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July 11, 2006

Ms. Sandra Paske, Secretary to the Commission
Public Service Commission of Wisconsin
610 N. Whitney Way
P.O. Box 7854
Madison, WI 53707-7854

**RE: Docket 1065-UO-100, Objection to Universal Service Fund Assessment
by Cheqtel Communications, Inc. and Request for Refund**

Dear Ms. Paske:

Attached for filing in the above-referenced docket is the Joint Petition for Rehearing and Reconsideration of Cheqtel Communications, Inc. and the Wisconsin State Telecommunications Association and Memorandum In Support.

Copies of this Petition are also being sent to the service list in this docket.

Sincerely,
/s/ Brian J. Rybarik
Brian J. Rybarik (SBN 1047401)
Legal Counsel and
Manager of Regulatory Affairs

cc: Scott Nicastro (via email)
Scott Girard (via email)
Joyce Dingman (via email)

**BEFORE THE
PUBLIC SERVICE COMMISSION OF WISCONSIN**

Objection to Universal Service Fund Assessment
by Cheqtel Communications, Inc. and Request for Refund

1065-UO-100

**JOINT PETITION FOR REHEARING AND RECONSIDERATION OF
CHEQTEL COMMUNICATIONS, INC. AND THE WISCONSIN STATE
TELECOMMUNICATIONS ASSOCIATION AND MEMORANDUM IN
SUPPORT**

INTRODUCTION AND MOTION

Pursuant to Wis. Stat. §§ 196.39 and 227.49, Cheqtel Communications, Inc. (“Cheqtel”) and the Wisconsin State Telecommunications Association (“WSTA”) move the Public Service Commission of Wisconsin (“Commission”) for rehearing and reconsideration of a portion of the June 22nd, 2006 Notification of Determination of USF Assessment (“*Order*”¹) in this docket.

The Commission found that Cheqtel was assessed an excessive amount for its portion of the state Universal Service Fund (“USF”). Cheqtel and the WSTA object to the portion of the *Order* in which the Commission required Cheqtel to pay one month’s assessment at the excessive amount and thereafter pay the corrected amount. This portion of the *Order* must be revised since it is based on a material error of law and is contrary to the Wisconsin statutes.

¹ This notification letter appears to be the final Commission action and is therefore the action that Cheqtel and the WSTA seek reconsideration of. While the letter does not state that it is an “Order”, it is designated as an “Order” in the Commission’s electronic regulatory filing system. See http://psc.wi.gov/apps/erf_search/content/result.aspx

BACKGROUND

On December 22, 2005, Cheqtel filed an objection to the USF Assessment billed by the Commission. *See Universal Service Fund Payments Refund Request*, Cheqtel Communications, Inc., Utility No. 1065, Docket No. 1065-UO-100 (December 22, 2005) (the “*Application*”); *see also Order* at 1. The basis for the *Application* was the fact that the assessment amount appeared to be excessive and did not correspond with the company’s actual intrastate revenues. *Id.*; Wis. Admin. Code § PSC 160.18(3). After an internal investigation, it was determined that the excessive assessment was based on an error in Cheqtel’s annual report, which overstated the company’s assessable revenue. *Application* at 1; *Order* at 1. This error meant that Cheqtel’s USF assessment was originally billed at \$3,813 per month, when the proper amount (based on a corrected annual report) should have been \$2,354 per month. *Id.* Cheqtel filed the *Application* to object to the assessment, as allowed by Wis. Stat. § 196.85(4).

