

**Before the
Federal Communications Commission
Washington, D.C. 20554**

Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
1998 Biennial Regulatory Review – Streamlined)	CC Docket No. 98-171
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)	CC Docket No. 90-571
Hearing and Speech Disabilities, and the Americans)	
with Disabilities Act of 1990)	
)	
Administration of the North American Numbering)	CC Docket No. 92-237
Plan and North American Numbering Plan Cost)	NSD File No. L-00-72
Recovery Contribution Factor and Fund Size)	
)	
Number Resource Optimization)	CC Docket No. 99-200
)	
Telephone Number Portability)	CC Docket No. 99-200
)	
Truth-in-Billing and Billing Format)	CC Docket No. 95-116
)	
American Public Communications Counsel)	CC Docket No. 98-170
Petition for Reconsideration)	
)	

**REPLY COMMENTS OF AT&T
IN SUPPORT OF
OPPOSITIONS OF VERIZON AND QWEST**

AT&T, on behalf of itself and its wholly-owned subsidiaries, supports Verizon’s and Qwest’s oppositions¹ to the Central Atlantic Pennsylvania Payphone Association’s (“CAPA’s”) petition for clarification of the Commission’s February 14, 2008, Order on Reconsideration in the above-referenced dockets, requesting that the Commission make its findings retroactive to

¹ Opposition of Verizon, CC Docket No. 96-45, *et al.* (filed May 14, 2008); Opposition of Qwest Communications International Inc., CC Docket No. 96-45, *et al.* (filed May 14, 2008).

2003.² In this order, the Commission reversed in part its earlier ruling in its *Centrex Waiver Order* that incumbent local exchange carriers (“ILECs”) can recover their universal service contribution costs associated with Centrex customers on a per-line basis from multi-line business customers through the federal universal service line item.³ The Commission reversed this finding only with respect to payphone service providers, citing in support section 276(b) of the Communications Act of 1934, as amended.⁴ As Verizon and Qwest correctly observe, in modifying the *Centrex Waiver Order*, the Commission effected a substantive change in its universal service fund (“USF”) contribution recovery rules in the Reconsideration Order, and did not merely interpret or apply existing law to a new situation.⁵ Indeed, recognizing as much, the Commission did not apply its ruling immediately, but rather gave ILECs 90 days in which to implement its new rules. As such, CAPA’s petition does not seek a mere “clarification” of the rules governing ILECs’ recovery of the costs associated with USF contributions on Centrex services, but rather a further modification of those rules by applying the revised rules adopted in the Reconsideration Order retroactively (as CAPA itself apparently recognizes insofar as it seeks, in the alternative, reconsideration of the Reconsideration Order). But, as Verizon and Qwest point out, and as discussed further below, there is no basis, either in law or in good public policy, for applying the new rules retroactively, as CAPA requests. Accordingly, CAPA’s

² Central Atlantic Pennsylvania Payphone Association, *Petition for Clarification or in the Alternative for Reconsideration*, CC Docket No. 96-45, *et al.* (filed Mar. 14, 2008); *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45, *et al.*, Order on Reconsideration, FCC 08-51 (rel. Feb. 14, 2008) (“Reconsideration Order”).

³ Reconsideration Order at para. 7 (citing *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45, *et al.*, Order and Second Order on Reconsideration, 18 FCC Rcd 4818, paras. 3-9 (2003) (*Centrex Waiver Order*)).

⁴ 47 U.S.C. § 276(b); Reconsideration Order at para. 8.

⁵ Verizon Comments at 2; Qwest Comments at 3-4.

petition should be denied.

