ISSUED: March 23, 2005

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

DR 26/UC 600

THE NORTHWEST PUBLIC COMMUNICATIONS COUNCIL, Complainant, v. QWEST CORPORATION, Defendant.	)	RULING

DISPOSITION: PROCEEDING HELD IN ABEYANCE

Introduction

This matter is before the Public Utility Commission of Oregon (OPUC) on cross motions for summary judgment filed by the Northwest Public Communications Council (NPCC) and Qwest Corporation (Qwest).[1] The principal issue concerns whether Qwest is bound by the refund provisions set forth in the Federal Communications Commission (FCC) Order DA 97-805 (hereafter, the *Waiver Order).* More specifically, the issue is whether the *Waiver Order* requires Qwest to refund a portion of the intrastate Payphone Access Line (PAL) rates paid by Payphone Service Providers (PSPs) since April 15, 1997, because those rates do not comply with the "New Services Test" (NST) established in the FCC's *Payphone Orders.*

Background

Section 276 of the Telecommunications Act of 1996 was enacted to "promote competition among PSPs, and promote the widespread deployment of payphone service to the benefit of the general public."[2] To advance these goals, Congress directed the FCC to prescribe regulations preventing the regional Bell operating companies (RBOCs) from subsidizing or discriminating in favor of their own payphone service. Section 276(b) requires the FCC to meet five specific

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[1] For purposes of this ruling, "Qwest" includes its predecessor, U S WEST Communications, Inc.
[2] 47 U.S.C. 276(b).

requirements, including "prescribing a set of non-structural safeguards for BOC payphone service . . . equal to those adopted in the Computer Inquiry III proceeding."[3]

The FCC implemented Section 276 in a series of orders, beginning with the so-called *Payphone Orders.*[4] The *First Payphone Order*, released September 30, 1996, addressed the five statutory requirements of Section 276(b). That decision requires, among other things, that "in order to receive compensation for completed calls originating from its payphones, a LEC PSP must be able to certify that it has complied with several requirements, including the institution of "effective intrastate tariffs reflecting the removal of charges that recover the costs of payphones and any intrastate [payphone] subsidies."[5] To implement the nonstructural safeguards requirement of Section 276(b)(1)(C), the FCC held that LECs must unbundle payphone line services and file tariffs using the NST.[6] The FCC concluded that LEC PSPs could begin receiving "dial around compensation" (DAC) for the use of their payphones if intrastate payphone tariffs complying with the requirements of the *First Payphone Order* were in effect by April 15, 1997.

On November 8, 1996, the FCC released its *Payphone Reconsideration Order*, modifying certain requirements for LEC tariffing of payphone services and unbundled network functions. Among other things, the FCC clarified that the states, not the FCC, would review the LEC's intrastate payphone tariffs. The states were directed to ensure that intrastate payphone service tariffs are cost-based, consistent with the requirements of Section 276, nondiscriminatory, and in compliance with the *Computer III* tariffing guidelines (i.e., NST-compliant).[7] The *Payphone Reconsideration Order* acknowledged that, in those cases where a LEC had already filed intrastate payphone tariffs, the state could conclude that the LEC's existing tariffs complied with the requirements of the payphone orders, in which case no further filings would be required. LECs that did not have intrastate payphone tariffs in compliance with the

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[3] *New England Public Communications Council, Inc., v. Federal Communications Commission, et al.*, 334 F.3d 69, 71 (D.C. Cir. 2003) (hereafter *New England PCC v. FCC*). *See also, In the Matter of Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Company Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571 (Dec. 20, 1991) (*Computer III*).

[4] Id., Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, CC Docket No. 96-128, First Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*First Payphone Order*); Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*), aff'd in part and remanded in part, *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (Second Payphone Order), vacated and remanded, *MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) (*Third Payphone Order*), aff'd, *American Pub. Communications Counsel v. FCC*, 215 F.3d 51 (D.C. Cir. 2000). The *First Payphone Order* and the *Payphone Reconsideration Order* are collectively known as the *Payphone Orders*.

