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

In the Matter of	)	
	)	
Petition for Waiver of Section 61.45(d), or in the Alternative, a Declaratory Ruling	)	WC Docket No. 05-175
	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: November 29, 2006 **Released: December 1, 2006**

By the Commission:

I. INTRODUCTION

1. In this Order, we grant in part a petition filed by several incumbent local exchange carriers (LECs) subject to price cap regulation, which seeks a waiver of section 61.45(d) of the Commission's rules to treat End User Common Line (EUCL) settlement payments to independent payphone service providers (IPSPs) as exogenous costs.[1] We conclude that the Petitioners should be allowed to treat as exogenous costs those settlement payments that were made to resolve complaints for refunds of EUCL charges improperly assessed on IPSPs for the period from October 15, 1993, to April 15, 1997.[2] Although the EUCL charges were assessed pursuant to Commission direction, a federal court

[1] Petition for Waiver of Section 61.45(d), or in the Alternative, a Declaratory Ruling (filed Apr. 13, 2005) (Petition). The Petition was filed by BellSouth, on behalf of itself and its wholly owned subsidiaries; Cincinnati Bell Telephone Company; SBC Services, Inc., on behalf of Pacific Bell Telephone Company, Southwestern Bell Telephone Company, L.P., Nevada Bell Telephone Company, and the Ameritech Operating Companies; Qwest Services Corporation; Sprint Incumbent Local Exchange Companies; and Verizon, on behalf of Contel of the South, Inc. d/b/a Verizon Mid-States, GTE Southwest Incorporated d/b/a Verizon Southwest, The Micronesian Telecommunications Corporation, Verizon California Inc., Verizon Delaware Inc., Verizon Florida Inc., Verizon Hawaii Inc., Verizon Maryland Inc., Verizon New England Inc., Verizon New Jersey Inc., Verizon New York Inc., Verizon North Inc., Verizon Northwest Inc., Verizon Pennsylvania Inc., Verizon South Inc., Verizon Virginia Inc., Verizon Washington DC Inc., Verizon West Coast Inc., Verizon West Virginia Inc. (Petitioners). The Commission sought comment on the Petition through a Public Notice issued on April 25, 2005. *See Pleading Cycle Established for Petition for Waiver of Section 61.45(d) or, in the Alternative, Declaratory Ruling to Treat End User Common Line Settlement Payments as Exogenous Costs*, WCB Docket No. 05-175, Public Notice, 20 FCC Rcd 1605 (WCB 2005). Comments on the Petition were filed May 16, 2005 by the New Jersey Division of the Ratepayer Advocate (Ratepayer Advocate Comments), a group of IPSPs (IPSP Comments), and AT&T Corp. (AT&T), prior to its merger with SBC Communications Inc. (SBC) (AT&T Comments). Petitioners replied to these comments on May 26, 2005 (Petitioners Reply Comments).

[2] *See infra* paras. 3-5 (describing the complaints). The costs eligible for exogenous treatment by this Order are limited to the lesser of: (1) the amount of any settlement that represents the refunding of improperly assessed EUCL charges plus interest; or (2) the amount of improperly assessed EUCL charges shown in the price cap carrier's books for the two-year period prior to the filing of each complaint, plus interest through the date of payment. In this case, interest shall be calculated at the Internal Revenue Service (IRS) rate for corporate overpayments. *See infra* para. 19.

of appeals subsequently found them to be improper. We reject Petitioners' request for exogenous treatment for settlements, including the associated interest, made with respect to EUCL charges improperly assessed prior to October 15, 1993, because the assessment of those charges resulted from Petitioners' error and not their reliance on Commission direction.[3]

II. BACKGROUND

2. When the Commission first adopted access charge rules in 1982, it permitted LECs to recover certain non-traffic-sensitive costs from end users through the monthly, flat-rated EUCL charge.[4] In 1983, when LECs were the only entities authorized to provide payphone service, the Commission exempted public payphones from the EUCL charge but concluded that it should be assessed on semi-public payphones.[5] In 1984, IPSPs were permitted to enter the market.[6] Petitioners determined that IPSPs were end users and assessed the EUCL charge on all IPSP payphones, irrespective of whether they were public or semi-public. Petitioners, however, did not assess the EUCL charge on their own public payphones.[7]