As Verizon and Qwest explain (and the Commission itself recognized recently), in considering “whether to give retroactive application to a new rule, the courts have held that when there is a ‘substitution of new law for old law that was reasonably clear,’ the new rule may justifiably be given solely prospective effect in order to ‘protect the settled expectations of those who had relied on the preexisting rule.’”⁶ Plainly, the Commission instituted a rule change in its Reconsideration Order, reversing its prior *Centrex Waiver Order* decision as it applied to payphone service providers. ILECs, like AT&T, unquestionably relied on the rules adopted in the *Centrex Waiver Order* in calculating the appropriate universal service line-item charge for multi-line business customers, such as payphone service providers.⁷ In addition, the Commission’s Reconsideration Order could in no way be interpreted as an “agency adjudication” in which retroactive effect would be appropriate for “new applications of existing law, clarifications, and additions.”⁸ The Commission’s action to reverse course with respect to its contribution rules for payphone service providers clearly occurred in the rulemaking, “quasi-legislative” context and not in an adjudication.⁹ The Commission also should deny CAPA’s petition because it is well-settled that administrative rules are not to be construed to have retroactive effect unless Congress has clearly expressed such an intent.¹⁰ CAPA has not even

⁶ Verizon Comments at 6 (quoting *Federal-State Joint Board on Universal Service, et al.*, CC Docket No. 96-45, *et al.*, Order on Reconsideration, FCC 08-101, para. 14 (rel. April 11, 2008) (*Fifth Circuit Order on Reconsideration*)); Qwest Comments at 5 (stating that “[r]etroactive rulemaking is generally not favored”) (further citations omitted).

⁷ Qwest Comments at 6; Verizon Comments at 5-6.

⁸ Verizon Comments at 6 (citing *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)).

⁹ *Id.* at 5-6 (explaining that the rule against retroactive rulemaking “generally prohibits the promulgation of so-called ‘legislative’ rules retroactively”).

¹⁰ Qwest Comments at 5 (citing *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988))

attempted to make such a showing, nor could it.

Even if CAPA could overcome the rule against retroactive rulemaking, which it cannot, between them, AT&T, Qwest, and Verizon have hundreds, if not thousands, of payphone service provider customers. There is nothing “equitable” or “fair” about requiring these carriers to go back over five years to calculate their monthly universal service line-item charges for these hundreds to thousands of customers with the mathematical precision demanded by section 54.712(a) of the Commission’s rules.¹¹ As the Commission recognized in its *Fifth Circuit Order on Reconsideration*, undertaking such a process under circumstances similar to those presented by the instant petition is like “unscrambling eggs” and the carriers’ administrative burdens and costs to do so would be enormous.¹² Moreover, there can be no question that ILECs assessed payphone service providers USF fees in accordance with Commission rules and, consistent with their contribution obligations, remitted these monies to the Universal Service Administrative Company (“USAC”). ILECs thus in no way profited from the way in which they were recovering their contribution costs from payphone service providers. Should the Commission grant CAPA’s petition, AT&T and other ILECs would request waivers from the Commission to obtain refunds from USAC in the amount of their contributions that were based on USF fees collected from payphone service providers during these prior years that must now be returned.¹³

For the reasons provided above and set forth in Verizon’s and Qwest’s oppositions,

(*Bowen*)); Verizon Comments at 4-5 (citing *Bowen*).

¹¹ Verizon Comments at 7-8.

¹² *Fifth Circuit Order on Reconsideration* at paras. 18-19. As CAPA itself acknowledges, the payphone industry is one in decline. CAPA Petition at 5. It is therefore likely that, since 2003, many of the ILECs’ payphone customers have discontinued business, which further complicates fulfilling CAPA’s request.

¹³ See *Federal-State Joint Board on Universal Service, et al.*, CC Docket Nos. 96-45 *et al.*, Order, 20 FCC Rcd 1012 (2004) (*Form 499-A Modification Order*); SBC Communications Inc. Application for Review of Action Taken Pursuant to Delegated Authority, CC Docket No. 96-45, *et al.* (filed Jan. 10, 2005).

AT&T respectfully requests that the Commission deny CAPA's petition for reconsideration of the Commission's Reconsideration Order.

Respectfully Submitted,

/s/ Cathy Carpino
Cathy Carpino
Gary Phillips
Paul K. Mancini

AT&T Inc.
1120 20th Street NW
Suite 1000
Washington, D.C. 20036
(202) 457-3046 – phone
(202) 457-3073 – facsimile

May 29, 2008

Its Attorneys