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EX PARTE

Filed electronically via ECFS

September 26, 2007

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

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

Dear Ms. Dortch:

On September 25, 2007, Melissa Newman, Craig Brown, Jerry Thompson and Lynn Starr, all of Qwest, and David Solomon, representing Qwest, met in separate meetings with Dana Shaffer, Al Lewis, Don Stockdale and Randy Clarke of the Wireline Competition Bureau, and with Al Lewis, Randy Clarke, Pamela Arluk, Lynne Engledow of the Wireline Competition Bureau and Tamara Preiss, Christopher Killion, Diane Griffin Holland and Paula Silberthau of the Office of General Counsel to discuss the above-captioned proceeding.

The attached documents were used as the basis for discussion.

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

Sincerely,

/s/ Lynn Starr

Attachments

Copy (w/attachments) via email to:
Dana Shaffer
Al Lewis
Don Stockdale
Randy Clarke
Pamela Arluk
Lynne Engledow
Tamara Preiss
Christopher Killion
Diane Griffin Holland
Paula Silberthau

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

September 25, 2007

Qwest
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THE TRUTH ABOUT PAYPHONE COMPENSATION AND QWEST

- The recent 10th Circuit opinion in TON Services is not of decisional significance to the issues pending before the Commission.

- The Commission did not require BOCs relying on existing payphone compensation tariffs to file anything new with the states by 1997, including new tariffs or new cost support information.
  - No New Tariff Filing Requirement
  - No New Cost Support Filing Requirement

- The credit provided for in the Limited Waiver Order applies only until May 19, 1997.

- Like the other BOCs, Qwest's payphone rates have been reviewed by numerous state commissions.

THE TRUTH ABOUT PAYPHONE COMPENSATION AND QWEST

- ***The recent 10th Circuit opinion in TON Services is not of decisional significance to the issues pending before the Commission.***
  - *TON Services* involved an appeal of the grant of Qwest's motion to dismiss TON's complaint. As the 10th Circuit indicated: "At this stage of the litigation, . . . the procedural posture of the case requires all allegations in the complaint to be construed in TON's favor. . . ." *TON Servs., Inc. v. Qwest Corp.*, No. 06-4052, 2007 U.S. App. LEXIS 17469, at *30 (10th Cir. 2007). The court simply reversed the dismissal and ordered that the case be stayed pending a potential primary jurisdiction referral to the FCC.
  - Any statement that may nonetheless be read as making conclusions on ultimate factual or legal issues in the pending litigation may be further clarified or resolved as that case progresses, e.g., in Qwest's pending petition for rehearing or otherwise, assuming the case in not dismissed pursuant to the statute of limitations, which the 10th Circuit recognized might occur.
  - In any event, the Commission has full legal authority to rule on the matters before it. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

- ***The Commission did not require BOCs relying on existing payphone compensation tariffs to file anything new with the states by 1997, including new tariffs or new cost support information.***

  No New Tariff Filing Requirement
  - The Commission did not require the re-filing of tariffs by those BOCs relying on existing tariffs to comply with the new services test. Rather, consistent with its general approach in this area, it left that issue to the states: "Where LECs have already filed intrastate tariffs for these services, states may, after considering the requirements of this order, the Report and Order, and Section 276, conclude: 1) that existing tariffs are consistent with the requirements of the Report and Order as revised herein; and 2) that in such case no further filings are required." *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order on Reconsideration, 11 FCC Rcd 21233, 21308 ¶ 163 (1996) ("*Payphone Compensation Reconsideration Order*").
  - The Common Carrier Bureau explicitly rejected a request from APCC that "the Commission 'must simply order all tariffs to be refiled.'" *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 12 FCC Rcd 21370, 21378 ¶ 17 (CCB 1997) ("*Limited Waiver Order*"). Specifically, the Bureau held that "APCC's proposal to require the refiling of all intrastate payphone service tariffs would unduly delay, and possibly undermine, the Commission's efforts to implement Section 276 . . . ." *Id.* at 21380 ¶ 21.
    - In rejecting APCC's argument that the Commission should require the re-filing of *all* payphone tariffs, the Commission necessarily <u>rejected</u> APCC's argument that "[t]he RBOCs should *not be* left to decide for

themselves which existing tariffs meet the new services test." Letter from Albert H. Kramer to Mary Beth Richards (Apr. 11, 1997) (emphasis in original).

