Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-128
	)	
Petition of TON Services, Inc. for Declaratory Ruling on a Primary Jurisdiction Referral	)	

OPPOSITION OF QWEST CORPORATION TO PETITION OF TON SERVICES, INC. FOR DECLARATORY RULING ON A PRIMARY JURISDICTION REFERRAL

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OPPOSITION OF QWEST CORPORATION TO PETITION OF TON SERVICES, INC. FOR DECLARATORY RULING ON A PRIMARY JURISDICTION REFERRAL

Qwest Corporation ("Qwest") hereby files this opposition to a Petition for Declaratory Ruling filed May 2, 2008 by TON Services, Inc. ("TON") in the above-captioned proceeding.

I. INTRODUCTION AND SUMMARY.

TON is a payphone provider that is party to the lawsuit in the District of Utah entitled *TON Services Inc. v. Qwest Corporation*. Acting on remand from the Tenth Circuit Court of Appeals,[1] the District Court directed that the parties seek the Federal Communications Commission's ("Commission") guidance on three issues:[2]

- Whether Qwest's "procedural non-compliance" with Commission regulations and orders give rise to statutory liability under 47 U.S.C. §§ 201(b), 276 (a) or 416(c);
- Whether Qwest's April 1997 to April 2002 tariff rates in each jurisdiction were cost-based and consistent with all aspects of 47 U.S.C. § 276(a),

[1] *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225 (10th Cir. 2007).

[2] *TON Services Inc. v. Qwest Corporation*, 2008 U.S. Dist. LEXIS 34326 (D. Utah 2008).

including Section 276's antidiscrimination and anti-subsidization requirements; and

- If Qwest's rates did not comply substantively with the requirements of the "new services test" or "NST" by failing to be cost-based, containing subsidies, or discriminating in favor of Qwest, what is the difference between Qwest's pre-April 2002 non-complying rates and rates that would have been NST compliant?[3]

The instant petition by TON seeks to bring these issues to the Commission. We will address each issue separately in turn. Basically, Qwest submits that:

- Qwest's intrastate payphone access line ("PAL") rates complied with the Commission's "new services test", and Qwest's determination that no further regulatory filings were mandated was reasonable and lawful.
- There is no evidence to support an allegation that Qwest's intrastate PAL rate were not compliant with the NST. The fact that Qwest revised many of its rates downward after the Commission's 2002 *Wisconsin Order* is legally and factually irrelevant.
- Assuming that it were to be determined that Qwest's intrastate PAL rates did not comply with the Commission's new services test in 1997, and further assuming that damages could be lawfully awarded in the teeth of such legal obstacles as the relevant statute of limitations, such damages would be based on what a lawfully calculated rate would have been. The rates filed by Qwest after the Commission's *Wisconsin Order* have no bearing on such a calculation.

[3] 2008 U.S. Dist. LEXIS 34326, internal pages 10-11.

II. BACKGROUND.

The Commission's PAL[4] rules have been the source of confusion and controversy ever since they were adopted, and especially since April of 1997 when the actual implementation of those rules was accomplished. Basically, the Commission had determined that both "smart" and "dumb" PAL rates should, in order to meet the statutory requirements that Bell Operating Company ("BOC") payphone services not be subsidized by their local exchange or exchange access operations, comply with the so-called "new services test", under which new services were priced when offered in a price cap environment.[5] However, rather than directly enforce the rules that it had just adopted, the Commission determined that tariffs for such services were to be filed at the state level, subject to state procedural rules.[6]

When the time came to analyze its tariffs for "dumb" PAL lines, Qwest had available the earlier long run incremental cost studies used to support the existing "dumb" PAL rates. Qwest used these studies in the preparation and filing of intrastate "smart" PAL rates. The rates for

