

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

In the Matter of)	
)	
Implementation of the Pay Telephone)	
Reclassification and Compensation Provisions)	
of the Telecommunications Act of 1996)	
)	CC Docket No. 96-128
The Michigan Pay Telephone Association's)	
Petition for Declaratory Ruling Regarding)	
The Prices Charges by AT&T Michigan)	
For Network Access Services Made)	
Available to Payphone Providers in Michigan)	

**COMMENTS OF AT&T INC., BELLSOUTH TELECOMMUNICATIONS, INC.,
AND THE VERIZON TELEPHONE COMPANIES
ON THE MICHIGAN PAY TELEPHONE ASSOCIATION'S
SECOND PETITION FOR DECLARATORY RULING**

INTRODUCTION AND SUMMARY

The Commission should dismiss or deny the Petition for Declaratory Ruling filed by the Michigan Pay Telephone Association (“MPTA”) and need not address the merits of the MPTA’s arguments. The MPTA petition challenges the application by the Michigan Public Service Commission (“MPSC”) of the “new services test” pricing standard to state payphone line rates and argues that the MPSC erred when it approved certain usage rates. *See* MPTA Pet. at 2. But application of the federal pricing standard to particular facts is a responsibility of state commissions, subject to state court review, and should not be subject to additional review by the Commission.

The MPTA petition challenges the application of a settled federal pricing standard – which the MPSC articulated and followed – to state-specific facts and circumstances. The Commission in its initial *Payphone Orders* held that the application of the federal pricing standard is a matter of state responsibility, *see infra* at 5, and MPTA has already filed a state-

court appeal arguing that the MPSC’s decision was inconsistent with the federal standards that even the MPTA admits it “purported[ly]” applied. MPTA Pet. at 2. The MPTA has thus availed itself of the appropriate state procedures and remedies; as a matter of comity and conservation of the Commission’s resources, the Commission should decline to review an individual state’s fact-specific application of the new services test.

More generally, the application of prior Commission orders to a particular set of facts – including state-specific circumstances that affect the reliability of a comparison to business rates – is not an appropriate subject for a declaratory ruling. The Commission should therefore exercise its discretion to deny MPTA’s petition.

The Commission should also reject MPTA’s brief (and unsupported) request for a declaration that any change in local usage rates would require a refund “going back to April 15, 1997.” *Id.* at 20. As we have explained in prior comments filed in this docket, the appropriate remedy in cases where a state commission determines that state payphone line rates should be changed to comply with the new services test is a matter governed by state law and procedure.

BACKGROUND

The MPTA’s petition – its second – arises out of an MPSC proceeding to review AT&T Michigan’s state payphone line rates. In March 1999, the MPSC held that AT&T Michigan’s payphone line rates complied with the Commission’s new services test. MPTA challenged that decision in state court, and, while that appeal was pending, the Commission issued the *Wisconsin Order*,¹ in which it clarified the federal pricing standard. In light of the Commission’s order, the

¹ Memorandum Opinion and Order, *Wisconsin Public Service Commission; Order Directing Filings*, 17 FCC Rcd 2051 (2002) (“*Wisconsin Order*”), *aff’d sub nom. New England Pub. Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *cert. denied*, 124 S. Ct. 2065 (2004).

Michigan Supreme Court granted a joint motion to remand filed by the MPTA and the MPSC. See *Michigan Pay Tel. Ass'n v. Michigan Pub. Serv. Comm'n*, 646 N.W.2d 471 (Mich. 2002).²

On remand, the MPSC conducted a supplemental hearing, with two days of cross-examination and 772 pages of transcript, and allowed the parties to file initial and reply briefs after the hearing. After an ALJ issued a Proposal for Decision, the MPSC considered exceptions filed by MPTA, SBC, and other parties, and then issued a final order. See *Opinion and Order, Complaint of Michigan Pay Telephone Ass'n et al. against Ameritech Michigan and GTE North Inc.*, Case No. U-11756, at 4 (MPSC Mar. 16, 2004) (Tab 1 to MPTA Pet.).

The key point for the Commission's purposes here is that the MPSC's Order correctly identified and proceeded to apply the proper federal pricing standard for payphone line rates – that is, the new services test as clarified by the Commission in the *Wisconsin Order*. The MPSC first noted that, in 1996, the Commission had issued orders implementing Section 276 that required BOCs “to comply with the NST [(new services test)] when setting prices for network services sold to” independent payphone providers (“IPPs”). *Id.* at 5. The MPSC noted that the new services test “requires that rates be set to recover the forward-looking direct cost of providing the service, plus a reasonable amount of overhead.” *Id.* And the MPSC further noted that in the *Wisconsin Order* the Commission had found that states may use “TELRIC or TSLRIC to determine forward-looking costs, with an added amount to recover overheads using UNE loading factors or, at the state's discretion, either the methodology explained in the FCC's

² The Common Carrier Bureau granted a petition for declaratory ruling filed by MPTA, directing the MPSC to “re-evaluate” its decision concerning the pricing of “BOCs' intrastate payphone line rates and overhead ratios to ensure compliance with the *Wisconsin Order*.” Order, *North Carolina Payphone Association Petition for Declaratory Ruling*, 17 FCC Rcd 4275, ¶ 3 (CCB 2002). That order was not cited by the Michigan Supreme Court.

