (“BOC’s”) failure to comply with the new services test (“NST”), the *Payphone Orders*,¹ and Section 276 of the Communications Act,² independently of state law or procedural requirements. Two federal circuit courts of appeals have now spoken to this issue within the last fourteen months.³ Whatever deference to state proceedings the Commission might otherwise consider to be warranted in this case, such concerns cannot stand in the way of the clear need to enforce the federal rights, obligations, and remedies that are explicitly reaffirmed in the opinions of the 9th and 10th Circuit courts of appeals.

TON Services leaves no doubt that BOCs who failed to comply with the NST by April 15, 1997, were in violation of the Act and are liable for damages (*i.e.*, reparations, which are equivalent to refunds). *TON Services* also confirms that the Commission’s delegation of NST review to state commissions did not limit the BOCs’ liability for noncompliance with federal law. As *TON Services* makes clear, the BOCs’ substantive compliance obligations are independent of the procedural requirement to file their rates and costs with state commissions. As *TON Services* also makes clear, Section 276 and the *Payphone Orders* placed the burden squarely on the BOCs to bring their rates into compliance with the NST. Therefore, those BOCs that, unlike Qwest, may have complied with the procedural filing requirement did not thereby

¹ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 (“*First Payphone Order*”), recon. 11 FCC Rcd 21233 (1997) (“*First Payphone Reconsideration Order*”).

² 47 U.S.C. § 276.

³ See also *Davel Communications v. Qwest*, 460 F.3d 1075 (9th Cir. 2006) (“*Davel*”).

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avoid their substantive obligations to comply with the NST or their liability for refunds for failure to comply.⁴

TON Services also confirms the holding of *Davel* that neither the federal filed rate doctrine nor any related state law requirements can deprive payphone service providers (“PSPs”) of their rights to refunds of payphone line charges that violated the NST. *TON Services* reaffirms that the federal rights, obligations and remedies under Section 276 and the *Payphone Orders* must be uniformly interpreted and applied, regardless of any conflicting state law.

Finally, *TON Services* confirms the petitioners’ position that the Common Carrier Bureau’s *Waiver/Refund Order*⁵ was not a procedural “standstill” order but a substantive measure mandating full refunds in order to ensure timely, even if retroactive, compliance with the NST.

I. TON SERVICES CONFIRMS THAT SECTION 276 MANDATES REFUNDS

A. By Failing To Comply With the NST, All the BOCs Violated Section 276 and Must Pay Refunds as a Matter of Federal Law

In *TON Services*, the 10th Circuit held that a BOC that does not comply substantively with the requirements of the NST is in violation of 276(a) and is liable for damages.

If Qwest’s rates did not comply substantively with the requirements of the NST by failing to be cost-based, containing subsidies, or discriminating in favor of Qwest, TON is entitled to seek damages under § 206 for Qwest’s violations of § 276(a).

TON Services at 34-35. This point – that PSPs are entitled to reparations for a BOC’s substantive violation of the NST -- is fundamental to all the petitions before the Commission. Not only Qwest, but all the BOCs, were required to “comply substantively with the requirements of the NST,” and where they failed to do so,⁶ the PSPs were entitled to seek damages, *i.e.*, refunds, from the BOCs. It does not matter whether PSPs sought such damages by filing

⁴ Thus, the *TON Services* rulings affect the petitions before the Commission as well as the Qwest court cases. Although the other BOCs, unlike Qwest, may have made some filings for state commission review, *e.g.*, by filing their existing payphone line rates and/or cost data, such filings did not insulate the BOCs from liability where the rates charged after April 15, 1997, did not comply with the NST.

⁵ *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997) (“*Waiver/Refund Order*”).

⁶ There is little dispute that in the states represented by petitioners, the BOCs’ rates were out of compliance with the NST for many years. In several of the states (*e.g.*, Massachusetts, Illinois) there are explicit state commission findings to that effect.

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complaints in federal court or by initially pursuing relief with the state commissions, to which the Commission assigned tariff review functions..

Moreover, in the face of this fundamental proposition, the Commission's "delegation" of review to state commissions could not and did not relieve the BOCs of their liability for reparations for noncompliance with federal law. It would violate Section 276 if, as a result of the assignment of review functions to state commissions, BOCs were liable for damages only if PSPs went to federal court (as in the *Davel* and *TON Services* cases) but could escape liability for the very same violation if PSPs participated in the state review process established in the *Payphone Orders*.⁷ That result also would violate the *Payphone Orders* and the Commission's intent in adopting those orders. PSPs, in effect, would be unjustly penalized for having initially pursued their refund claims before the state commissions pursuant to the Commission's "delegation" of review in the *Payphone Orders*..