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[4] PAL lines are the lines that are used by the providers of payphone services to connect to the local exchanges of local exchange carriers ("LECs"). Pursuant to the directives of Section 276 of the 1996 Telecommunications Act, incumbent LEC payphone services were deregulated, and non-discriminatory PAL rates were filed and maintained by LECs. The PAL rates were of two kinds: 1) so-called "dumb" PAL rates, without central office intelligence, used primarily by competitive payphone providers, and 2) so-called "smart" PAL rates, with central office intelligence, used by the incumbent LECs' own payphone operations (and some competitive operations as well). At the beginning of 1997, Qwest already had in effect rates for "dumb" PAL services. These rates had been supported by long-run incremental cost studies. "Smart" PAL rates were tariffed in the states during late 1996-early 1997. These "smart" PAL rates relied on the same cost studies that underlay the "dumb" PAL rates. The "dumb" PAL rates were all lower than the "smart" PAL rates because of the added costs of central office intelligence.

[5] *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541, 20614-16 ¶¶ 146-48 (1996) ("1996 Pay Telephone Report and Order); Order on Reconsideration, 11 FCC Rcd 21233, 21300-02 ¶¶ 146-48, 21307-09 ¶¶ 162-65 (1996) ("1996 Pay Telephone Reconsideration Order").

[6] *1996 Pay Telephone Reconsideration Order*, 11 FCC Rcd at 21307-09 ¶¶ 162-165, 21348 ¶ 268.

"dumb" PAL services had been filed and approved by state regulators prior to 1996. When the Commission determined that the NST was to be applied to intrastate "dumb" PAL rates (rather than interstate rates, as had been initially envisioned), Qwest examined its existing rates and existing cost studies and determined that the cost studies were consistent with the generally utilized and approved long run incremental cost standards of the state regulators and that the overheads in the prices were consistent with past NST pricing decisions of the Commission. Accordingly, Qwest determined that its existing rates for all intrastate PAL services -- "smart" PAL rates as well as "dumb" PAL rates -- were consistent with the Commission's directives that they comply with the NST. Qwest is of the firm belief that this opinion was and is correct.

Qwest then faced the issue of what to do procedurally in dealing with the state regulators to whom supervision of the Commission's NST requirement had been delegated. Basically the assumption was that states would, should they so desire (the states could, of course, have declined to accept this delegation from the Commission), apply their own costing principles and tariff procedures to incumbent LEC intrastate PAL tariffs. The Commission's rules very clearly did not require that a new tariff be filed if an existing tariff complied with the NST.[7] Similarly, the Commission rejected the notion that cost studies underlying PAL rates needed to be filed with the Commission itself.[8] Incumbent LECs that were not able to have NST-compliant tariffs in effect by April 15, 1997, were given a limited waiver of 45 days to accomplish the necessary filings, subject to the proviso that "[a] LEC who seeks to rely on the waiver granted in the instant

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[7] *See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370, 21380 ¶ 21 (CCB 1997).

[8] *Id.* ¶ 22.

order must also reimburse their customers or provide credit from April 15, 1997, in situations where the newly tariffed rates are lower than the existing rates."[9]

As has been described in other documents in this docket,[10] Qwest read the Commission's *Orders* regarding intrastate PAL rates as requiring it to review its existing rates for "dumb" PAL lines and determine if they met the new services test. If they did, Qwest determined that it had no further obligation with regard to filing anything at the Commission or at a state commission until a request for such information was made, or a complaint was filed requiring a response. If the existing rates did not meet the Commission's directives, Qwest recognized an obligation to make a filing with the state to rectify the rates and bring them into compliance. Qwest examined in detail its existing long run incremental cost studies, examined existing overheads, and compared the "dumb" PAL rates with the rates for "smart" PAL services and existing local business line services. Upon the completion of this review, Qwest concluded that it was in compliance with all applicable rules and that no further filings were necessary. Over the course of the ensuing five years, Qwest's PAL rates were examined in a number of state proceedings, sometimes resulting in reductions, sometimes not.[11]

During this entire period, no one filed a complaint with the Commission contending that any Qwest intrastate PAL rate did not meet the new services test,[12] or that Qwest had somehow violated the Commission's rules by not filing "cost support" at the state level supporting its

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[9] *Id.*

[10] *See, e.g.*, Exhibit 1, attached hereto, *ex parte* from Lynn Starr, Qwest to Marlene H. Dortch, FCC, CC Docket No. 96-128, dated Sept. 26, 2007.