[5] *Payphone Reconsideration Order* at para. 131.

[6] *Id.* at para. 199; See also *In the Matter of Wisconsin Public Service Commission,* Order Directing Filings, Bureau/CPD No. 00-01, FCC 02-25 (rel. January 31, 2000) at para. 12.

[7] *New England PCC v. FCC, supra at 72*.

Payphone Orders were directed to file tariffs with the states no later than January 15, 1997. Rates were to be effective no later than April 15, 1997.[8]

Qwest filed new PAL[9] tariffs with the OPUC on January 15, 1997, in Advice No. 1668. The Advice stated that the tariffs were "intended to meet the requirements in FCC Order 96-388 (paragraphs 146-147) (*First Payphone Order)* as modified in FCC Order 96-439 (paragraph 163) (*Reconsideration Order)*." Paragraph 163 of the *Reconsideration Order* specifically states that the intrastate PAL rate filings must meet the Computer III standards (*i.e.*, the NST).

The OPUC considered and approved Qwest's new intrastate PAL rates at its April 1, 1997, public meeting. An OPUC staff report presented at the public meeting reiterated that the filing was intended to meet the requirements established by the FCC in its *Payphone Orders*.[10]

The OPUC-approved PAL rates became effective on April 15, 1997. On the same day, the FCC's Common Carrier Bureau adopted and released its *Waiver Order*. Among other things, the *Waiver Order* granted a request by a coalition of RBOCs, including Qwest, to extend the time to file intrastate tariffs for payphone services. Paragraph 2 states:

> Because some LEC intrastate tariffs for payphone services are not in full compliance with the Commission's guidelines, we grant all LECs a limited waiver until May 19, 1997 to file intrastate tariffs for payphone services consistent with the 'new services' test, pursuant to the federal guidelines established in the Order on Reconsideration, subject to the terms discussed herein. This waiver enables LECs to file intrastate tariffs consistent with the 'new services' test of the federal guidelines detailed in the Order on Reconsideration and the Bureau Waiver Order, including cost support data, within 45 days of the April 4, 1997 release date of the Bureau Waiver Order and remain eligible to receive payphone compensation as of April 15, 1997, as long as they are in compliance with all of the other requirements set forth in the Order on Reconsideration.

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[8] *Payphone Reconsideration Order* at para. 163.

[9] As defined in Qwest's tariff, Public Access Line, or PAL, service "provides telephone service to all Payphone Service Providers (PSP) pay telephones with or without coin collecting devices." The new PAL rates filed by Qwest on January 15, 1997, included "Smart PAL Service" which is defined in the tariff as "a flat or message, two-way or outgoing only line which utilizes central office coin control features." See, U S WEST Communications, Inc., PUC Oregon No. 25, Exchange and Network Services, Section 5, Original Sheet 57.1.

[10] The transcript of the April 1, 1997, public meeting does not indicate that NPCC entered an appearance or submitted comments regarding Qwest's proposed PAL rates. *Qwest Memorandum in Opposition to NPCC's Motion for Partial Summary Judgment and in Support of Qwest's Motion for Summary Judgment (Qwest Memorandum),* Affidavit of Lawrence Reichman, Exhibit 3, January 4, 2005.

> Under the terms of this limited waiver, a LEC must have in place intrastate tariffs for payphone services that are effective by April 15, 1997. The existing intrastate tariffs for payphone services will continue in effect until the intrastate tariffs filed pursuant to the Order on Reconsideration and this Order become effective. A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates. This Order does not waive any of the other requirements with which the LECs must comply before receiving compensation. (Footnotes omitted.)

