

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
	)	
1998 Biennial Regulatory Review – Streamline Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms	)	CC Docket No. 98-171
	)	
	)	
Telecommunications Service for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990	)	CC Docket No. 90-571
	)	
	)	
Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size	)	CC Docket No. 92-237
	)	
	)	
Number Resource Optimization	)	CC Docket No. 99-200
	)	
Telephone Number Portability	)	CC Docket No. 95-116
	)	
Truth-in-Billing and Billing Format	)	CC Docket No. 98-170
	)	
American Public Communications Council Petition for Reconsideration	)	

**COMMENTS OF  
QWEST COMMUNICATIONS INTERNATIONAL INC. IN OPPOSITION TO  
CENTRAL ATLANTIC PENNSYLVANIA PAYPHONE ASSOCIATION PETITION**

Qwest Communications International Inc., on behalf of its wholly-owned subsidiary, Qwest Corporation (“Qwest”) submits these comments in accord with the Federal Communications Commission’s (“Commission”) Public Notice and in opposition to the Central

Atlantic Pennsylvania Payphone Association's ("CAPA") Petition filed March 14, 2008 in the above-referenced docket.<sup>1</sup>

## I. BACKGROUND

***Qwest's Statement of Interest.*** Qwest is an incumbent local exchange carrier ("LEC") in fourteen western states and would be adversely impacted if CAPA's Petition were granted by the Commission. Qwest's customers currently include payphone providers who are not direct contributors to the federal universal service fund ("FUSF") and thus are being assessed FUSF charges by Qwest for the FUSF-assessable services that they purchase from Qwest. Qwest is a LEC that pursuant to the interim waiver of Commission rule 47 C.F.R. § 54.712 has been using equivalency ratios to assess FUSF charges on its multi-line business customers, including payphone providers. If the Commission grants CAPA's Petition, Qwest would bear the administrative and financial burdens of providing partial refunds to its prior and current payphone provider customers for FUSF charges legitimately assessed over the last five years.

***Timeline of Relevant Commission Decisions.*** In December 2002, the Commission adopted an *Order* in which, *inter alia*, it adopted a rule that limited telephone providers' recovery of FUSF contributions from customers to not more than the interstate telecommunications portion of the customer's bill times the relevant contribution factor.<sup>2</sup> The rule was to become effective on April 1, 2003.<sup>3</sup>

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<sup>1</sup> See Public Notice, DA 08-874, rel. Apr. 14, 2008.

<sup>2</sup> *In the Matter of Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format*, Report and Order and Second Further

Subsequently, on March 14, 2003, the Commission released an *Order* addressing several petitions for reconsideration of the rules recently adopted in the *Interim Contribution Methodology Order*.<sup>4</sup> In this *Order* the Commission granted an interim waiver of 47 C.F.R. § 54.712 that allowed LECs to continue to “recover federal universal service contribution costs through universal service line items using the equivalency ratios established for Centrex lines under [the Commission’s] rules governing the Presubscribed Interexchange Carrier Charge (PICC).”<sup>5</sup> This waiver enabled LECs to continue to use the equivalency ratios in assessing FUSF charges on their multi-line business customers, including payphone providers. This *Order* was also effective on April 1, 2003.<sup>6</sup>

Subsequently, on April 30, 2003, the American Public Communications Council (“APCC”) filed a petition for reconsideration seeking to have the Commission reconsider application of the interim waiver to the extent it permitted LECs to use equivalency ratios to assess FUSF charges on its multi-line business customers that were payphone providers.<sup>7</sup>

Recently, on February 14, 2008, the Commission granted APCC’s petition for reconsideration,

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Notice of Proposed Rulemaking, 17 FCC Rcd 24952 (2002) (“*Interim Contribution Methodology Order*”). Specifically 47 C.F.R. § 54.712 states the following: “[f]ederal universal service contribution costs may be recovered through interstate telecommunications-related charges to end users. If a contributor chooses to recover its federal universal service contribution costs through a line item on a customer’s bill the amount of the federal universal service line-item charge may not exceed the interstate telecommunications portion of that customer’s bill times the relevant contribution factor.”

<sup>3</sup> *Interim Contribution Methodology Order*, 17 FCC Rcd at 24979 ¶ 52.

<sup>4</sup> *Order and Second Order on Reconsideration*, 18 FCC Rcd 4818 (2003) (“*Reconsideration Order*”).

<sup>5</sup> *Id.* at 4820 ¶ 3.

<sup>6</sup> See 69 Fed. Reg. 15669 (2003).

<sup>7</sup> Petition for Reconsideration, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170 and NSD File No. L-00-72, filed by the American Public Communications Council, Apr. 30, 2003.

concluding that “LECs may not charge additional USF line-item amounts related to the Centrex adjustments to PSPs.”<sup>8</sup> The *Order* was effective upon release, but LECs were provided 90 days after the effective date of the *Order* to become compliant with the *Order*.<sup>9</sup>

## II. ARGUMENT

The Commission’s recent decision granting the APCC petition for reconsideration effects a significant change in the law. For the first time, 47 C.F.R. § 54.712 applies to LEC FUSF charges to payphone providers. CAPA now asks this Commission to further hold that payphone service providers are entitled to refunds of the difference in the amount of FUSF charges they actually paid and the amount of FUSF charges they would have paid had the interim waiver never been in effect.<sup>10</sup> The Commission should not permit the requested relief as the Commission would be engaging in inappropriate retroactive rulemaking in the absence of any clear Congressional intent to permit such retroactive relief.