[11] *See* Attachment A to Exhibit 1, hereto, a brief summary of state activity.

[12] One formal proceeding addressed whether Qwest's rates for payphone services were subsidized by interstate access rates. *See In the Matter of Ameritech Illinois, U S WEST Communications, Inc., et al. v. MCI Telecommunications Corporation*, Memorandum Opinion and Order, 14 FCC Rcd 18643 (1999).

existing PAL rates.[13] Numerous payphone providers did participate in various proceedings, negotiations and legal actions concerning Qwest's intrastate PAL rates, and reaped the benefits of whatever rate reductions and/or refunds resulted from those proceedings. TON, the petitioner here, participated in no federal or state regulatory proceedings.

One state, Wisconsin, declined the Commission's delegation of authority to review intrastate payphone tariffs, resulting in the Commission's Common Carrier Bureau issuing a directive that the Wisconsin LECs file their then-effective intrastate PAL tariffs at the Commission for review, "together with all supporting documentation . . . necessary to demonstrate compliance with the requirements of section 276 and the Commission's implementing rules."[14] This *Order* directed that the LECs support these specific tariffs by using long run incremental costs based on Total Element Long Run Incremental Cost ("TELRIC") methodology, and otherwise described the parameters of the expected support for the tariff rate levels for PAL tariffs filed at the Commission itself. The *Order* and the filing requirement were made applicable only to the Wisconsin LECs named in the *Order*: "No other Wisconsin LECs are being required at this time to submit data to the Commission."[15] On a petition for review to the full Commission, the Bureau *Order* was substantially modified and clarified, including reaffirmation that, when conducting its own review of intrastate PAL rates, a state was not bound by federal TELRIC cost standards and could "use its accustomed total service long run

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[13] These issues were, of course, raised in numerous state proceedings involving Qwest's intrastate rates, including its rates for PAL services.

[14] *In the Matter of Wisconsin Public Service Commission; Order Directing Filings*, Order, 15 FCC Rcd 9978, 9983 ¶ 16 (2000).

[15] *Id.* ¶ 13.

incremental costs ("TSLRIC") methodology (or another forward-looking methodology) to develop the direct costs of payphone line service costs."[16]

To the extent that the Commission modified the existing guidelines in the *Wisconsin Order* (*e.g.*, by limiting the total overhead allocation percentage allowed to be included in the NST), such a directive was clearly prospective only. Indeed, the Commission made it clear that the guidelines in the *Wisconsin Order* were "to assist states in determining whether BOCs' intrastate payphone line rates comply with section 276 and our *Payphone Orders*."[17] The Commission confirmed the prospective nature of the *Wisconsin Order* when it represented to the Court on appeal that the BOC Petitioners did not have standing to appeal because they could not demonstrate that they had been injured by the *Wisconsin Order*.[18] The Court disagreed with the Commission on standing, but only because the *Wisconsin Order*, by setting standards for future state rate proceedings, directly impacted existing and prospective BOC business plans and operations:

> The *Order's* forward-looking cost-based methodology means that the BOCs cannot recover certain expenses beyond the current costs of providing service -- namely, expenses owing to inefficiencies such as poor management or inflated

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[16] *In the Matter of Wisconsin Public Service Commission, Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2066 ¶ 49 (2002) ("*Wisconsin Order*").