3. In 1989, the United States District Court for the Western District of Wisconsin referred to the Commission a complaint filed by C.F. Communications Corporation (CFC), an IPSP, which challenged the assessment of the EUCL charge by certain LECs.[8] Pursuant to the district court's primary jurisdiction referral, on May 10, 1989, CFC filed 13 formal complaints with the Commission objecting to the LECs' assessment of EUCL charges.[9] On October 14, 1993, the Common Carrier Bureau (Bureau) denied CFC's claims, and the Commission affirmed the Bureau's decision in 1995.[10] The Commission determined that CFC's payphones were subject to EUCL charges because CFC was an end user and that CFC's payphones were not public telephones under the Commission's rules.[11] On appeal, however, the D.C. Circuit Court rejected these determinations and remanded the case to the Commission.[12] The Court

[3] *See infra* para. 15.

[4] *See MTS and WATS Market Structure*, CC Docket No. 78-72, Third Report and Order, 93 FCC 2d 241, 243, para. 3; 280, para. 128 (1983) (*Access Charge Order*), *modified on recon*., 97 FCC 2d 682 (1983) (*First Reconsideration Order*), *modified on further recon*., 97 FCC 2d 834 (1984), *aff'd and remanded in part sub nom*., *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 737 F.2d 1095 (D.C. Cir. 1984). *See also C.F. Communications Corp. v. FCC*, 128 F.3d 735, 736-7 (D.C. Cir. 1997) (*C.F. Communications*).

[5] *First Reconsideration Order*, 97 FCC 2d at 706, para. 60. "A pay telephone is used to provide public telephone service when a public need exists, such as at an airport lobby, at the option of the telephone company and with the agreement of the owner of the property on which the phone is placed." *Id.* at 704 n.41. "A pay telephone is used to provide [semi-public] telephone service when there is a combination of general public and specific customer need for the service, such as at a gasoline station or pizza parlor." *Id.* at 704 n.40.

[6] *See Registration of Coin Operated Telephones*, Memorandum Opinion and Order, 57 RR 2d 133 (1984).

[7] *See C.F. Communications Corp., et al. v. Century Telephone of Wisconsin, Inc., et al.*, File Nos. E-89-170 et al., Memorandum Opinion and Order on Remand, 15 FCC Rcd 8759, 8762, para. 10 (2000) (*2000 EUCL Order*).

[8] *C.F. Communications Corp. v. CenturyTel. of Wisconsin*, Case No. 89-C-0168-C, Order (W.D. Wis. Apr. 27, 1989).

[9] CFC and several other IPSPs subsequently filed 52 additional formal complaints raising the same allegations raised by CFC in its initial complaints. The Commission did not consolidate these complaints with the initial 13 complaints. For further discussion of these complaints, *see 2000 EUCL Order*, 15 FCC Rcd at 8760, paras. 2, 4-6.

[10] *C.F. Communications Corp. v. Century Telephone of Wisconsin*, *Inc., et al.*, File Nos. E-89-170, et al., Memorandum Opinion and Order, 8 FCC Rcd 7334 (1993) (*Bureau CFC Order*), *aff'd*, 10 FCC Rcd 9775 (1995) (*1995 EUCL Order*).

[11] *1995 EUCL Order,* 10 FCC Rcd at 9779, paras. 16-20.

[12] *C.F. Communications*, 128 F.3d at 742.

held that CFC was not an end user, and that the Commission had improperly discriminated between similarly situated services (IPSP-owned and LEC-owned public payphones) without a rational basis.[13]