No New Cost Support Filing Requirement

- As noted above, the Commission left to the states the issue of how to deal with BOCs relying on existing payphone compensation tariffs. *Payphone Compensation Reconsideration Order*, 11 FCC Rcd at 21308 ¶ 163.
- The fact that the Common Carrier Bureau ordered the filing of cost studies in a particular case four years later underscores the conclusion that no underlying requirement existed. *See Wisconsin Public Service Commission*, 15 FCC 9978, 9981 ¶ 6 (CCB 2000). On review, the Commission also did not indicate any pre-existing cost study requirement existed. *See Wisconsin Public Service Commission*, 17 FCC Rcd 2051 (2002).
- In their post-1997 review of Qwest's payphone compensation tariffs, no state found that prior Commission orders required the filing of additional cost support data to support these pre-existing tariffs. Indeed, some states have found the opposite. *See, e.g., In re Qwest Corp.*, Order No. 01-810, 2001 WL 1286044 (Or. PUC Sept. 14, 2001), *rev'd on other grounds*, *Northwest Pub. Communic'ns Council v. Pub. Util. Comm'n of Or.*, 100 P.3d 776 (Or. Ct. App. 2004) ("[Payphone association] NWPA asserts that in order to comply with the new services test, Qwest must submit studies and cost data. We disagree. We find NWPA's reading of FCC requirements to be overly formal. The FCC requires only that rates be cost based and in compliance with the new services test. The new services test requires a showing that rates for a service include direct costs and reasonable overhead. Beyond that, the FCC has not specified what kind of evidence is necessary to determine whether PAL rates satisfy the new services test."); *In re Payphone Services*, Docket No. INU-99-1, Order, 1999 PUC LEXIS 917, at *7 (Iowa U.B. July 30, 1999) (Iowa Utilities Board refused to open a challenge to Qwest's payphone compensation rates, stating that Qwest, which had not made a new cost support showing, had nevertheless "made at least a prima facie showing that its preexisting rates for a pay telephone line are consistent with applicable FCC requirements."). States in other regions (e.g., California and Florida) similarly did not interpret FCC rules as requiring the filing of new costs studies for existing tariffs.

- ***The credit provided for in the Limited Waiver Order applies only until May 19, 1997.***
  - The *Limited Waiver Order* gave those carriers who determined their existing payphone rates were not compliant with the new services test 45 days (until May 19, 1997) to file new tariffs. The credit applied only to a "LEC who seeks to rely on the waiver granted in the instant Order" by submitting "newly tariffed rates," and the Bureau repeatedly referred to its actions as "limited," of "limited duration," or of "brief duration." 12 FCC Rcd at 21370 ¶ 1, 21371 ¶ 2, 21379 ¶ 19, 21380 ¶ 21, 21381 ¶ 23, 21382 ¶ 25. It is apparent from the

structure and language of the order that the credit would be available from the effective date of any newly filed May 19, 1997 tariffs back to April 15, 1997.

- In any event, Qwest reviewed all of its TSLRIC studies on file with, or available to, the state commissions in its region and determined that its existing tariffs complied with the new services test. Accordingly, consistent with the Bureau's recognition that only "some" LECs in "some" states would be re-filing tariffs, *id.* at 21376 ¶ 14, 21381 ¶ 23, Qwest did not "seek to rely" on, and did not file "newly tariffed rates" pursuant to, the *Limited Waiver Order*. *Id.* at 21370 ¶ 2. Thus, the limited credits provided in the *Limited Waiver Order* do not apply to any determination that Qwest's pre-existing tariffs did not comply with the new services test.