[17] *Id.* at 2072 ¶ 68. The guidelines coming out of the *Wisconsin Order* were summarized by the Commission:

> First, BOCs' intrastate payphone line rates, including usage rates, should comply with the flexible, cost-based new services test. Second, these rates should be calculated using a forward-looking, direct cost methodology such as TELRIC or TSLRIC, but the full pricing regime of sections 251 and 252 does not apply. Third, overhead loading rates for payphone line rates should be cost-based, and such rates may be calculated using UNE overhead loading factors, provided that such rates do not exceed an upper limit calculated using the methodology from either the *Physical Collocation Tariff Order* or the *ONA Tariff Order*. Finally, BOCs' payphone line rates should be adjusted to account for SLC charges, as set forth herein. *Id.*

[18] *New England Public Communications Council, Inc. v. FCC*, No. 02-1055, *et al.*, Brief for Respondent at 19.

> capital and depreciation -- that they could recover under a historical-cost method. . . . To comply with the *Wisconsin Order*, the BOCs will almost certainly have to modify their tariffs to lower their existing rates -- or at the very least, refrain from raising their rates -- before submitting the tariffs for state review.[19]

After issuance of the Court's decision in *New England Public Communications Council,* Qwest further reviewed its intrastate PAL rates. In most cases rates were further reduced (many Qwest PAL rates had been subject to a variety of proceedings over the previous five years, many of which had resulted in reductions from the rates in place in April of 1997).

On February 23, 2004, more than two years after release of the *Wisconsin Order*, TON brought a civil action against Qwest claiming that it had been injured by Qwest's failure to file cost support with state regulators in 1997, and requesting damages therefor. TON did not challenge the Qwest rates for PAL services, but instead claimed that it was damaged by a procedural failure of Qwest to make what it deemed were the appropriate cost support showings. The damages claimed by TON were not based on the level of Qwest's PAL rates, but on the allegation that the rates were discriminatory and "subsidized," in violation of Section 276(a) of the Act. Qwest moved to dismiss on the basis of primary jurisdiction, and the District Court granted the motion on the basis that the suit would not lie in the absence of a determination by the appropriate regulatory body that the rates themselves were unreasonable or unlawful.

The District Court granted the motion and dismissed the complaint without prejudice in order that TON could approach the appropriate regulatory agencies and obtain a ruling on whether or not the Qwest PAL rates had been unreasonable or unlawfully high (*i.e.*, out of line with the NST) in the past. The Tenth Circuit vacated the District Court's order and remanded in order that the District Court could refer several issues to the Commission under primary

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[19] New *England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 74 (D.C. Cir. 2003), *cert. denied*, 2004 U.S. LEXIS 3066 (S. Ct., April 26, 2004) (footnote omitted).

jurisdiction.[20] The Tenth Circuit, accepting all allegations in the complaint as true,[21] found that the gist of TON's complaint was not that Qwest's PAL rates were unlawful or too high, but that Qwest's failure to file cost support for its existing PAL tariffs with the states in 1997 constituted "procedural non-compliance" with the appropriate Commission rules.[22] Because this "procedural non-compliance" was not the same as having a non-compliant rate, the District Court's dismissal in reliance on the filed tariff doctrine was vacated and remanded for a proper referral.

The District Court then issued its referral order. Within this context, we turn to the specific issues referred to the Commission by the District Court.

III. QWEST'S PURPORTED PROCEDURAL NON-COMPLIANCE WITH COMMISSION REGULATIONS AND ORDERS DOES NOT GIVE RISE TO STATUTORY LIABILITY UNDER 47 U.S.C. SECTIONS 201(b), 276 (a) OR 416(c).

The referred question is an outgrowth of the recent Supreme Court decision in *Global Crossing Telecommunications, Inc. v. Metrophones Telecommunications, Inc.*[23] In *Global Crossing*, the Court held that the Commission could make non-compliance with a Commission rule rise to the level of a statutory "unreasonable practice" under Section 201(a) of the Communications Act. In that case the Court examined a specific Commission *Order* which had found that it would be an unreasonable practice for an interexchange carrier to fail to make the payments to payphone providers dictated by the Commission's rules. In light of the fact that the Commission had "authoritatively ruled that carriers must compensate payphone operators," the Court found that the Commission's determination was consistent with the statutory scheme.[24] In

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[20] *TON Services, Inc. v. Qwest Corporation*, 493 F.3d 1225.