4. On remand, the Commission found that CFC and the other IPSPs were not end users under section 69.2(m) of the Commission's rules.[14] The Commission also determined that, regardless of whether CFC was an end user, the primary determination the Commission should have made was whether CFC's payphones were public or semi-public.[15] Accordingly, the Commission found that the LECs had imposed an unreasonable charge in violation of section 201(b) of the Act by classifying all IPSP payphones as semi-public and assessing EUCL charges upon IPSP payphones that were deployed in the same manner as LEC-owned public payphones.[16] The Commission also rejected arguments that awarding damages to the IPSPs would be inappropriate because the LECs were acting in accordance with Commission rules. In light of the rules' requirement that LECs evaluate whether individual payphones should be classified as public or semi-public, the Commission found that the access charge orders did not, in fact, require carriers to assess the EUCL charge indiscriminately on all IPSP-owned payphones.[17] Thus, the Commission ruled that the IPSPs were entitled to damages.[18] The *2000 EUCL Order* was upheld on appeal.[19]

5. In November 2002, the Commission concluded that several LECs violated section 201(a) of the Act and Part 69 of the Commission's rules by improperly assessing EUCL charges on IPSPs and partially granted thirteen complaints.[20] In that decision, the Commission expressed its expectation that the order would facilitate the resolution of the approximately 3000 outstanding informal complaints. The majority of those complaints had been filed shortly after the *C.F. Communications* court decision overturning the Commission's *1995 EUCL Order*.

6. The Commission regulates Petitioners pursuant to a price cap regime set forth in Part 61 of its rules under which a carrier's rates are limited by a price cap index (PCI) that may be adjusted from time-to-time.[21] One of the ways PCIs may be adjusted is through exogenous cost adjustments. Exogenous costs generally are those triggered by administrative, legislative, or judicial action beyond the carriers' control that have not been recovered elsewhere.[22] Section 61.45(d) provides that exogenous costs "shall be limited to those cost changes that the Commission shall permit or require by rule, rule waiver, or declaratory ruling."[23] Refunds of overcharges are not listed in the rules as a type of cost that is accorded

[13] *Id.* at 740.

[14] *2000 EUCL Order,* 15 FCC Rcd at 8768, para. 24.

[15] *Id.* at 8768, para. 25.

[16] *Id.* at 8766, para. 20; 8768, para. 26.

[17] *Id.* at 8768, para. 27.

[18] *Id.* at 8769, para. 28.

[19] *See Verizon Telephone Companies v. FCC*, 269 F.3d 1098 (D.C. Cir. 2001) (*Verizon Telephone*).

[20] *See Communications Vending Corporation of Arizona, Inc., et al. v. Citizens Communications Company f/k/a Citizens Utility Company and Citizens Telecommunications Company d/b/a Citizens Telecom, et al.*, Memorandum Opinion and Order, 17 FCC Rcd 24201, 24208-09, para. 16 (2002) (*2002 EUCL Order*).

[21] *See* 47 C.F.R. §§ 61.41-61.49.

[22] *Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Report and Order, 5 FCC Rcd 6786, 6807, para. 166 (1990) (*LEC Price Cap Order*).

[23] 47 C.F.R. § 61.45(d). These costs are created by such events as: the expiration of amortizations; changes in the Uniform System of Accounts; separations changes; changes in universal service fund obligations; the reallocation of regulated and nonregulated costs; tax law changes; retargeting the PCI for price cap carriers taking advantage of the low-end adjustment mechanism; inside wire amortizations; and the completion of amortization of equal access

(continued....)

exogenous treatment by rule, thus necessitating a waiver petition.

7. *Petition.* Petitioners request that the Commission waive section 61.45(d) or, in the alternative, issue a declaratory ruling, to permit them to treat EUCL settlement payments to IPSPs as exogenous costs. Petitioners estimate the settlement amounts to be between $35 and $45 million, collectively.[24] Petitioners assert that they assessed EUCL charges on IPSPs pursuant to three separate Commission interpretations of its access charge rules, all of which were overturned on appeal. They further assert that there has been no dispute that the EUCL charges represented costs they were entitled to recover, the only dispute being from whom.[25] They submit that these costs were not included in the rates they charged other common line ratepayers.[26] Because they assessed these charges pursuant to Commission interpretations, Petitioners contend that they should be permitted to rectify the effects of complying with the Commission's erroneous interpretations. They argue that, when the Commission makes a legal error, courts have held that the proper action is one that puts the parties in the position that they would have been in had the error not been made.[27] Petitioners further argue that the Commission errors were clearly beyond the carriers' control, as is required for exogenous treatment. Finally, Petitioners point to a statement in the *2002 EUCL Order* suggesting that the carriers could receive exogenous cost treatment if they could show that the cost changes were extraordinary.[28] Thus, Petitioners argue that they should be allowed to treat these settlement costs as exogenous.