- ***Like the other BOCs, Qwest's payphone rates have been reviewed by numerous state commissions.***
  - In 1997, Qwest examined its TSLRIC studies for its Payphone Access Line and other payphone services for its 14 states. These cost studies were on file with state commissions in 12 of the 14 states, excluding Iowa and North Dakota. Qwest compared existing payphone rates with cost studies for all 14 of its states and concluded that its rates were compliant with the FCC's new services test. In May 1997, Qwest certified to the FCC and all 14 state commissions in its region that it complied with the requirements for payphone compensation, which included compliance with the new services test.
  - Ten of these 14 state commissions subsequently investigated and/or formally reviewed Qwest's payphone rates, consistent with the Commission's intent that states play the leading role in this area. Qwest had informal discussions with all of its state commissions. The four states that chose not to have investigations were Idaho, North Dakota, Utah, and Washington.
    - No complaints were filed in Idaho or North Dakota relating to Qwest's payphone rates, unlike all of the other states.
    - In Utah, in April 1997 a complaint was filed regarding all local exchange carrier payphone rates and the Utah commission referred those complaints to individual local carrier rate investigations, including an on-going rate case for Qwest. No further payphone complaints were filed in that state rate investigation.
    - In Washington, a payphone rate investigation was completed in 1995, resulting in a PAL rate reduction.
  - For a summary of Qwest's state Payphone Access Line activity, *see* Qwest Letter to Marlene H. Dortch, CC Docket No. 96-128, Attachment A (June 28, 2007) (appended hereto).

ATTACHMENT A

STATE PAYPHONE ACCESS LINE ACTIVITY, 1997-2002—QWEST CORPORATION (FORMERLY U S WEST COMMUNICATIONS, INC.)

Prior to 1997, Qwest Corporation ("Qwest") conducted total-service long run incremental cost ("TSLRIC") studies for "smart" payphone access line (or "PAL") services in all of its states as part of its overall efforts to comply with the Federal Communications Commission's ("Commission") payphone rules. Because "smart" PALs were necessary to support the newly unbundled Qwest payphone services, Qwest filed new "smart" payphone access line tariffs in all fourteen states in early 1997. In contrast, for "dumb" PAL services -- those generally used by independent payphone providers -- Qwest already had TSLRIC studies on file with, or available to, 12 of its state commissions that permitted them to determine whether Qwest's "dumb" PAL rates complied with the new services test.[1] Qwest reviewed these cost studies in April of 1997 and determined that they demonstrated Qwest's "dumb" PAL rates compliance with the new services test.

In 1997, Qwest delivered a certification (hereinafter, "Payphone Certification") to the state commission in each of its fourteen states, as well as this Commission, that it complied with all requirements necessary for it to qualify for payphone compensation, which included compliance with the new services test. In addition, the majority of the state commissions in Qwest's region specifically investigated and/or formally reviewed Qwest's rates for "dumb" PAL services prior to 2002.

ARIZONA. On January 15, 1997, Qwest filed revisions to its Arizona intrastate tariffs to add its new **"**smart" PAL service. On April 15, 1997, the Arizona Corporation Commission ("Arizona Commission") initiated a rate proceeding where it specifically conducted a new services test analysis.[2] The Arizona Commission also approved Qwest's PAL tariffs, subject to further examination and true-up.[3] In May of 1997, Qwest delivered a Payphone Certification to the Arizona Commission. On December 31, 1998, the Arizona Commission approved a settlement agreement between the Arizona Commission staff and the Arizona Payphone Association, which reduced Qwest's dumb PAL rates, retroactive to April 15, 1997.[4] In approving the settlement,

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[1] The majority of Qwest's states had either statutory obligations or commission rules that required Qwest to price its retail services above TSLRIC or its equivalent. As a matter of practice, commissions required Qwest to have TSLRIC studies on file with the commission, or to have studies available upon request by commission staff. In 1997, the two states that did not have requirements for cost studies for payphone services were Iowa and North Dakota.