[21] *Id.* at 1236-37.

[22] *Id.* at 1237.

[23] 127 S. Ct. 1513 (2007) ("*Global Crossing*").

[24] *Id.* at 1523.

this case, whether the Commission mandated that BOCs undertake any action beyond an internal and good faith examination of their rates is itself hotly contested, which is a far cry from the "authoritative" ruling that characterized the ruling in *Global Crossing*. TON does not allege a statutory violation.

However, in discussing this referred issue, it is important to keep in mind a very important matter that TON basically ignores. The Tenth Circuit did not reach a conclusion that Qwest violated any Commission rules or any provisions of the statute. The Court instead accepted as true for purposes of dismissal analysis TON's properly pleaded allegation that Qwest's failure to file cost support with state regulators in 1997 constituted "procedural non-compliance" with the Commission's rules, but never analyzed the issue and never reached a definitive conclusion on the matter. Indeed, given the procedural posture of the case it could not have reached any conclusion on this issue. TON's implication to the contrary is not accurate.[25] In this proceeding and elsewhere Qwest is free to advocate the correct position that its actions in 1997 were completely "procedurally compliant" with the applicable Commission rules. That this position is correct is outlined above. The Commission very clearly did not require that a BOC refile its existing tariffs if the BOC determined that the tariffs were already NST compliant, and the Commission left the procedural matter of how to ensure compliance with the NST to state, rather than federal, processes. Upon request of the Commission, Qwest will submit a detailed account of the procedures which it utilized to ensure compliance. Simply stated, Qwest relied on pre-existing TSLRIC cost studies for "dumb" PAL rates to: 1) analyze "dumb" PAL rates to ensure that they were compliant with the NST; and 2) set "smart" PAL rates at a higher level in order to comply with the NST and to reflect the additional costs of central office processing.

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[25] TON Petition at 9.

Qwest participated in numerous state proceedings involving its PAL rates during the period 1997-2003.

In addition, there is a more important jurisdictional consideration that the Commission must evaluate. When the Commission determined that PAL rates and the NST should be enforced by the states, it left that enforcement to the state regulators. The full panoply of state regulatory options was available to TON and other claimants and potential claimants from 1997 on -- and numerous payphone providers appeared before state regulators to contest filed rates under those procedures. Qwest submits that the enforcement of the NST was left to state jurisdiction exclusively unless the state rejected the Commission's delegation (as was the case, at least initially, by Wisconsin). States were (and are) given considerable flexibility in determining whether a specific rate is NST-compliant,[26] and they are (and have been) in the best position to exercise the discretion that was given to them by the Commission. While the Commission clearly has the duty and the obligation to answer the questions referred by the Court, nothing in this response should indicate that federal jurisdiction over PAL rates should be extended to supersede the obligation of state regulators to comply with and enforce federal law in their own processes.

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[26] *See, e.g.*, *Wisconsin Order*, 17 FCC Rcd at 2065 ¶ 43, 2069 ¶ 58, 2072 ¶ 68; *In the Matter of Wisconsin Public Service Commission, Order Directing Filings*, Order on Reconsideration, 21 FCC Rcd 7724, 7726-27 ¶ 6 (2006) (referencing the "flexible, cost-based 'new services test'") ("*Wisconsin Reconsideration Order*"). *See also ex parte* from Melissa Newman, Qwest to Marlene H. Dortch, FCC, CC Docket No. 96-128, dated Sept. 5, 2006 and its attached *ex parte* from Robert B. McKenna, Qwest, dated Sept. 5, 2006, at 12 of 17; *ex parte* from Lynn Starr, Qwest to Marlene H. Dortch, FCC, CC Docket No. 96-128, dated May 16, 2007 and its attached *ex parte* from Robert B. McKenna, dated May 16, 2007 at 10 and 11 of 12. *And 1996 Pay Telephone Reconsideration Order*, 11 FCC Rcd at 21307-09 ¶¶ 162-165.