III. DISCUSSION

8. We find that Petitioners have made a showing sufficient to warrant waiver of section 61.45(d) to permit them to treat as exogenous those settlement costs that relate to refunds of EUCL charges improperly assessed on IPSPs from October 15, 1993, to April 15, 1997. Section 1.3 of the Commission's rules provides the Commission with the authority to grant waivers "if good cause therefore is shown."[29] Courts have interpreted this rule as requiring Petitioners to demonstrate that special circumstances warrant a deviation from the general rule and that such a deviation will serve the public interest.[30] As discussed below, we find that Petitioners have demonstrated that a waiver is in the public interest. Accordingly, we grant Petitioners a waiver to treat as exogenous the settlement costs of refunding EUCL overpayments by IPSPs from October 15, 1993, to April 15, 1997.

(...continued from previous page)
expenses. 47 C.F.R. § 61.45(d)(1); *LEC Price Cap Order*, 5 FCC Rcd at 6807, para. 166; *see also Access Charge Reform,* CC Docket No. 96-262 et al., First Report and Order, 12 FCC Rcd 15982, 16147-48, paras. 379-80, *clarified on recon*., Order on Reconsideration, 12 FCC Rcd 10119, 10121, paras. 5-6 (1997), *rev. denied sub nom*. *Southwestern Bell Telephone Co. v. FCC,* 153 F.3d 523 (8th Cir. 1998).

[24] Petition at 1.

[25] *Id*. at 8-9 (citing 61 C.F.R. § 45(c), 69 C.F.R. §§ 152-54).

[26] *Id*. at 2.

[27] *Id*. at 8 (citing *1993 Annual Access Tariff Filings, Phase I, 1994 Annual Access Tariff Filings*, CC Docket Nos. 93-193, 94-65, 93-193, and 94-157, Order Terminating Investigation, 20 FCC Rcd 7672, 7695, para. 56 nn.182-83 (2005) (*OPEBS Order*); *PUC of California v. FERC*. 988 F.2d 154, 168 (1993); *Southeastern Michigan Gas Co. v. FERC*, 133, F.3d 34, 42 (D.C. Cir. 1998)).

[28] *Id*. at 10 (citing *2002 EUCL Order*, 17 FCC Rcd at 24217, para. 38 ("[T]o the extent that Defendants might have recovered their [NTS] costs from IXCs if they had not assessed the EUCLs on [IPSPs], the Defendants are not without recourse. Commission rules provide a mechanism whereby Defendants can seek to demonstrate that the damages paid to Complainants constitute extraordinary cost changes, thus increasing the permitted price caps.")).

[29] 47 C.F.R. § 1.3.

[30] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969).

9. Price cap carriers must comply with the rate structure rules contained in Part 69 of the Commission's rules that specify the rate elements that a carrier may assess.[31] The EUCL charge, the rate element at issue here, is one of the charges allowed for the recovery of common line costs. During the period in question, price cap carriers were allowed to assess a residential and single-line business EUCL charge or a multiline business EUCL charge on the appropriate end users.[32] Because EUCL charges are subject to caps, however, carriers, in some cases, may not be able to recover all of their common line costs through those charges. In those cases, common line costs not recovered through EUCL charges were largely recovered through the CCLC that is assessed on IXCs.[33] The assessment of a EUCL charge, by definition, reduced the amount of costs that could be recovered from other common line rate elements because a carrier may not recover more through common line charges than the price cap index allows for common line charges.