B. The Commission's Delegation of Review to State Commissions Did Not Limit the BOCs' Liability for Refunds

Several other rulings in the *TON Services* opinion confirm that PSPs are entitled to refunds regardless of the forum and that the Commission's initial delegation of review to state commissions did not alter the BOCs' liability for noncompliance with federal law.

Significantly, the court in *TON Services* explicitly distinguishes the "procedural" violation of failing to submit rates and costs for state commission review from the "substantive" violation of failing to ensure actual "substantive" compliance with the NST. *Id.* at 34. Qwest, of course, committed a procedural violation (failing to file its rates and costs) as well as a substantive violation (failing to comply with the NST), while the other BOCs generally did make some type of procedural filing which nonetheless failed to "comply substantively with the requirements of the NST." *Id.* *TON Services* makes clear that independently of any procedural violation, substantive violation of the NST still gives rise to liability:

Even if a procedural violation of FCC orders does not give rise to statutory liability, a substantive evaluation of Qwest's NST compliance would nevertheless be necessary If Qwest's rates did not comply

⁷ Although the issue is not explicitly addressed in *TON Services*, as APCC has previously explained, Congress entrusted implementation of Section 276 solely to the FCC. *Under United States Telecomms. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) ("*USTA II*"), the Commission could not lawfully delegate authority to the states to implement and enforce federal law while abdicating responsibility for effective supervision of their decisions. It would have been a blatant violation of *USTA II* if the involvement of state commissions deprived PSPs of an effective remedy for BOCs' violations of Section 276. It is precisely for that reason that the Commission retained jurisdiction to ensure BOC compliance with Section 276. *See Waiver/Refund Order*, 12 FCC Rcd at 21379, ¶ 19, n.60.

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substantively with the requirements of the NST . . . TON is entitled to seek damages under § 206

Id. Moreover, just as a procedural *violation* is to be distinguished from a substantive violation, procedural *compliance* does not equate to substantive compliance – nor does it excuse a substantive violation. By filing their rates and costs with state commissions under state procedures, the non-Qwest BOCs could not and did not automatically relieve themselves of their burden to ensure substantive NST compliance or of their liability to PSPs for substantive noncompliance.

The 10th Circuit repeatedly stresses that this burden of ensuring substantive NST compliance falls squarely on the BOCs. As the court states:

[The FCC’s] orders make clear the Commission’s intention that LECs are to bear the burden of demonstrating NST compliance to regulators.

TON Services at 12. And again:

A separate line of FCC adjudicatory orders distinguishes the relatively easy process of LEC “certification” for the purposes of receiving per-call compensation, . . . from the far more burdensome process of ensuring actual NST compliance.

Id. at 14. And yet again:

[M]any of the FCC’s orders specify LECs bear the burden of demonstrating or justifying their tariff rates to state regulators and are responsible for ensuring their rates are NST compliant. *See, e.g.,* New Services Test Order, 17 F.C.C.R. at 2069 ¶ 158; Bureau Wisconsin Order, 15 F.C.C.R. at 9881, 9882 ¶¶ 9, 11; Waiver/Refund Order, 12 F.C.C.R. at 21379 ¶ 18.

TON Services at 31-32.

The BOCs’ burden, moreover, was different from the burden that a carrier typically bears of showing regulators that a rate change initiated by the carrier is reasonable. Even if they initiated no rate changes, the BOCs had to affirmatively demonstrate that their *existing* rates complied with the NST. As a result of the enactment of Section 276 and the adoption of the *Payphone Orders*, BOCs whose existing rates did not satisfy the NST *were out of compliance* until they made a remedial rate filing that did comply. Thus, it wasn’t sufficient for BOCs to file their existing rates and cursory cost information with state commissions as a “certification” of compliance. If there was no actual compliance with the NST as of April 15, 1997, the BOCs were in violation of federal law and are liable for refunds.