IV. QWEST'S APRIL 1997 TO APRIL 2002 TARIFF RATES IN EACH JURISDICTION WERE COST-BASED AND CONSISTENT WITH ALL ASPECTS OF 47 U.S.C. SECTION 276(a), INCLUDING SECTION 276'S ANTI-DISCRIMINATION AND ANTI-SUBSIDIZATION REQUIREMENTS.

If the Commission deems it necessary, Qwest is willing to submit the cost studies and other documentation it still possesses documenting its costs and NST compliance with regard to its 1997 PAL rates (and subsequent rates filed between 1997 and 2002). It must be remembered that no federal challenge to Qwest's PAL rates was launched until 2003,[27] six years after the disputed filing period (and four years after the expiration of the statute of limitations for federal causes of action for violations of the Communications Act), and TON's challenge came a full year after that. Accordingly, Qwest does not have all of the relevant cost studies -- but it does have sufficient information to permit an examination of Qwest's cost methodology and analysis when it reviewed its PAL rates in 1997 for NST compliance. Qwest believes that this information is not necessary because the responsibility for ensuring NST compliance had been delegated to the states, and therefore challenges to Qwest's intrastate rates, including challenges based on the NST, should must properly have been filed with state regulators, not with the Commission. Qwest will of course provide the Commission with those documents it believes are necessary.

Several matters are of note.

First, TON explicitly alleged to the Tenth Circuit Court of Appeals that it was not challenging the rate levels of Qwest's intrastate PAL tariffs, and, indeed, that position was the centerpiece of the Tenth Circuit's opinion. TON claims that it was damaged by Qwest's failure to file cost support in 1997 -- a failure that, if true, occurred five years beyond the applicable

[27] With the filing of the initial Davel lawsuit in 2003. *Davel Communications, Inc. v. Qwest Corporation*, C03-3680P, Complaint for Declaratory Relief and Damages, Nov. 25, 2003 (W.D. Wash.).

statute of limitations. TON claims instead that the allegation that Qwest did not file the proper cost support for its tariffs in 1997 is well nigh conclusive proof that the rates that it had on file were unreasonably high -- an assumption that logic does not permit at all.[28] In fact, it is rudimentary that someone challenging a tariffed rate has the burden of proving that the rate was unlawful, not the other way around.[29] Whether Qwest was wrong or not in its interpretation of its filing obligations in 1997, it clearly cannot be determined that its rates themselves were unreasonable based solely on this fact. Qwest submits that there is no nexus between Qwest's determination not to file PAL cost support in 1997 and whether its 1997-2002 PAL rates were lawful. While Qwest submits that the burden of proving that these rates were unlawful in any complaint proceeding falls upon TON, Qwest is willing in the alternative to provide cost information to the Commission upon request.

Second, Qwest's PAL rates were not discriminatory. Section 276(a) prohibits discrimination in favor of Qwest's own payphone services -- by providing less costly "smart" PAL services than the "dumb" PAL services used by TON and other competitors.[30] Qwest's "smart" PAL rates were determined by adding the costs of central office processing to the "dumb" PAL costs and allocating equivalent overhead costs as allowed by state commissions for Qwest's PAL rates. TON does not contend that Qwest improperly calculated these additional costs. TON, while claiming that the rates were discriminatory, really does not undertake at all to make the necessary comparison between dumb and smart rates or allege that the differential

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[28] TON Petition at 16.