The Commission opened this docket to consider Cheqtel’s *Application*. *Notice of Proceeding and Hearing*, Public Service Commission of Wisconsin, Docket No. 1065-UO-100 (February 8th, 2006) (“*Notice of Hearing*”). During the course of the docket, testimony was offered, a hearing was held, briefs were submitted by the parties and a staff briefing memorandum was issued. *See case history, available at http://psc.wi.gov/apps/erf_search/content/result.aspx*. The Commission ultimately agreed that the original USF assessment was excessive and must be reduced. *Order* at 1. However, in the *Order*, the Commission applies “damages” to Cheqtel by requiring them to pay one month of the higher, excessive and erroneous amount. *Id.*

Specifically, the *Order* states that “in this instance, the Commission finds that the applicant is liable for the following payments: The first month of the original assessment in the amount of \$3,813. Hereinafter, the applicant’s payments shall be reduced to the amount of \$2,354 per month.” *Id.*

This “damage” assessment represents a material error of law and must be reversed.²

ARGUMENT

I. THE COMMISSION SHOULD GRANT THIS PETITION TO CORRECT A MATERIAL ERROR OF LAW

A petition for rehearing will be granted when an administrative decision is based on a material error of law, a material error of fact, or where there is a discovery of new evidence that is sufficient enough to reverse or modify the original determination. Wis. Stat. § 227.49 (3)(a)-(c). The *Order* in this case contains a material error of law because the “damages” assessed by the Commission violates the statutory requirements of Wis. Stat. § 196.85(4).

Cheqtel brought this matter to the Commission as an objection to the USF assessment it received on December 1, 2005. The statute at issue here, Wis. Stat. § 196.85(4) provides a process by which a company can challenge an erroneous assessments made by the Commission. *See e.g. Briefing Memo on Request of Cheqtel Communications for Refund of USF Assessment*, Public Service Commission of Wisconsin,

² While this is a petition for rehearing, no additional hearing on this issue is actually necessary since this error of law can be corrected without any additional testimony.

Docket No. 1065-UO-100 at 2 (May 8, 2006) (outlining the applicable rules and statutes in this case). The statute provides the following procedure:

Within 30 days after the date of the mailing of any bill under sub. (1), (2), or (2e), the public utility, sewerage system, joint local water authority, or power district that has been billed may file with the commission objections setting out in detail the grounds upon which the objector regards the bill to be excessive, erroneous, unlawful, or invalid. The commission, after notice to the objector, shall hold a hearing upon the objections, from 5 to 10 days after providing the notice. If after the hearing the commission finds any part of the bill to be excessive, erroneous, unlawful, or invalid, it shall record its findings upon its minutes and transmit to the objector by registered mail an amended bill, in accordance with the findings. *The amended bill shall have the same force and effect under this section as an original bill rendered under sub. (1), (2), or (2e).*

Wis. Stat. § 196.85(4) (emphasis added).

Under this statute, companies must object to an inaccurate assessment within 30 days of mailing. *Id.* There is no dispute that Cheqtel followed the proper procedure and filed their objection within the prescribed time. Also, the Commission found that the assessment levied on Cheqtel was erroneous, unlawful or invalid. *Order* at 1. As such, the Commission is required to transmit a new, amended bill that will have the same force and effect as the original, December 1st bill. Wis. Stat. § 196.84(4). Yet, under the *Order*, Cheqtel will still be required to pay one month at the higher, erroneous and invalid assessment amount. This is in direct conflict with the statute that requires any corrections to be applicable to the entire assessment period. Wis. Stat. § 196.85 (4).

The justification offered in the *Order* is that it was reasonable for the Commission to rely on the annual report data provided by Cheqtel and therefore the

assessment amounts are not “necessarily excessive, erroneous or unlawful.” *Order* at 1. This position is problematic considering the Commission concedes that the assessment amount in the original bill was, in fact, excessive. *See id.* (reducing Cheqtel’s ongoing payments to the corrected \$2,354 per month). Once this conclusion is reached, the Commission must apply the correct assessment amount back to the original bill. Wis. Stat. S 196.85(4).³

Imposing the penalty fashioned by the Commission here effectively renders the last sentence of the statute to be superfluous, a result that has been routinely rejected by courts. *Landis v. Physicians Ins. Co.*, 2001 WI 86, ¶16, 245 Wis. 2d 1, 628 N.W.2d 893 (“in interpreting a statute, courts must attempt to give effect to every word of a statute, so as not to render any portion of the statute superfluous.”) Given the timelines established in the statute, Cheqtel’s objection was required during the first month of assessment. As such, Cheqtel was requesting an adjustment to the “original bill”- the only bill Cheqtel received before it filed its objection. Since no other bill was rendered before the objection was filed, the result of the *Order* requires that the last sentence of the statute be ignored.