10. For a party to receive exogenous cost treatment, it must show that the costs were beyond the control of the carrier and were proper costs that have not been recovered elsewhere. The settlement costs of complaints relating to EUCL charges improperly assessed on IPSPs from October 15, 1993, to April 15, 1997, are properly accorded exogenous treatment because they were beyond the carrier's control. From October 15, 1993, until April 15, 1997, the Petitioners assessed EUCL charges on IPSPs pursuant to Bureau or Commission orders that found the assessments proper under the rules. In October 1997, the D.C. Circuit Court overturned these Commission findings. Thus, we find that, contrary to the Ratepayer Advocate's assertion, Petitioners did not make a mistake of law; rather, they were complying with validly issued Commission orders.[34] The Petition presents the type of activity beyond the control of the carrier that the exogenous rule was designed to address. Petitioners clearly did not control the Bureau, the Commission, or the Court.

11. Petitioners have also satisfied the second condition for receiving exogenous treatment -- that the costs to be accorded exogenous treatment were proper costs that have not been recovered elsewhere. During the years in question, the assessment of a EUCL charge on IPSPs meant that those costs were not recovered through another rate element. Beginning October 15, 1993, Petitioners were obligated to assess a EUCL charge on IPSPs in accordance with the interpretation of section 69.104 provided by the Bureau, and subsequently by the Commission. As noted above, at that point, the Petitioners could not have recovered the costs recovered through the EUCL charge assessed on IPSPs through any other rate element. The Bureau and Commission orders precluded Petitioners from recovering those costs elsewhere at that time, and they have not recovered those costs since.[35] Petitioners submit that they have availed themselves of all their defenses, including the two-year statute of limitations on complaints.[36]

12. The Ratepayer Advocate's contention that exogenous treatment is not appropriate because the complainants sought review of the Bureau and Commission orders is misplaced.[37] The Bureau and Commission orders were not stayed and it is well established that, in the absence of a stay, parties must comply with Commission orders.[38] Thus, Petitioners were obligated to assess the EUCL

[31] 47 C.F.R. Part 69.

[32] 47 C.F.R. §§ 69.104(d) and (e) (1996).

[33] 47 C.F.R. § 69.105 (1996).

[34] Ratepayer Advocate Comments at 6-7.

[35] *See* Petition at 2.

[36] *See* Petitioners Reply Comments at 12.

[37] Ratepayer Advocate Comments at 6.

[38] *OPEBS Order*, 20 FCC Rcd at 7693, para. 51 n.173. *See* 47 U.S.C. § 416(c) ("It shall be the duty of every person ... to observe and comply with [Commission] orders so long as the same shall remain in effect."); 47 U.S.C. § (continued....)

charges as directed by the respective orders, or forego those revenues altogether.[39] Here, the question is whether Petitioners may recover settlement costs associated with the improperly assessed EUCL charges as exogenous costs. Granting exogenous cost treatment is the final step in undoing the effects of what was wrongfully done by virtue of the legally erroneous orders.[40] This result "puts the parties in the position they would have been in had the error not been made."[41]

13. We conclude that Petitioners have demonstrated that good cause exists to grant the requested waiver. Petitioners complied with Commission orders that obligated them to assess the EUCL charges on IPSPs or forego recovery of some of their common line costs. When those orders were overturned on appeal, Petitioners refunded those charges and now seek recovery of those costs. These special circumstances warrant waiving our rules to allow exogenous cost recovery, and we find that the waiver serves the public interest by restoring the parties to the position they would have been in but for the Commission's legally erroneous orders.

14. The Ratepayer Advocate's other arguments as to why exogenous treatment should not be granted are also misplaced with respect to the period from October 15, 1993, to April 15, 1997. The Ratepayer Advocate contends that Petitioners have not provided empirical evidence establishing that price caps do not result in rates that are either too high or too low and did not address whether any claimed increase in price caps resulting from EUCL charges would be offset by benefits resulting from the separations freeze.[42] It further argues that the waiver allowing Verizon to keep its advanced services outside price caps should preclude Verizon from receiving any relief because the analysis in the order granting that waiver implies that Verizon already is fully recovering its costs.[43] Under price cap regulation, LEC rates are controlled by a series of PCIs that are expected to keep rates reasonable, without any ongoing consideration of overall earnings. Exogenous cost treatment is a narrowly focused remedy. It looks only at the costs in question to determine if an adjustment is warranted. Thus, the assertions concerning excess earnings, the effects of the separations freeze, and the effects of unrelated waivers are not relevant to evaluating this petition seeking exogenous cost treatment. Finally, the Ratepayer Advocate questions whether SBC should be afforded any relief based on its conduct in the Oklahoma payphone market, where it was assessed penalties in excess of $20 million.[44] SBC responds that these Oklahoma events do not involve EUCL charges and thus have no bearing on the exogenous cost

(...continued from previous page)
155(c)(1) (staff orders issued under delegated authority "shall have the same force and effect" as Commission orders).