[29] *See New Valley Corporation v. Pacific Bell*, Memorandum Opinion and Order, 15 FCC Rcd 5128, 5134 ¶ 14 (2000); *Beehive Telephone Nevada, Inc. v. The Bell Operating Companies*, Memorandum Opinion and Order, 10 FCC Rcd 10562, 10566 ¶ 23 (1995).

[30] 47 U.S.C. § 276(a).

between the rates was unlawfully discriminatory. There is no allegation of discrimination that has ever been made on this record.[31]

Finally, the Court referred the question of whether Qwest's PAL rates were "subsidized," as prohibited by Section 276(a). The subsidization issue dealt with keeping PAL rates too low, not too high, and TON makes no claim that any of Qwest's 1997 PAL rates were too low.

In short, if the Commission desires to examine the Qwest PAL rates in 1997 for NST compliance, TON bears the burden of going forward with evidence documenting that the rates were not compliant. Whether Qwest's PAL rates were "substantively" compliant is ultimately independent of whether Qwest made state filings, and the states themselves provided ample opportunity to examine Qwest's rates in the proper jurisdictional context. Qwest suggests that the Commission need not conduct an investigation of Qwest's PAL rates and their relationship to cost. The TON complaint is based entirely on Qwest conduct (not filing cost studies with the state commissions) that is subject to a statute of limitations that expired at the very latest in late 1999. Hence, TON can collect no damages in any event. Moreover, Qwest suggests that the Commission should simply continue to recognize that the proper processes to challenge intrastate PAL rates, including their compliance with the NST, lie with the states, under the procedures and processes established by the states. TON refused to avail itself of these processes, but that is not the fault of either the Commission or of Qwest.

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[31] Even if discrimination were demonstrated on this record, the damages for unlawful discrimination in a tariff case are measured by actual damages, not by the difference between the two rates. *See Interstate Commerce Commission v. United States*, 289 U.S. 385, 390-91 (1933); *MCI Telecommunications Corporation v. American Telephone and Telegraph Company*, Initial Decision of Administrative Law Judge Joseph Chachkin, 94 FCC 2d 360, 394 ¶ 104 (1981); *In the Matter of Exchange Network Facilities for Interstate Access*, Memorandum Opinion and Order, 1 FCC Rcd 618, 626 ¶¶ 53-54, 628 ¶ 69 (1986).

V. IF QWEST'S RATES HAD NOT COMPLIED SUBSTANTIVELY WITH THE REQUIREMENTS OF THE NST BY FAILING TO BE COST-BASED, CONTAINING SUBSIDIES, OR DISCRIMINATING IN FAVOR OF QWEST, THE DIFFERENCE BETWEEN QWEST'S PRE-APRIL 2002 NON-COMPLIANT RATES AND RATES THAT WOULD HAVE BEEN NST COMPLIANT WOULD NEED TO BE CALCULATED UNDER THE FLEXIBLE NEW SERVICES TEST.

If TON were to be entitled to damages for unreasonable rates for PAL services provided by Qwest (which it is not, and has actually not even alleged), the amount of such damages would be measured by the difference between the rate charged and the reasonable rate as determined by the proper regulatory authority. Normally this would involve the complaining party presenting evidence as to the proper rate, and the rate maker basing its decision on the basis of that evidence (and contrary evidence by the carrier). If it comes to that, given the wide discretion given to state regulators in applying the NST, especially prior to the *Wisconsin Order*, Qwest can see no alternative to referring the cases to the individual states for a determination of what rates would have been appropriate had Qwest made full cost showings in support of its existing rates in April-May 1997. Any effort by the Commission to determine damages on its own would have to be able to take account of the wide discretion that was allowed to states in applying the NST, and Qwest cannot devise a way for that discretion to be factored into any Commission review.[32]

TON, on the other hand, claims that damages should be measured based upon comparing the rates on file with state commissions before and after the issuance of the *Wisconsin Order*.[33] This argument is erroneous for several reasons.