The *Waiver Order* makes clear that the waiver authorized by the FCC was limited in duration and was granted for the purpose of enabling the states to ensure that intrastate tariffs were filed in accordance with FCC rules, including the NST. Paragraphs 23 and 24 state:

> Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule and such deviation serves the public interest. Because the LECs are required to file, and the states are required to review, intrastate tariffs for payphone services consistent with federal guidelines, which, in some cases, may not have been previously filed in this manner at the intrastate level, we find that special circumstances exist in this case to grant a limited waiver of brief duration to address this responsibility. In addition, for the reasons stated above, our grant of a waiver in this limited circumstance, does not undermine, and is consistent with, the Commission's overall policies in CC Docket No. 96-128 to reclassify LEC payphone assets and ensure fair PSP compensation for all calls originated by payphones. Moreover, the states' review of the intrastate tariffs that are the subject of this limited waiver will enable them to determine whether these tariffs have been filed in accordance with the Commission's rules, including the 'new services' test. Accordingly, we grant a limited waiver for 45 days from the April 4, 1997 release date of the Bureau Waiver Order the requirement that LEC intrastate tariffs for payphone services comply with the 'new services' test of the federal guidelines, as set forth in paragraph 163 of the Order on Reconsideration, subject to the terms discussed herein. This Order does not waive any of the other requirements set forth in paragraphs 131-132 of the Order on Reconsideration. (Footnotes omitted.)
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> In this Order, the Bureau grants a limited waiver of the Commission's requirement that effective intrastate tariffs for

> payphone services be in compliance with federal guidelines, specifically that the tariffs comply with the 'new services' test, as set forth in the Payphone Reclassification Proceeding. LECs must comply with this requirement, among others, before they are eligible to receive the compensation from IXCs that is mandated in that proceeding.[11]

Qwest did not file new PAL tariffs prior to the May 19, 1997, date established in the *Waiver Order*. It contends that the refund requirements of the *Waiver Order* apply only to LECs that actually filed new intrastate tariffs within the specified 45-day period (*i.e.*, between April 4, 1997, and May 19, 1997). Qwest claims that refund provisions in the *Waiver Order* do not apply to its Oregon intrastate PAL rates because those rates were not filed within the 45-day period, but, in fact, had already been approved by the OPUC at its April 1, 1997, public meeting.

NPCC claims that Qwest remains liable to pay refunds under the terms of the *Waiver Order*, notwithstanding the fact that Qwest did not file new tariffs during the 45-day waiver period. NPCC asserts:

1. The *Payphone Orders* required Qwest to file NST-compliant Oregon intrastate PAL tariffs effective April 15, 1997. Those tariffs were required to be filed before Qwest was eligible to receive DAC for its own payphones.

2. Qwest's Oregon intrastate PAL tariffs have never been NST-compliant. This was determined by the Oregon Court of Appeals in November 2004 in *Northwest Public Communications Council v. OPUC.*[12] The Court remanded the case back to the OPUC with instructions to develop NST-compliant rates.

3. Because Qwest: (a) did not file NST-compliant Oregon intrastate PAL tariffs within the 45-day waiver period specified by the *Waiver Order,* and (b) nevertheless began collecting DAC effective April 15, 1997, Qwest remains subject to the refund requirements set forth in the *Waiver Order*. The applicable refund period extends from April 15, 1997, until such time as NST-compliant PAL rates are established by the OPUC in accordance with the Court of Appeals remand in *NPCC v. OPUC.*

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[11] On May 20, 1997, Qwest sent a letter to interexchange carriers certifying that: (a) it had effective intrastate payphone service tariffs in compliance with the *Payphone Orders,* including the NST; and (b) was eligible to receive DAC as of April 15, 1997, in 13 of the 14 states in which it provided service, including Oregon. *Qwest Memorandum*, Affidavit of Lawrence Reichman, Exhibit 5, January 4, 2005.

[12] 196 Ore. App. 94, 100 P.3d 776, 2004 Ore. App. LEXIS 1471 (November 10, 2004) (hereafter, *NPCC v. OPUC).*

In response, Qwest reiterates that the refund provisions in the Waiver Order do not apply, and advances affirmative defenses based on the filed rate doctrine, res judicata, standing, and the federal statute of limitations. NPCC asserts that the affirmative defenses raised by Qwest are either inapplicable or preempted.

