



N A R U C
National Association of Regulatory Utility Commissioners

NOTICE VIA ELECTRONIC FILING

October 15, 2015

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

RE: Notice of Oral Ex Parte filed in the proceedings captioned: *In the Matter of Rates for Instate Inmate Calling Services, WC Docket No. 12-375 [FCC 13-113]*

Secretary Dortch:

Earlier today, the undersigned spoke with **Amy Bender, Wireline Legal Advisor to FCC Commissioner Michael O’Rielly** and separately with **Nicholas Degani, Wireline Legal Advisor to FCC Commissioner Ajit Pai**. In both conversations, the undersigned generally reiterated NARUC’s on-the-record¹ positions (as reiterated below) with respect to the pending decision on inmate calling and intrastate services that:

- [1] The original NPRMs acknowledged that intrastate ISC rates are “set by the States;”*
- [2] NARUC opposes arguments that expand the FCC’s jurisdiction to intrastate toll rates or unnecessarily supplant existing State Public Service Commission decisions over this service;*
- [3] As a policy matter, States are in the best position to regulated intrastate inmate calling rates;*
- [4] The FCC lacks authority to preempt intrastate inmate calling rates; and*
- [5] Any dissenting FCC Commissioner views can only assist anyone seeking judicial review of an FCC decision preempting intrastate inmate calling rates.*

¹ See, e.g., January 9, 2015 *Comments of the National Association of Regulatory Utility Commissioners*, filed in WC Docket 12-375, online at: <http://apps.fcc.gov/ecfs/comment/view?id=60001007813>; July 21, 2014 *Notice of Oral Ex Parte from James Bradford Ramsay, NARUC General Counsel to Marlene H. Dortch*, filed in WC Docket 12-375, online at: <http://apps.fcc.gov/ecfs/comment/view?id=6018233616>; December 21, 2013 *Comments of the National Association of Regulatory Utility Commissioners*, filed in WC Docket 12-375, online at: <http://apps.fcc.gov/ecfs/comment/view?id=6017482122>; April 22, 2013 *Reply Comments of the National Association of Regulatory Utility Commissioners*, filed in WC Docket 12-375, online at: <http://apps.fcc.gov/ecfs/comment/view?id=6017319919>. December 28, 2012 *Ex Parte Letter to the Honorable Julius Genachowski, Chairman, Federal Communications Commission, from James Bradford Ramsay, NARUC General Counsel in the Matter of the “Wright Petition” concerning Inmate calling rates*, filed in CC Docket No. 96-128, <http://apps.fcc.gov/ecfs/comment/view?id=6017155457>.

In our earlier comments NARUC points out that the FCC lacks authority to address intrastate ICS rates:

The *Second Further Notice* invites comment on a new interpretation of § 276 – one that is both inconsistent with the text of the statute and also the Commission and Court precedent. As a preliminary matter, there is at least one rule of statutory construction Congress specified that both the FCC and any reviewing Court must consider. On top of the general jurisprudential rule establishing a heavy presumption against a finding that a federal statute preempts State authority,² Congress imposes an explicit rule of statutory construction in § 601(c)(1): where a provision can be read in several ways, it must be construed to avoid preemption.³ Until this proceeding, the FCC has consistently interpreted this section in a much less preemptive fashion. It has never been expanded to give the FCC authority to establish intrastate toll rates – which are not always provided by the payphone equipment owner at specific locations.

Moreover, the plain text of § 276 specifies a purpose that is inconsistent with the *FNPRM*'s proposed new interpretation of that provision. The rules under § 276 are to assure that Bell Operating Companies do not “discriminate in favor of its payphone services” or “subsidize its payphone services directly or indirectly.”

Section 276 has to be read in *pari materia* with 47 U.S.C. § 152's⁴ express reservation of State authority over the toll service rates of calls that originate and terminate within the boundaries of that State. The Supreme Court applied Section 152 strictly, refusing even to permit federal prescription of limits on the cost inputs that factor into intrastate rate setting. “Section 152(b) constitutes, as we have explained above, a congressional **denial of power** to the FCC to require state commissions to follow FCC depreciation practices for **intrastate** ratemaking purposes.”⁵ Even after the 1996 amendments, where Congress expanded the FCC's authority into intrastate telecommunications matters, the FCC itself never construed its authority under Section 276 to extend to intrastate toll services. In the *Second Further Notice*, the FCC again relies on Section 276 which states:

[T]he Commission shall take all actions necessary (including any reconsideration) to prescribe regulations that (A) establish a per call compensation plan **to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone**, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation.⁶

On its face, this provision focuses on owners of payphone equipment. It entitles these “Payphone Service Providers” (PSPs) to compensation for use of that equipment. Section 276 creates a federal regime specific to the

² When addressing questions of express or implied federal preemption, Courts begin their analyses “with the assumption that the historic police powers of the States [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). That assumption applies with particular force when Congress has legislated in a field traditionally occupied by the States. *Metronic v. Lohr*, 518 U.S. 470 at 485 (1996). *Altria Grp. Inc. v. Good*, 555 U.S. 70 at 77 (2008).