[2] *See In the Matter of the Application of U S WEST Communications, Inc. Filing to Revise its Network Services Tariff (Public Access Line Services)*, Docket No. T-01015A-97-0024, Decision No. 61304 ¶ 4 (Dec. 3, 1998) ("*Arizona Order*").

[3] *Id.* at Settlement Agreement ¶ 5.

[4] *See Arizona Order* ¶ 5.

the Arizona Commission stated that "[t]he rates and charges contained in the Agreement are just and reasonable and in compliance with all applicable state and federal law."[5]

COLORADO. On January 15, 1997, Qwest filed revisions to its Colorado intrastate tariffs to add its new **"**smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Colorado Public Utility Commission ("Colorado Commission"). On March 31, 1998, the Colorado Payphone Association filed a complaint alleging that Qwest's "dumb" PAL rates were not in compliance with the new services test. On May 4, 1998, the Colorado Commission adopted an order reducing, on a prospective basis, Qwest's "dumb" PAL rates in order to comply with the new services test.[6] Contrary to the payphone providers' assertions,[7] the rates ordered by the Colorado Commission were final, though the Colorado Commission noted that Qwest would be required to comply with this Commission's "future specific directives regarding the pricing of payphone services."[8]

IDAHO. On January 15, 1997, Qwest filed revisions to its Idaho intrastate tariffs to add its new **"**smart" PAL service. Preexisting "dumb" PAL rates were unchanged. In May of 1997, Qwest delivered a Payphone Certification to the Idaho Public Utilities Commission ("Idaho Commission"). No complaints were filed with the Idaho Commission regarding Qwest's pre-existing "dumb" rates.

IOWA. On January 15, 1997, Qwest filed revisions to its Iowa intrastate tariffs to add its new **"**smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Iowa Utilities Board ("Iowa Board"). On March 22, 1999, Payphone Concepts, Inc. filed a complaint alleging that the "dumb" PAL rates of Qwest and other Iowa incumbent local exchange carriers exceeded the new services test. On July 30, 1999, the Iowa Board dismissed the complaint, finding that Qwest had made at least a *prima facie* case of new services test compliance, and there was no reasonable basis for further investigation of Qwest's payphone pricing.[9]

MINNESOTA. In April 1996, the Minnesota Public Utilities Commission ("Minnesota Commission") started an investigation of Qwest's payphone rates.[10] On January 15, 1997, Qwest

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[5] *Id.* at Conclusions of Law ¶ 6.

[6] *See Colorado Payphone Association v. U S WEST Communications, Inc.*, Public Utilities Commission of the State of Colorado, Docket No. 98F-146T, Decision No. C99-497 (May 18, 1999) ("*Colorado Commission Order*").

[7] *See* Letter from Brooks E. Harlow, Miller Nash LLP, counsel for Davel Communications, Inc., *et al*., to Marlene H. Dortch, Federal Communications Commission, CC Docket No. 96-128, dated Feb. 22, 2007 at n.7.

[8] *See Colorado Commission Order* at 7.

[9] *See In re Payphone Services*, Order Terminating Investigation, Docket No. INU-99-1 (July 30, 1999).

[10] Order Initiating Expedited Proceeding and Establishing Timetable for Comments and Replies, Docket No. P-421/C-95-1036.

filed revisions to its Minnesota intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Minnesota Commission. In 1997 and 1998, the Minnesota Independent Payphone Association filed complaints regarding Qwest's payphone access services, focusing on allowing payphone providers to resell Qwest's local business lines. Ultimately the Association prevailed and the resale request was granted.[11] In each of these investigations, the payphone providers could have questioned Qwest's compliance with the new services test, but did not.