Petitions for Declaratory Ruling with FCC

Oregon is not the only jurisdiction where an outstanding controversy exists concerning whether refunds are owed by an RBOC for failure to implement NST-compliant rates on April 15, 1997. The Illinois Public Telecommunications Association, the Independent Payphone Association of New York, and the Southern Public Communications Association have filed petitions with the FCC in CC Docket 96-128, requesting a declaratory ruling that PSPs are entitled refunds where rates charged by RBOCs have exceeded those required by the NST. The FCC consolidated the petitions for consideration on January 5, 2005 (hereafter, "the consolidated petitions").

Among the issues raised by the consolidated petitions is whether the FCC's *Payphone Orders*, including the *Waiver Order*, require RBOCs to refund PAL rates retroactive to April 15, 1997, to the extent that NST-compliant rates are determined to be less than the rates that were actually charged to PSPs. The petitions also ask the FCC to preempt decisions by state commissions and courts that have reached a contrary conclusion.[13]

NPCC has filed comments in the consolidated proceedings supporting the issuance of a declaratory ruling by the FCC authorizing refunds to PSPs and preempting state decisions to the contrary. NPCC's comments detail the nature of its dispute with Qwest and urge the FCC to provide guidance on the refund issue so that the matter may be brought to resolution within "a reasonable timeframe." NPCC emphasizes that without FCC guidance it could be a very long time before its dispute with Qwest is finally resolved. In particular, it states:

> And the NPCC will continue to litigate against Qwest in Oregon for as long as necessary. However, without FCC guidance, that could be a long time. Assuming the NPCC prevails at the OPUC on refunds, Qwest is likely to appeal, since Qwest has shown no sign of relenting and Qwest's refund obligation is estimated to be in excess of $6 million in Oregon. Accordingly, the NPCC believes that if this Commission grants IPANY's petition, it would be very helpful in ensuring that

[13] For example, the Supreme Court of New York, Appellate Division, concluded that the *Waiver Order* does not require refunds where a LEC did not file new rates within the 45-day period prescribed by the FCC. *See, Independent Payphone Association of New York, Inc., v. Public Service Commission of the State of New York, and Verizon New York, Inc.*, 5 A.D.3d 960, 2004 N.Y. App. Div. LEXIS 3442 (March 25, 2004).

refund disputes in Oregon and other states are resolved quickly.[14]

Telephone Conference

At the telephone conference held on March 3, 2005, I suggested that this proceeding be held in abeyance pending a decision by the FCC on the consolidated petitions for declaratory ruling now pending in CC Docket 96-128. The parties expressed certain reservations with that proposal. NPCC noted that the consolidated petitions are not a high-priority item for the FCC and may not be considered in the near future. Qwest expressed concern that postponing disposition of the proceeding might increase its financial exposure in the event that NPCC prevails on the refund issue.

Decision

After considering the filings and the arguments made by the parties at the telephone conference, I find that the most reasonable procedural approach is to hold this proceeding in abeyance pending a decision by the FCC on the consolidated petitions for declaratory ruling. The reasons for my decision are as follows:

1. The threshold question presented in this proceeding concerns the scope of the refund obligation contemplated by the FCC's *Payphone Orders*, and, in particular, the *Waiver Order*. That issue and other related matters are squarely before the FCC in its review of the consolidated petitions. Since the RBOCs' refund liability under the *Payphone Orders* is ultimately a question of federal law, it makes sense to allow the FCC the opportunity to provide guidance to the states concerning the proper interpretation of those orders. While this Commission could certainly opine on what the FCC intended in its *Payphone Orders*, the FCC itself is in the best position to articulate what its decisions require.