³ Section 601(c)(1) provides that “[t]his Act and the amendments by this Act shall not be construed to modify, impair, or supersede Federal, State, or local law unless expressly so provided in such Act or amendments.” (emphasis added). Cf. 47 U.S.C. § 261(b)&(c) (1996).

⁴ Section 152(b) states, in pertinent part:
[N]othing in this chapter shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier

⁵ *Louisiana Pub. Serv. Commission v. FCC*, 476 U.S. 355, 374 (1986) (emphasis added).

⁶ 47 U.S.C. § 276(b)(1)(A) (emphasis added). See *Second Further Notice* at ¶ 29.

payphone, where previously “[S]tates ...regulated payphones as part of the LEC’s network-based service.”⁷ The section permitted the FCC to preempt State regulations that “prohibit the provision of payphone service by any entity other than the incumbent LEC.”⁸ This new framework separated payphone equipment from the telecommunications services provided, including, as the FCC has previously specified, *the operator services provided to payphones which are independently regulated under the Telephone Operator Consumer Services Improvement Act* (“TOCSIA”).⁹ Congress was focused on introducing competition for the provision of payphone equipment and specified that Payphone Service Providers have a right to be paid by the carriers whose calls are initiated by their payphones. The FCC viewed Section 276 to require the agency to ensure “that all calls are fairly compensated, including those **for which the PSP currently receives no revenue.**”¹⁰

Significantly, Section 276 does not apply to long-distance calling rates. PSPs have no right to impose long-distance rates.¹¹ Rather, it is the interexchange carrier who gets paid by the calling or called party for the completed telephone call itself. Section 276 simply ensures that the PSP gets its fair share for providing the handset that allowed the call to occur. Congress’s focus cannot be ignored simply because Section 276 defines

⁷ CC Docket No. 96-128, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, FCC 96-388, 11 FCC Rcd. 20541, 20546 ¶ 9 (1996) (“*First Payphone Report and Order*”). This order famously was reversed and remanded, with several remands to follow, with regard to the per-call PSP compensation rate.

⁸ *First Payphone Report and Order* ¶ 13.

⁹ Pub. L. No. 101 435, 104 Stat. 986 (1990) (codified at 47 U.S.C. § 226).

¹⁰ *First Payphone Report and Order* ¶ 48 (emphasis added). The FCC’s § **64.1300 Payphone compensation obligation** implementing rules make that distinction clear:

(a) For purposes of this subpart, a Completing Carrier is a long distance carrier or switch-based long distance reseller that completes a coinless access code or subscriber toll-free payphone call or a local exchange carrier that completes **a local, coinless access code or subscriber toll-free payphone call.**

(b) Except as provided herein, a Completing Carrier that completes a **coinless access code or subscriber toll-free payphone call** from a switch that the Completing Carrier either owns or leases shall compensate the payphone service provider for that call at a rate agreed upon by the parties by contract.

(c) The compensation obligation set forth herein shall not apply to calls to emergency numbers, calls by hearing disabled persons to a telecommunications relay service or **local calls for which the caller has made the required coin deposit.**

(d) In the absence of an agreement as required by paragraph (b) of this section, the carrier is obligated to compensate the payphone service provider at a per-call rate of \$.494.