Physical Collocation Order or that explained in its Open Network Architecture (ONA) Order.”
Id. at 6 (footnotes omitted).

In elaborating on its understanding of that federal standard, the MPSC made clear that “IPPs are not telecommunications providers, which are entitled to obtain services provided by the LECs at UNE rates.” *Id.* at 12. Thus, the MPSC rejected “the MPTA’s argument that the LECs should be required to use the UNE method for determining whether the IPP rates comply with the NST.” *Id.* at 18. But the MPSC also held that IPPs should not be “treated the same as all other retail customers, because of legal constraints on payphone service rates outlined above.” *Id.* at 12. Thus, the MPSC said it would “determine whether the IPP rates . . . meet the NST as expressed by the FCC in the Wisconsin Order.” *Id.* After performing that analysis, the MPSC found that “the overhead loading factor as established by [AT&T’s] analysis is a reasonable one and complies with the NST,” but it also found that AT&T had “fail[ed] to account for the EUCL charge.” *Id.* at 19. “To the extent that including the EUCL charges would render the IPP rates in excess of the reasonable allocation of the overhead [AT&T] calculated, [AT&T’s] IPP rates do not comply with the NST.” *Id.* at 20. The MPSC therefore required AT&T to adjust its rates to “comply with the NST.” *Id.* The MPSC also determined that “[t]o the extent that [AT&T] . . . [has] charged IPP rates in excess of the ceiling imposed by the NST when the EUCL charge . . . is taken into consideration, . . . a refund is due to [its] customers.” *Id.* at 26.

On February 10, 2005, the MPSC denied rehearing. *See* Order Denying Rehearing, *Complaint of Michigan Pay Telephone Ass’n et al., against Ameritech Michigan and GTE North Inc.*, Case No. U-11756 (MPSC Feb. 10, 2005) (Tab 2 to MPTA Pet.). Both MPTA and AT&T then filed appeals (of the MPSC’s determination regarding NST-compliant rates and the MPSC’s refund determination, respectively) in the Michigan Court of Appeals. The two appeals were

consolidated, and briefing was completed in September 2005. The parties are currently awaiting a ruling by the Michigan Court of Appeals.

ARGUMENT

THE COMMISSION SHOULD DISMISS OR DENY MPTA'S PETITION

A. The Commission should deny MPTA's petition because it is inconsistent with the Commission's own determination that the states, not the Commission, are responsible for application of the Commission's pricing standards to state payphone line rates. Particularly where, as here, a petitioner acknowledges that a state commission has recognized and sought to apply the correct federal standard, the question whether the particular application of that standard to state-specific facts is a function for judicial review as provided under state law, not review by the Commission. It would be inconsistent with "the interest in federal-state comity," *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 15, for the Commission to treat state commissions as little more than subsidiary bureaus of the Commission, making only preliminary determinations subject to Commission review.

In the *First Report and Order*, the Commission held that "tariffs for payphone services must be filed with the Commission as part of the LECs' access services to ensure that the services are reasonably priced and do not include subsidies." Report and Order, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 20541, 20615, ¶ 147 (1996). In the *Order on Reconsideration*,³ however, the Commission – *over IPPs' objections* – eliminated the requirement that LECs file federal tariffs for "basic payphone line[s]." 11 FCC Rcd at 21308, ¶ 163. Instead, the Commission held that it would "*rely on the states* to ensure that the basic payphone line is

³ Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233 (1996).

tariffed by the LECs in accordance with the requirements of Section 276.” *Id.* (emphasis added). Accordingly, the Commission will not take over that state commission role unless state commissions are “unable” to carry it out. *Wisconsin Order*, 17 FCC Rcd at 2056, ¶ 15.⁴

That is not the case here: MPTA presented the same arguments that it makes here to the MPSC, which fully considered and treated as binding all requirements of federal law in resolving the issues presented. Moreover, MPTA has a forum available to it for pursuit of any claims that the MPSC Order violates federal law – an appeal in Michigan appellate court. Under these circumstances, entertaining MPTA’s petition would be inconsistent with the Commission’s express determination that state commissions, not the FCC, bear responsibility for implementation of the federal pricing standard at the state level and would represent a serious intrusion on the proper role of the MPSC and the Michigan state courts in enforcing state and federal law. Because MPTA has a full and fair opportunity to litigate these issues in a state forum – an opportunity of which it has availed itself through its appeal in state court – it should not be permitted to mount a collateral attack on the state commission’s ruling before the Commission.