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C. The 10th Circuit's Filed Rate Doctrine Analysis Confirms That State Commissions Are Precluded from Applying State Law to Deny Refunds

The *TON Services* court's filed rate doctrine analysis also confirms that state commissions' application of state law cannot limit the BOCs' liability for refunds. The court agreed with *Davel* that the filed rate doctrine "does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirements, even where the effect of enforcement would be to change the filed tariff" *Davel* at 1085, *quoted in TON Services* at 21. Now two U. S. Circuit Courts of Appeal have explicitly addressed that precise question and both have expressly rejected the BOCs' filed rate doctrine defense.

Moreover, it makes no difference whether a court or state commission considers federal or state law doctrines as a bar to refunds, because "[s]tate filed rate doctrines are . . . preempted by 47 U.S.C. §276(c)." *TON Services* at 20-21, n. 14. Indeed, any application of state law by a state commission which precluded refunds would be similarly inconsistent with enforcement of the "command of the very regulatory statute giving rise to the tariff-filing requirements."⁸ The Court recognized that "as the Waiver/Refund Order expressly anticipated that PSPs might be entitled to pay PAL rates lower than those on file during the waiver period, an application of the filed rate doctrine would be contrary to the purposes behind the congressionally-sanctioned regulatory scheme." *Id.* at 25.

D. *TON Services* Confirms that Refunds Are Necessary to Ensure Uniform Application of Federal Law

Throughout its decision, the 10th Circuit expresses the principle, argued by APCC and the PSP petitioners before this Commission, that implementation and enforcement of the FCC's *Payphone Orders* is a matter of federal law that must be uniformly applied throughout the country. The court directed that this matter be referred to the Commission under the doctrine of primary jurisdiction due to the need for "uniformity in interpretation of the comprehensive regulatory scheme."⁹ The Commission's mandate was "to carry out, as quickly as

⁸ For example, the "retroactive ratemaking" principle relied on by the Illinois Commerce Commission in denying refunds is preempted. *See* Illinois Commerce Commission, *Investigation into Certain Payphone Issues as Directed in Docket 97-0225*, ICC Docket No. 98-1095, Interim Order at 42 (November 12, 2003) ("*ICC Order*"). A state commission's denial of refunds is flatly inconsistent with the Commission's regulations because the Commission expressly required the BOCs to comply with the NST no later than April 15, 1997. The Commission had to require timely compliance in order to carry out Section 276(a), which prohibited BOC discrimination after the effective date of the Commission's regulations, which was April 15, 1997. Denying refunds permitted the BOCs to be out of compliance from April 15, 1997, until they finally revised their rates to comply, many years after the deadline.

⁹ *TON Services* at 33. Similarly, the 9th Circuit's *Davel* decision stressed the need for uniformity, albeit primarily in relation to the *Waiver/Refund Order*, which is discussed in the next section.

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practicable,^[10] Congressional intent to promote competition in the telecommunications industry.” *Id.* at 25. As the court recognizes, uniform refunds are necessary to effectuate “the Congressional command in Section 276(a) that PAL tariff rates not include subsidies or result in price discrimination.” *Id.* at 23-24 n. 16.

* * *

In summary, the 10th Circuit in *TON Services* clearly recognizes that Section 276 required the Commission to establish a comprehensive, uniform national scheme to promote competition and deployment in the payphone market. To stand by idly and allow various state jurisdictions to reach conflicting and contradictory interpretations and enforcement of this Commission’s *Payphone Orders* would be flatly “contrary to the purposes behind the congressionally-sanctioned regulatory scheme.” *Id.* at 25. Furthermore, this Commission never intended such a result. From the outset in the *First Payphone Order*, implementation of the Commission’s NST requirement was one of only two areas where the Commission expressly preempted any inconsistent state requirements, recognizing the need for a nationally uniform approach for implementing the cost-based rate requirement of Section 276(a). *First Payphone Order*, 11 FCC Rcd at 20614 ¶ 147. While numerous states have enforced the Commission’s requirement that NST-compliant rates actually be effective no later than April 15, 1997, by ordering refunds of rates charged in excess of the NST requirement, other states have not, thereby permitting non-NST compliant rates to continue in effect for years after the FCC’s mandatory deadline of April 15, 1997. It is now incumbent upon the Commission to enforce Section 276 directly by requiring refunds of any charges that exceeded NST levels after April 15, 1997.¹¹

II. TON SERVICES RECOGNIZES THAT THE COMMON CARRIER BUREAU’S WAIVER/REFUND ORDER INDEPENDENTLY MANDATES REFUNDS OF NON-COMPLYING PAYPHONE LINE CHARGES

The 10th Circuit also gives direct support to the arguments made by the petitioners here that the Commission’s *Waiver/Refund Order* and the direct commitments of the RBOCs

¹⁰ The Commission had to complete its rules no later than nine months after enactment of Section 276, and the BOCs were prohibited from discriminating after the effective date of the rules. 47 U.S.C. §§ 276(a), (b).