³ This interpretation of the statutory requirements is apparently shared by Commission staff. The revisions to the Commission’s USF rules (currently under consideration) include a provision relating to objections to USF assessments. *Biennial Review of Universal Service Fund Rules*, Public Service Commission of Wisconsin Docket 1-AC-198, Notice of Hearing, Attachment B at 27 (June 2, 2006). The revised rules provide the following example:

“For example, if a new assessment amount is billed on October 1 and an objection is filed on October 15, the objection will be to the amount on all bills from October 1st on. If an appeal is filed on November 15, the objection will be to the amount on all bills from November 1st on.”

Id.

The Commission's decision in this case appears to be a punishment against Cheqtel for making an error in their annual report. Such a penalty is not provided for in the statutes, and the Commission only has the power provided by the Legislature. *Kimberly-Clark Corp. v. PSC*, 110 Wis.2d 455, 461-62, 329 N.W.2d 143 (1983) ("It is axiomatic that because the legislature creates administrative agencies...such agencies have 'only those powers which are expressly conferred or which are necessarily implied by the statutes under which it operates.'") Additionally, there is no policy reason to apply a penalty here, since companies have every incentive to provide accurate figures in their annual reports.⁴ This was an inadvertent error that is not in need of a punishment.

The *Order* in this case does not follow the statutory directive of Wis. Stat. § 196.85(4) since the bill rendered does not correct the error back to the original billing date. Additionally, there is no basis in law or policy to apply a penalty to Cheqtel in this case. The error of law in this case must be corrected and Cheqtel's assessment be reduced to the proper amount (\$2,354 per month) for the entire assessment period.

II. THE COMMISSION SHOULD GRANT THIS REQUEST UNDER WIS. STAT. § 196.39

Cheqtel and the WSTA recognize that the rehearing procedure in Wis. Stat. § 227.49 is available in contested cases. *See* Wis. Stat. § 227.49 (entitled "Petitions for rehearing in contested cases."). While this is not technically a contested case, at the

⁴ During the decision on this issue, the Commissioners themselves identified a concern about the resources invested in correcting the original error. The Commissioners acknowledged that correcting the error was probably more costly than the error itself. This recognition further illustrates the incentive that companies have to file error-free annual reports.

directive of the Commission, this case has followed Class 1 proceeding procedures. *Notice of Hearing* at 2 (“This is not a contested case, but the procedures for Class 1 proceedings (see Wis. Stat. ch. 227, subchapter III) will be followed”). The Commission could chose to apply the same procedures it did in the case and correct this error of law according to the procedures in Wis. Stat. § 227.49.⁵

In the alternative, Cheqtel and the WSTA respectfully request that the Commission use its power under Wis. Stat. § 196.39 to correct this error of law.⁶

CONCLUSION

For the reasons state above, Cheqtel and the WSTA respectfully request that the Commission take the necessary action to reverse the portion of the *Order* identified above and reduce Cheqtel’s USF assessment accordingly.

⁵ To the extent that the Commission believes that the provisions of Wis. Stat. § 227.49 do not apply to this case, the WSTA plans to file a Petition for Judicial Review of the Order pursuant to the provisions of Wis. Stat. § 227.53.

⁶ Wis. Stat. § 196.39 allows the Commission to alter or amend any order so long as the affected utility is given notice and an opportunity to be heard. Wis. Stat. § 196.39(1). Additionally, under this statute, the Commission may reopen any case following the issuance of an order in the case, for any reason. *Id.* Since Cheqtel is a party to this petition, this constitutes its “opportunity to be heard” on this issue. As noted in n.2 above, the petitioners do not believe that any additional testimony is needed to correct this error of law.

Dated this 12th day of July, 2006.

WELD, RILEY, PRENN & RICCI, S.C

By: /s/ G. Scott Nicastro

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