2. An OPUC decision on the pending motions is unlikely to shorten the time necessary to resolve the dispute between the parties. In its comments to the FCC, NPCC acknowledges that Qwest is virtually certain to appeal an OPUC decision in NPCC's favor. An appeal could easily take years to wind its way through the Oregon appellate courts. It is very doubtful that this process would be concluded before the FCC's decision on the consolidated

[14] *In the Matter of Independent Payphone Association of New York's Petition for Pre-Emption and Declaratory Ruling Concerning Refund of Payphone Line Rate Charges*, CC Docket No. 96-128, Comments of Northwest Public Communications Council and the Minnesota Independent Payphone Association, in Support of Petition for a Declaratory Ruling, p. 6, January 18, 2005.

petitions.[15] On the other hand, if Qwest were to prevail, it is likely that NPCC will ask the FCC to preempt the OPUC decision, just as it has done in the pending consolidated petition proceeding. In my view, it makes little sense to expend time and resources litigating this matter before the OPUC and state courts when it is unlikely to produce a final outcome, especially when the identical issues are pending before the FCC.

3. Qwest has raised a number of affirmative defenses to NPCC's request for refunds pursuant to the *Waiver Order*. All of these defenses have been raised in the consolidated petition proceeding, with the possible exception of Qwest's claim that NPCC's refund request is barred by the federal statute of limitations. To the extent that the FCC grants the petitions for declaratory ruling, however, it seems probable that the FCC will have occasion to consider all of these defenses, including the federal statute of limitations.[16]

4. Qwest has expressed concern that a delay in the resolution of this proceeding may increase its financial exposure in the event refunds are found to be due. As emphasized above, however, an OPUC decision on the pending motions is unlikely to accelerate the final resolution of this matter. Moreover, because a federal question is involved and the matter currently resides in a federal forum, any potential RBOC financial exposure will remain until the federal proceedings are finally resolved. Consequently, a decision to hold this proceeding in abeyance pending the outcome of the FCC's action on the consolidated petitions will not increase Qwest's financial exposure beyond what it would be otherwise.[17]

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[15] Moreover, even if the state court appeals were finalized before the federal proceedings are concluded, it would not settle the preemption issue. As noted above, NPCC claims that state decisions declining to authorize PSP refunds are contrary to the FCC's *Payphone Orders* and are therefore preempted. For example, NPCC's comments filed in support of the petition for declaratory ruling filed by the Illinois Public Telecommunications Association state that "payphone service providers are entitled to refunds where regional Bell operating companies . . . overcharge PSPs for payphone services under the new services test, and state commissions are preempted from holding otherwise." *In the Matter of the Illinois Public Telecommunications Association's Petition for Declaratory Ruling Regarding the Remedies Available for Violations of the Commission's Payphone Orders*, CC Docket No. 96-128, Comments of Northwest Public Communications Council, the Minnesota Independent Payphone Association, and the Colorado Payphone Association in Support of Petition for a Declaratory Ruling, p. 1, August 26, 2004.

[16] As noted above, NPCC's comments in support of the consolidated petitions describe in detail the circumstances surrounding NPCC's dispute with Qwest. If the FCC goes forward with the consolidated petitions, it is realistic to expect that Qwest will participate and raise its affirmative defenses in that proceeding.

[17] It should be noted that the petitioners in the consolidated petition proceeding have requested that the FCC

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For the reasons set forth above, this proceeding should be held in abeyance pending a decision by the FCC on the consolidated petitions for declaratory ruling in CC Docket 96-128. The parties may move to reopen the proceeding if circumstances arise warranting such action.

Dated at Salem, Oregon, this 23rd day of March, 2005.

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Samuel J. Petrillo
Administrative Law Judge

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require the RBOCs to either refund PAL rates paid in excess of NST compliant rates, or disgorge all of the DAC received since April 15, 1997. NPCC alleges that the amount of DAC received by the RBOCs dwarfs the refunds claimed to be owed to PSPs. To the extent this is true and the FCC determines that disgorgement is proper, Qwest's financial exposure could be much greater. The fact that different remedies may be imposed is yet another reason to allow these issues to be resolved by the FCC.