[39] The language quoted by the Ratepayer Advocate from the *Verizon* case addressed Petitioners' reliance on the Commission orders as a defense to having to make refunds. The court did not address the LECs' obligation to comply with Commission orders.

[40] *Southeastern Michigan Gas Co. v. FERC,* 133 F.3d 34, 42 (D.C. Cir. 1998) (an agency has authority to "undo . . . what was wrongfully done by virtue of [a legally erroneous] order") (quoting *United States Gas Improvement Co. v. Callery Properties, Inc.,* 382 U.S. 223, 229 (1965)). *See Public Utilities Commission of the State of California v. FERC,* 988 F.2d 154, 163 (D.C. Cir. 1993).

[41] *Exxon Co. v. FERC*, 182 F.3d 30, 49 (D.C. Cir. 1992) (quoting *Public Utilities Commission of the State of California v. FERC*, 988 F.2d at 168). *See Communications Vending Corp. of Arizona v. Citizens Communications Co.*, 17 FCC Rcd 24201, 24215 (2002), *aff'd*, *Communications Vending Corp. of Arizona, Inc. v. FCC*, 365 F.3d 1064 (D.C. Cir. 2004).

[42] Ratepayer Advocate Comments at 9.

[43] *Id*. at 10-11 (citing *Petition for Waiver of the Commission's Price Cap Rules for Services Transferred from VADI to Verizon Telephone Companies,* WC 05-17, Order, 20 FCC Rcd 8900 (WCB 2005)).

[44] *Id*. at 11.

determination.[45]

15. For EUCL charges assessed on IPSPs on or before October 14, 1993, when the *Bureau CFC Order* was released, the Ratepayer Advocate is correct that the error was Petitioners'.[46] As the Commission found on remand from the Court's 1997 decision, the LECs imposed an unreasonable charge in violation of section 201(b) by classifying all IPSP payphones as semi-public and assessing EUCL charges upon IPSP payphones that were deployed in the same manner as LEC-owned public payphones.[47] Petitioners' reliance on the informal staff letters stating that EUCL charges should be assessed on IPSPs is unavailing.[48] Carriers cannot rely on such informal staff representations. Indeed, in the *2000 EUCL Order*, the Commission expressly found that two informal letter rulings of Commission staff were not binding on the Commission in the context of determining whether the LECs owed damages to the IPSPs.[49] As in that decision, we find that the two informal staff letters are not binding on the Commission and do not overcome the finding that Petitioners, through their own tariffing processes, improperly assessed EUCL charges on IPSPs prior to October 15, 1993. Therefore, Petitioners are not entitled to exogenous treatment for any settlement payments, including the associated interest, made with respect to EUCL charges improperly assessed on IPSPs prior to October 15, 1993.

16. We reject AT&T's argument that we should require Petitioners to recover any exogenous costs only from end users.[50] The rules governing the calculation of interstate access charges within the common line basket provide an equitable mechanism to spread the permitted recovery among the various rate elements.[51] At the time of the EUCL assessments, the majority of the recovery would have come from IXCs if the EUCL charge had not been assessed on IPSPs. Petitioners state that exogenous costs would be recovered through the workings of the common line basket and that only a modest amount of the settlement payments will be recovered from IXCs.[52] Under these circumstances, we see no reason to create an exception to the EUCL price caps ceilings for the small amounts in question.

17. We also reject the assertion by the Ratepayer Advocate and AT&T that exogenous treatment will result in retroactive ratemaking.[53] No rates are being changed retroactively; all assessments will be prospective. Moreover, as noted above, when the Commission makes an error, it should place parties in the position that they would have been in if the error had not been made. The result here does so.