B. The MPTA petition also is not an appropriate petition for a declaratory ruling. The petition addresses a single state commission determination, decided based on an extensive evidentiary record and in reaction to particular litigation positions of the individual parties. This Commission has made clear that a declaratory ruling will not contribute substantially to “terminating a controversy or removing uncertainty,” 47 C.F.R. § 1.2, in cases where the

⁴ For example, in the *Wisconsin Order*, the Commission addressed the issue presented only because the Wisconsin Public Service Commission (“PSC”) found that it had no jurisdiction to address the issue. *See Wisconsin Order* ¶ 20. Even in light of this, the Commission declined to address Wisconsin-specific rates, instead urging the Wisconsin PSC to do so. *See id.* ¶ 66.

resolution of the petition depends on such unique circumstances.⁵ This is not a case where a petitioner seeks a clarification of a prior Commission order so that it can be properly applied in any number of different tribunals. Rather, MPTA takes issue with the way that the MPSC – which admittedly applied the *correct* federal pricing standard – weighed the record evidence and expert testimony regarding the specific rates in Michigan. MPTA’s petition thus does not provide an appropriate vehicle for resolution of any supposed controversy.

C. It is true that the Bureau (and not the Commission, as MPTA states) remanded a previous MPSC decision for further consideration in light of the *Wisconsin Order*. *See supra* n.1. But the circumstances in 2002 were quite different from those at issue here: in particular, the Commission had just issued a significant clarification of the applicable federal pricing standard. The Bureau’s order simply asked the state commissions to apply the federal standard as it had been articulated by the Commission. That is precisely what the MPSC has done.

By contrast, both the Bureau and the Commission itself in the *Wisconsin Order* refused to do what the MPTA effectively asks of the Commission here: to review the facts of particular cases and a state commission’s ultimate determination based on those facts. *See Wisconsin Order*, 17 FCC Rcd at 2071, ¶ 66 (refusing to review cost-support material and instead requesting that the Wisconsin Commission – despite its earlier finding that it lacked jurisdiction – to review state payphone line rates for compliance with the federal standard). Thus, the MPTA’s petition asks the Commission to make an unprecedented intrusion into an area that the Commission clearly determined would be a responsibility of the states.⁶

⁵ *See, e.g.*, Memorandum Opinion and Order, *Omnipoint Communications, Inc. New York MTA Frequency Block A*, 11 FCC Rcd 10785, 10789, ¶ 9 (1996) (noting that a declaratory ruling is inappropriate where the issue presented is best resolved on a “case-by-case basis”).

⁶ The Bureau order is not a Commission-level precedent, and we respectfully disagree with it. But, in any event, it is distinguishable for the reasons explained in the text.

D. The MPTA asserts, without support, that the Commission should also order that, if the MPSC decides on remand that it should require a lower “usage service rate, then that rate was unlawfully set in excess of its cost-based level in violation of the new services test and refunds are due the IPPs going back to April 15, 1997.” MPTA Pet. at 20.

Any request that the Commission address the appropriateness of refunds in particular cases should be denied for the reasons that we have previously set forth in comments filed in response to petitions filed by the Illinois Public Telecommunications Association, the Southern Public Communication Association, the Independent Payphone Association of New York, and the Florida Public Telecommunications Association.⁷ Nothing in the Commission’s prior payphone orders purports to require refunds when a state commission determines that a particular payphone line rate must be reduced. *See, e.g.*, Comments on IPTA Petition at 12-15. Instead, prior Commission orders make clear that such remedial determinations are wholly within the discretion of state commissions, applying state law and procedures.

CONCLUSION

For the foregoing reasons, the Commission should dismiss or deny MPTA’s petition.

⁷ *See* Comments of AT&T Inc., BellSouth Telecommunications, Inc., and the Verizon Telephone Companies on Florida Public Telecommunications Association’s Petition for a Declaratory Ruling, C Docket No. 96-128 (FCC filed Feb. 28, 2006); Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Independent Payphone Association of New York’s Petition for an Order of Preemption and Declaratory Ruling, CC Docket No. 96-128 (FCC filed Jan. 18, 2005); Comments of BellSouth Telecommunications, Inc., SBC Communications Inc., and the Verizon Telephone Companies on Southern Public Communication Association’s Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Dec. 10, 2004); Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association’s Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Aug. 26, 2004) (“Comments on IPTA Petition”); Reply Comments of BellSouth Telecommunications, Inc., SBC Communications, Inc., and the Verizon Telephone Companies on Illinois Public Telecommunications Association’s Petition for a Declaratory Ruling, CC Docket No. 96-128 (FCC filed Sept. 7, 2004).

Respectfully submitted,

/s/ Aaron M. Panner

AARON M. PANNER

STUART BUCK

KELLOGG, HUBER, HANSEN,

TODD, EVANS & FIGEL, P.L.L.C.

1615 M Street, N.W.

Suite 400

Washington, D.C. 20036

(202) 326-7900

*Counsel for AT&T Inc., BellSouth
Telecommunications, Inc., and the Verizon
Telephone Companies*

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