MONTANA. On January 15, 1997, Qwest filed revisions to its Montana intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Montana Public Service Commission ("Montana Commission"). The Montana Commission subsequently consolidated its review of Qwest's PAL rates in an existing general rate docket, and the Northwest Payphone Association intervened. On August 26, 1998, the Montana Commission found that Qwest's rates met the new services test.[12] Following an appeal of this decision by the Northwest Payphone Association, the Montana Commission approved a settlement that resulted in a reduction of Qwest's "dumb" PAL rates.[13]

NEBRASKA. On January 15, 1997, Qwest filed revisions to its Nebraska intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Nebraska Public Service Commission ("Nebraska Commission"). A 1997 investigation by the Nebraska Commission focused on whether payphone investment had been removed from access rates.[14] On June 8, 1999, the Nebraska Commission commenced an investigation of whether Qwest's PAL rates complied with the new services test.[15] This docket was closed without a decision on the rates in 2002, and refunds requested by payphone providers were accordingly denied.[16]

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[11] *See In the Matter of a Formal Complaint of the Members of MIPA Against U S WEST Communications, Inc.*, Docket No. P-421/C-95-1036, 1996 Minn. PUC LEXIS 160 (Nov. 27, 1996, *recon denied*, 1997 Minn. PUC LEXIS 6 (Mar. 3, 1997).

[12] *In the Matter of the Application of U S WEST Communications, Inc. to Restructure its Prices for Regulated Telecommunications Service*, Utility Division Docket No. D96.12.220, Order No. 5965c, Final Order (Aug. 26, 1998).

[13] *See In the Matter of the Application of U S WEST Communications, Inc., to Restructure its Prices for Regulated Telecommunications Service*, Final Order on Settlement of Judicial Review, Docket No. D96.12.220, Order No. 5965e (Mar. 8, 1999).

[14] *See In the Matter of the emergency petition of MCI Telecommunications Corp. and AT&T Communications both of Denver, Colorado, to investigate compliance of Nebraska LECs with FCC Payphone Orders*, Order Accepting Stipulation, Issuing Findings and Closing Docket at 1, (Aug 3, 1999)

[15] *Id.* at 2.

[16] *See In the Matter of the Application of the Commission, on its own motion, to conduct an investigation into specific areas of concern in the provisioning of payphones in the state of Nebraska*, Order Closing Docket and Merging Record into Application No. C-2696/PI-57 (Mar. 19, 2002).

NEW MEXICO. On January 15, 1997, Qwest filed revisions to its New Mexico intrastate tariffs to add its new **"**smart" PAL service. On February 21, 1997, the New Mexico Public Utility Commission ("New Mexico Commission") initiated a docket to investigate compliance with this Commission's *Payphone Orders*. The state commission noted that it (and other states) had responsibility for determining whether intrastate tariffs had been filed in accordance with the new services test.[17] In May of 1997, Qwest delivered a Payphone Certification to the New Mexico Commission. On August 21, 1997, the New Mexico Commission found that Qwest's payphone tariff was "just and reasonable and in compliance with all legal requirements."[18] The New Mexico Commission noted Qwest's statement that it had reviewed its "payphone related" services, including "dumb" PAL services, for compliance with the new services test, and found that each complied with that test.[19]

NORTH DAKOTA. On January 15, 1997, Qwest filed revisions to its North Dakota intrastate tariffs to add its new **"**smart" PAL service. "Dumb" PAL rates were not changed. In May of 1997, Qwest delivered a Payphone Certification to the North Dakota Public Service Commission ("North Dakota Commission"). No complaints were made to the North Dakota Commission challenging Qwest's "dumb" PAL rates.

OREGON. On January 15, 1997, Qwest filed revisions to its Oregon intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Oregon Public Utility Commission ("Oregon Commission"). In 1997, the Oregon Commission conducted a review of Qwest's earnings and rates. Qwest's "dumb" payphone rates were specifically selected for review in this proceeding. The Northwest Payphone Association challenged Qwest's "dumb" PAL rates in this proceeding, claiming that the rates did not comply with the new services test. The Oregon Commission disagreed and sustained Qwest's rates for "dumb" PAL services.[20] The Northwest Payphone Association appealed the Oregon Commission decision. On November 10, 2004, in light of this Commission's *Wisconsin Order*, the Oregon Court of Appeals remanded the PAL rate decision to the Oregon Commission.[21] The Oregon Commission currently has an open docket to implement the court's remand.