¹¹ Contrary to Qwest’s argument (*see* letter to Marlene Dortch, FCC Secretary, from Lynn Starr, Qwest (August 3, 2007)), the 10th Circuit in *TON Services* has made important rulings on key issues in this proceeding. The force of these rulings is not diminished by their Rule 12(b)(6) context: they involve issues of law, not fact. There are no essential facts in dispute in the cases; rather, all that is necessary is for the Commission to decide the disputed issues of law, to rule that refunds are required by law and to order the Bell Companies to provide such refunds to the petitioning PSPs.

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themselves in the “RBOC Coalition letters” of April 10 and 11, 1997, are independent bases for mandating refunds.

Throughout its decision, the 10th Circuit correctly construes the *Waiver/Refund Order*, not as a procedural “standstill” order, but rather as a substantive measure to ensure timely (though retroactive) NST compliance by the BOCs despite their failure to meet the filing deadline for submitting rates and costs to state commissions. The court notes that the Commission justified the *Waiver/Refund Order* “as a means of furthering the Commission’s overall policies in implementing Section 276(a)” and of “attempting to carry out, as quickly as practicable, Congressional intent to promote competition in the telecommunications industry” *TON Services* at 24-25. As the Bureau itself did when it issued the order, the court clearly attaches far more than procedural importance to the *Waiver/Refund Order*.¹²

More specifically, the court explicitly interprets the *Waiver/Refund Order* as “specifying that an LECs’ reliance on the waiver required it to provide refunds for the difference between its *NST-compliant* rates and its prior rates.” *Id.* at 24 (emphasis added). Similarly, the court explicitly interprets the BOCs’ letters of April 10 and 11, 1997, as “explicitly promis[ing] the FCC that, notwithstanding the filed rate doctrine, the BOCs would ‘voluntarily undertake’ to provide a ‘retroactive rate adjustment’ in the event their *NST-compliant* rates were lower than their prior rates in exchange for permission to delay the effective date for *NST-compliant* tariffs.” *Id.* at 23 n. 16 (emphasis added). Further, the court specifically confirms that the *Waiver/Refund Order* “emphasized the link between *NST compliance* and an LEC’s qualifications to recover per-call compensation” (*id.* at 9)(emphasis added) because “in exchange for the ability to receive per-call compensation as scheduled, the BOCs volunteered to reimburse or credit PSPs in states where the new, *NST-compliant* rate was lower than the prior tariff rate”(*id.* at 10)(emphasis added).

These findings are a clear recognition that the refund requirement of the *Waiver/Refund Order* is far more than a mere procedural requirement that the BOC pay the difference between its prior rates and filed rates that only *purported* to be *NST-compliant*. It is a requirement that the BOC pay the difference between its prior rates and *NST-compliant* rates for the period up to the date when *NST-compliant* rates “become effective.” *Waiver/Refund Order* ¶ 19.

* * *

In summary, *TON Services* provides compelling authority for this Commission to enforce Section 276 and its *Payphone Orders* (1) by declaring that failure to comply with the NST is a

¹² Again, the court emphasized that refunds pursuant to the *Waiver/Refund Order* can be provided consistently with the filed rate doctrine because they “would have applied to all PSP customers and would have effected the Congressional command in Section 276(a) that PAL tariff rates not include subsidies or result in price discrimination.” *TON Services* at 23-24. The court would hardly have made this statement if it viewed the *Waiver/Refund Order* as merely a procedural standstill order.

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violation of Section 276, (2) by ordering payment of refunds by the BOCs that failed to comply with the NST, and (3) by holding that any inconsistent state decision is preempted pursuant to Section 276(c). The Commission must correct the conflicting and often contradictory state commission interpretations of this Commission's *Payphone Orders* and ensure that refunds are provided so that the Commission's regulations are uniformly applied to ensure NST compliance as of the April 15, 1997, deadline, as Section 276 requires.

Sincerely,



Albert H. Kramer
Robert F. Aldrich

Enclosure

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