- The fact that Qwest reduced its rates following the issuance of the *Wisconsin Order* is not evidence that the former rates were unreasonable, or even that these rates did not comply with the *Wisconsin Order*. In fact, the *Wisconsin*

[32] The Tenth Circuit in TON suggested that a Joint Board under Section 410 be convened. With all due respect, this does not appear to be practical.

[33] TON Petition at 17.

Order provided "guidance" for state regulators, and did not constitute a rate prescription or establishment of a rate (as the Commission properly stated in the *Order* itself).

- Even if the prior rates did not conform to the *Wisconsin Order*, this does not mean that they did not meet the NST. The NST has always been a flexible test, and the *Wisconsin Order* was meant to apply prospectively, not retroactively to existing rates.
- The chief reason why the rates filed by Qwest after the issuance of the *Wisconsin Order* were lower than those previously on file has little to do with the terms of the *Wisconsin Order* itself. To the contrary, both the *Wisconsin Order* and the earlier enumerations of the NST required that generally accepted state cost methodologies be applied in calculating the rate. By the time Qwest filed new rates after the issuance of the *Wisconsin Order*, the state commissions had adopted new long run incremental cost methodologies under the Commission's delegation of authority under Section 252 of the Act. These new cost methodologies resulted in lower long run incremental costs. At the time the earlier rates were filed (or reviewed), Qwest used the then-accepted studies and methods. In both cases Qwest's analyses were completely consistent with the principles of the *Wisconsin Order* and all prior pronouncements of the Commission. If the state regulators had not changed cost methodologies, the newer post-*Wisconsin Order* rates would have been considerably higher. Qwest can make a demonstration of various

permutations of the *Wisconsin Order* applied retroactively on request of the Commission.

VI. SUGGESTED RESPONSES TO REFERRED QUESTONS.

Based on the foregoing, Qwest recommends that the referred questions be answered as follows:

- Qwest did not violate the Act or the Commission's rules when it determined, after study, that its PAL rates (both its "dumb" PAL rates and its "smart" PAL rates) in 1997 complied with the Commission's NST. Assuming that the Commission had established a rule requiring that the showings undertaken by Qwest be submitted to the states, failure to do so would not rise to the level of a violation of the Communications Act.
- There is no evidence that Qwest's 1997-2002 PAL rates were not compliant with the NST. There is no reason to require Qwest to file cost information or other documentation demonstrating how it determined that its rates were compliant. Whether Qwest had been required to make cost showings at the states in 1997 or not has no bearing on whether Qwest's PAL rates were NST compliant.
- If Qwest's rates had not been compliant between 1997 and 2002, the proper measure of damages should have been determined in a state regulatory proceeding. If it is appropriate to determine damages here, the proper measure would be based on differences between the rates as filed and the rates that would have been filed under the NST, taking in to account the statutes of limitations and the respective jurisdictions of the reviewing bodies. The

difference between the pre-*Wisconsin Order* and the post-*Wisconsin Order* rates is irrelevant.

Respectfully submitted,

QWEST CORPORATION

By: /s/ Robert B. McKenna

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Its Attorneys

May 12, 2008

EXHIBIT 1

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Lynn Starr
Vice President-Federal Regulatory

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
Spirit of Service™

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).

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **OPPOSITION OF QWEST CORPORATION TO PETITION OF TON SERVICES, INC. FOR DECLARATORY RULING ON A PRIMARY JURISDICTION REFERRAL** to be 1) filed via ECFS with the Office of the Secretary of the FCC in CC Docket No. 96-128; 2) served via e-mail on the FCC's duplicating contractor, Best Copy & Printing, Inc. at fcc@bcpiweb.com. and 3) served via First Class United States Mail, postage prepaid, on the following party:

Floyd A. Jensen
Floyd Andrew Jensen PLLC
Suite 100
999 S. 1200 East
Salt Lake City, UT 84105-1539

/s/ Richard Grozier

May 12, 2008