SOUTH DAKOTA. On January 15, 1997, Qwest filed revisions to its South Dakota intrastate tariff to include its new "smart" PAL service, and a payphone provider intervened in the

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[17] *See In the Matter of Compliance with Federal Regulation of Payphones*, Findings of Fact, Conclusions of Law and Order, Docket No. 97-69-TC ¶ 27 (Aug. 21, 1997) ("*New Mexico Order*").

[18] *Id.* ¶ 54.

[19] *Id.* ¶ 53.

[20] *See In the Matter of the Application of U S WEST Communications, Inc., for an Increase in Revenues*, Order, Docket No. UT 125/UT 80, Order No. 00-190 at 6-7 (Apr. 14, 2000) and Order No. 01-810 at 48-56 (Sept. 14, 2001).

[21] *Northwest Public Communications Council v. Public Utility Commission of Oregon*, 100 P.3d 776 (Nov. 10, 2004)

resulting docket. In May of 1997, Qwest delivered a Payphone Certification to the South Dakota Public Utilities Commission ("South Dakota Commission"). On October 17, 1997, the South Dakota Commission found Qwest's "smart" PAL rates to be reasonable, and the contribution margin (which is the same for "smart" and "dumb" PAL rates) likewise reasonable.[22]

UTAH. On January 15, 1997, Qwest filed revisions to its Utah intrastate tariffs to add its new **"**smart" PAL service. "Dumb" PAL rates were not changed. On April 14, 1997, MCI and AT&T filed an emergency petition with the Utah Public Service Commission ("Utah Commission") requesting, among other things, that payphone rates be cost justified. The claims were referred to the pending Utah general rate case, and parties complaining about PAL rates were directed to file complaints. In May of 1997, Qwest delivered a Payphone Certification to the Utah Commission. No complaints were filed contending that Qwest's "dumb" PAL rates were excessive.

WASHINGTON. On January 15, 1997, Qwest filed revisions to its Washington intrastate tariffs to add its new "smart" PAL service. "Dumb" PAL rates were not changed. On April 16, 1997, AT&T and MCI filed a formal complaint contending that Qwest had not removed all payphone investment from its intrastate access rates. This complaint was ultimately successful and Qwest was required to reduce its access charges. In May of 1997, Qwest delivered a Payphone Certification to the Washington Commission. No complaints were filed contending that Qwest's "dumb" PAL rates were excessive.

WYOMING. On January 15, 1997, Qwest filed revisions to its Wyoming intrastate tariffs to add its new "smart" PAL service. In May of 1997, Qwest delivered a Payphone Certification to the Wyoming Public Service Commission ("Wyoming Commission"). On September 16, 1999 the Wyoming Commission approved a comprehensive price plan for Qwest. Every rate was to be based on TSLRIC costs, plus a 26% margin. The Wyoming Commission expressly approved payphone access line rates, finding that "the prices for Public Access Line pricing . . . constitute well reasoned and proper applications of the Act and the evidence to reach an acceptable pricing result."[23]

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[22] *In the Matter of the Filing by U S WEST Communications, Inc. for Revisions to its Exchange and Network Services Tariff*, Order Approving Revisions to the Tariff, TC97-006, at 2-3 (Oct. 17, 1997). The contribution margin is the difference between the TSLRIC of the service and the proposed price, or the amount of revenue that the service contributes to the common overhead cost recovery of the firm.

[23] *In the Matter of the Application of U S WEST Communications, Inc., for authority to implement prices in conjunction with its proposed Wyoming price regulation plan for essential and noncompetitive* services, Docket No. 70000-TC-99-480 (Record No. 4868) ¶¶ 140-41 (Sept. 16, 1999).