¹¹ In ¶ 33, the *Second Further Notice* takes text out-of-context asking about § 276’s “requirement that regulations adopted by the Commission ensure that payphone service providers are compensated” on a “per call” basis and for “each and every completed intrastate and interstate call”? As discussed, *infra*, that text has to be read in context. The thrust of § 276 is obvious. The “per call” compensation plan for PSPs does not apply to telecommunications relay services or emergency calls. Such a ban is logical in the context of a plan to assure that the Bell Operating Companies were not finding ways to favor their own payphones over others. It is not logical in this context. Note, the FCC has not suggested any “per call” compensation plan will require an “inmate” service provider to include free TRS services as this part of the statute seems to require. See *FNPRM* ¶¶ 134-144 (discussing interrelationship between ICS calls and TRS access). What about § 276’s requirement to assure that BOCs “have the same right” that independent payphone providers do “to negotiate with the location provider...unless the FCC determines its not in the public interest.” Note - there is no provision in that section to make similar rules for the referenced “independent” payphone providers – a category, which under the FCC’s jurisdictional proposal, necessarily includes most of the companies providing inmate calling services. *There is no default requirement for the FCC to block non-BOC negotiations with location service providers as not in the public interest.* Indeed the only similar provision for non-BOC/independent PSP - § 276(e) - lacks that limiting language, specifying only that the FCC “shall” provide regulations that “provide for all payphone service providers to have the right to negotiate with the location provider on the location providers’ selecting and contracting with, and subject to the terms of any agreement with the location provider, to select and contract with the carriers that carry intraLATA calls from their payphones.” Specifying that the FCC must create rules to allow all “payphone service providers” to “negotiate” such terms seems directly at odds with the regulations the FCC is proposing in this proceeding as does the requirement in § 276(a) that the Bell Operating Companies cannot subsidize its payphone service directly or indirectly from its “basic exchange” (local) and “exchange access” (toll) operations.

“payphone service” as “the provision of public or semi-public pay telephones, the provision of inmate telephone service in correctional institutions, and any ancillary services.”¹²

“Inmate telephone service” obviously refers to the provision of the equipment, and not calling service, else Congress would have used the term “inmate telecommunications services.”¹³ Congress provided an explicit definition of “telecommunications services” in 47 U.S.C.S 153.

The earlier 2013 *FNPRM* cites *Illinois Public Telecommunications Association v. FCC*, 117 F.3d 555 (D.C. Cir. 1997),¹⁴ as supporting this revisionist reading of Section 276. It does not. *Illinois Public Tel.* did not involve intrastate toll rates. It focused on rates for local calls made from a payphone and paid with coins. The FCC adopted a “‘market-based’ surrogate” for the local coin rate in order to ensure that PSPs receive the per-call compensation to which they are entitled.¹⁵ As the D.C. Circuit observed, “The Commission emphasized, however, that the local coin rate would be only the default rate, from which the PSPs and IXCs could negotiate a departure.”¹⁶

The Court’s decision was clear. The “market-based surrogate” was upheld: Because the only compensation that a PSP receives for a local call (aside from the subsidies from CCL charges that LEC payphone providers enjoy) is in the form of coins deposited into the phone by the caller, and there is no indication that the Congress intended to exclude local coin rates from the term “compensation” in § 276, we hold that the statute unambiguously grants the Commission authority to **regulate the rates for local coin calls.**¹⁷

Illinois Public Tel. is distinguishable on both the facts and the law. The appeal was in the context of local coin calls, relies on the context of public payphones in a multi-carrier environment; and protects the right of those who provide payphones – and nothing else – to be compensated for use of their equipment.

Inmate Telephone Service has none of these characteristics, as they cannot be paid with coins, are provided pursuant to exclusive public contracts, and are carried by the owner of the payphone (assuring the equipment owner is compensated for the use of its equipment).

It is clear in this context, though clearly well-intentioned, the FCC’s jurisdictional reach, well exceeds its statutorily-authorized grasp.

This *Second Further Notice* also implicates intrastate ICS and access for long-distance ICS calls through intrastate telecommunications relay services (TRS). See generally *FNPRM*, ¶¶ 133-144, at 54-58. States are the traditional providers and/or administrators of intrastate TRS access services, e.g., through the operation of State-specific TRS centers that utilize calling assistants and other assistive technologies to serve the communications needs of persons with disabilities.

¹² 47 U.S.C. § 276(d).

¹³ “Congress’ choice of words is presumed to be deliberate” *University of Texas Southwestern Med. Ctr. v. Nassar*, ___ U.S. ___, 133 S. Ct. 2517, 2529 (2013) (citing *Gross v. FBL Financial Svcs., Inc.*, 557 U.S. 167, 177 n.3 (2009)).

¹⁴ *FNPRM* ¶ 137.

¹⁵ 117 F.3d at 560.

¹⁶ 117 F.3d at 560.

¹⁷ 117 F.3d at 562 (emphasis added).

The FCC must assure that any rules it chooses to implement do not disturb or negatively impact the various arrangements — and associated compensation mechanisms for access and call completion via TRS centers — between various States and providers of intrastate TRS access services.

I have attempted to cover all the key advocacy points raised during the meeting. I am copying Ms. Bender and Mr. Degani with this notice. If she or he indicates I have inadvertently left out some advocacy, I will immediately refile a corrected notice that includes the omitted discussions. If you have questions about this or any other NARUC advocacy, please do not hesitate to contact me at 202.898.2207 (w), 202.257.0568(c) or at jramsay@naruc.org.

Respectfully Submitted,

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