18. The argument made by the IPSPs that Qwest's legal fees associated with the settlement negotiations are ineligible for exogenous treatment if a settlement was not reached before September 9,

[45] *See* Petitioners Reply Comments at 13.

[46] Ratepayer Advocate Comments at 5-6. Petitioners indicate that for three carriers, January 1991 is the earliest month for which exogenous treatment is requested. *See* Letter from Davida Grant, Esq., Senior Counsel, AT&T, et al., to Marlene H. Dortch, Secretary, FCC (filed Mar. 3, 2006) at 1-3.

[47] *2000 EUCL Order,* 15 FCC Rcd at 8766, para. 20; 8768, para. 26.

[48] Petition at 6.

[49] *2000 EUCL Order*, 15 FCC Rcd at 8768-69, para. 28 (general policy statements included in correspondence to individuals need not be published and "may not be relied upon, used, or cited as precedent, except against persons who have actual notice of the document in question ....") (citing 47 C.F.R. § 0.445(e)). The Commission found that there was no evidence that any of the petitioners had actual knowledge of the letters.

[50] AT&T Comments at 4-5.

[51] *See* 47 C.F.R. §§ 69.152-54.

[52] *See* Petitioners Reply Comments at 6-7.

[53] Ratepayer Advocate Comments at 9-10; AT&T Comments at 3.

2005, also lacks merit.[54] As Qwest asserts, legal expenses are not part of the claim for exogenous treatment and are thus beyond the scope of this waiver proceeding.[55] In any event, Qwest has resolved the outstanding complaints.[56]

19. Finally, we find that the settlement costs eligible for exogenous costs treatment must be limited in certain respects. First, exogenous cost recovery shall be limited to the amount of improperly assessed EUCL charges shown in the price cap carrier's books for the two-year period prior to the filing of each complaint. This limitation is necessary to ensure compliance with the statute of limitations imposed by section 208 of the Act.[57] This amount also reflects what the price cap rules permitted the carrier to charge. Second, we limit the amount of interest that a carrier may include as an exogenous cost. If a Commission order had been necessary to resolve the damage amount, the Commission would have set the interest rate used to calculate the refund. Generally, the Commission has used the IRS corporate overpayment rate.[58] The present record does not disclose any information about the rate of interest employed in the settlements. The interest rate used to determine the amount of the exogenous cost should not vary depending on whether a complaint is resolved by a settlement agreement between parties or pursuant to a Commission decision. Therefore, we find that the interest to be used in establishing the limit on exogenous cost recovery shall be calculated at the IRS rate for corporate overpayments. Absent these two conditions, carriers might pay more in order to reach a quick and easy settlement, and ratepayers would bear the burden. Thus, in summary, the exogenous costs allowed by this Order are the lesser of the settlement amount, or the amount calculated in accordance with the two conditions enumerated in this paragraph.

IV. ORDERING CLAUSE

20. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 201-205 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 201-205, the Petition IS GRANTED to the extent indicated herein and IS OTHERWISE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

[54] IPSP Comments at 1-2. The Commission originally set September 9, 2005, as the deadline for converting informal complaints to formal complaints. *Informal Complaints filed by Independent Payphone Service Providers,* Order, 20 FCC Rcd 5866 (EB 2005). The date was extended to November 7, 2005, for Qwest. *See* Letter from Albert H. Kramer, Esq., Counsel for Complainants, and Daphne E. Butler, Esq., Counsel for Qwest, dated Aug. 11, 2005 (joint request for extension of time and waiver).

[55] Petitioners Reply Comments at 2-3.

[56] *See* Letter from Davida Grant, Esq., Senior Counsel, AT&T, et al., to Marlene H. Dortch, Secretary, FCC (filed Mar. 3, 2006) at 1.

[57] 47 U.S.C. § 208.

[58] *See, e.g.*, *Investigation of Tariffs Filed by ACS of Anchorage, Inc., and the National Exchange Carrier Association*, CC Docket No. 02-36, Memorandum Opinion and Order, 17 FCC Rcd 10849 (Com. Car. Bur. 2002).