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Ex Parte Presentation

August 31, 2007

By Electronic Filing

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

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association et al., Petitions for Declaratory Ruling

Dear Ms. Dortch:

On August 27, 2007, Albert H. Kramer, representing the American Public Communications Council ("APCC"), met with Dan Gonzalez, Chief of Staff. We discussed the views of APCC as reflected in its previous filings with respect to the above-referenced proceeding and the New Services Test. Among other things, we discussed the recent decision of the 10th Circuit court of appeals in *TON Services v. Qwest Corp.* (10th Cir., No. 06-4052, slip. op., July 23, 2007) ("*TON Services*"), including the matters discussed in APCC's ex parte submission of August 8, 2007.

In addition, we discussed how *TON Services* supports a position taken in earlier ex parte submissions in this proceeding by APCC and others – specifically, that the Common Carrier Bureau's *Waiver/Refund Order*[1] cannot legally be interpreted as granting a waiver of the statutory NST requirement that allowed the BOCs to charge non-compliant rates – in violation of the statute -- without requiring full refunds to ensure retroactive compliance with the statute.

The Bell Operating Companies ("BOCs") have argued that the *Waiver/Refund Order* did not require them to refund any non-NST-compliant rates charged to payphone service providers ("PSPs") after May 19, 1997. In other words, the BOCs contend that the *Waiver/Refund Order* allowed them to remain out of compliance with the NST until the state commissions completed their NST review proceedings, with no need to retroactively cure such noncompliance, no matter how long the state review proceedings took. *TON Services* confirms that this is a legally impermissible interpretation of the *Waiver/Refund Order*.

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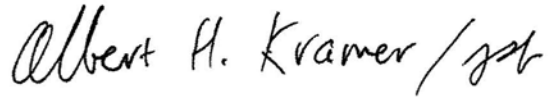
[1] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997) ("*Waiver/Refund Order*").

TON Services affirms what the Commission itself has previously held -- that the BOCs' failures to comply with the new services test violated Section 276(a) of the Communications Act, which prohibited the BOCs from discriminating in favor of their own payphones "after the [April 15, 1997] effective date of the rules prescribed pursuant to [Section 276(b)]."[2] The Commission, of course, had no authority to waive such a statutory requirement. Clearly, the *Waiver/Refund Order* cannot reasonably be construed as granting the BOCs a waiver that the Commission had no authority to give. Therefore, the only permissible interpretation of the *Waiver/Refund Order* is that the Commission did *not* grant the BOCs an indefinite waiver of the NST requirement, but rather conditioned the waiver in order to ensure retroactive compliance with Section 276(a), by requiring the BOCs to refund any charges collected in excess of NST-compliant rates.

Sincerely,



Albert H. Kramer

cc: Dan Gonzalez

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[2] 47 U.S.C. §276(a). *See TON Services* at 34-35 ("If Qwest's rates did not comply substantively with the requirements of the NST . . . , TON is entitled to seek damages under §206 for Qwest's violations of §276(a)"). *See also Wisconsin Public Service Commission*, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2052 ¶ 2 (2002), *aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).