CAPA argues that “notions of equity and fairness” support the Commission applying its decision retroactively. CAPA argues that the Commission should permit refunds for payphone providers essentially because payphone providers have fallen on difficult times and need every penny they can get and because the Commission should never have permitted LECs to use

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<sup>8</sup> *In the Matter of Federal-State Joint Board on Universal Service; 1998 Biennial Regulatory Review - Streamlined Contributor Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms; Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990; Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size; Number Resource Optimization; Telephone Number Portability; Truth-in-Billing and Billing Format, American Public Communications Council Petition for Reconsideration, Order on Reconsideration, 23 FCC Rcd 2567, 2570 ¶ 8 (2008).*

<sup>9</sup> *Id.* ¶¶ 9, 11.

<sup>10</sup> CAPA Petition at 4, 7.

equivalency ratios to assess FUSF charges on payphone providers in the first place. But, for the following reasons, these arguments are not sufficient to support any retroactive application of the Commission's decision.

First, as a general principle, legislative provisions and administrative rules are presumptively prospective in nature so that individuals have the opportunity to know what the law is and to conform their conduct accordingly.<sup>11</sup> Administrative rules are not to have retroactive effect unless Congress has clearly expressed such an intent.<sup>12</sup> As the Commission has recently noted, “[r]etroactive rulemaking is generally not favored.”<sup>13</sup> A statute or rule will have retroactive effect where it “would impair rights a party possessed when he acted, increase a party’s liability for past conduct, or impose new duties with respect to transactions already completed.”<sup>14</sup>

The law was very clear as to its prior application. LECs were permitted to use the equivalency ratios in assessing FUSF charges on multi-line business customers. The

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<sup>11</sup> See *Landgraf v. USI Film Products*, 511 U.S. 244, 265 (1994) (stating that “the presumption against retroactive legislation is deeply rooted in our jurisprudence . . . [e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. . . .”) (footnote omitted).

<sup>12</sup> See *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988) (stating that “a statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless that power is conveyed by Congress in express terms”).

<sup>13</sup> See *In the Matter of Federal-State Joint Board on Universal Service; Access Charge Reform; Universal Service Contribution Methodology; Petition for Reconsideration and Clarification of the Fifth Circuit Remand Order of BellSouth Corporation; Petition for Reconsideration of the Fifth Circuit Remand Order of Arya Communications International Corporation; Joint Request for Review of Decision of Universal Service Administrator of Cable Plus L.P., and MultiTechnology Service, L.P.; Request for Review of Pan Am Wireless, Inc.; Request for Review of USA Global Link, Inc.*, CC Docket Nos. 96-45 and 96-262, WC Docket No. 06-122, Order on Reconsideration, FCC 08-101 ¶ 22 (citing *Bowen*) (rel. Apr. 11, 2008).

<sup>14</sup> *Landgraf*, 511 U.S. at 280.

Commission's recent decision is not a clarification of an existing rule; it is a reversal of a prior Commission holding.

Thus, as a new rule that effects a significant change from prior law, the presumption is that the rule should apply only prospectively. To overcome this presumption, CAPA must demonstrate that Congress intended that the Commission could engage in retroactive rulemaking on this issue. CAPA has wholly failed to demonstrate any Congressional intent to have the Commission engage in retroactive rulemaking.

Second, even "notions of equity and fairness" do not support CAPA's position. CAPA's arguments wholly ignore the fact that the Commission did in fact legally authorize the FUSF assessments that LECs have charged payphone providers for the last five years. While CAPA may view that this should not have been the rule, it does not change the critical fact that this was the rule, and that LECs who followed this rule were acting in accordance with the law. To now reverse that authorization and require that LECs provide refunds for what were previously legitimate charges is in fact the ultimate inequity for which the presumption of prospectivity for rulemaking exists in the first instance. The alleged inequities suffered by the payphone providers because of what those providers view the law should have been but was not, cannot outweigh the inequities to be suffered by the LECs if their past legal conduct is now determined to be unsanctioned conduct requiring recompense.

### III. CONCLUSION

For the above-stated reasons, Qwest opposes CAPA's Petition and urges the Commission to deny the additional relief requested.

Respectfully submitted,

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*Its Attorneys*

May 14, 2008

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC. IN OPPOSITION TO CENTRAL ATLANTIC PENNSYLVANIA PAYPHONE ASSOCIATION PETITION** to be 1) filed via ECFS with the Office of the Secretary of the FCC in CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116 and 98-170; 2) served via e-mail on the FCC's duplicating contractor, Best Copy & Printing, Inc. at [fcc@bcpiweb.com](mailto:fcc@bcpiweb.com); 3) served via e-mail on Ms. Carol Pomponio, Telecommunications Access Policy Division, Wireline Competition Bureau at [carol.pomponio@fcc.gov](mailto:carol.pomponio@fcc.gov); and 4) served via e-mail on Mr. David Duarte, Telecommunications Access Policy Division, Wireline Competition Bureau at [david.duarte@fcc.gov](mailto:david.duarte@fcc.gov).

/s/ Richard Grozier

May 14, 2008