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June 23, 2006

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Ex Parte Presentation

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., TW-A325
Washington, DC 20554

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association, Petition for Declaratory Ruling

Dear Ms. Dortch:

On June 22, 2006, Albert H. Kramer and Robert F. Aldrich of Dickstein Shapiro Morin & Oshinsky LLP, (representing the American Public Communications Council ("APCC")), met with Michelle Carey, advisor to Chairman Kevin Martin. We discussed the matters summarized in the enclosed document which was handed out during the meeting.

Sincerely,

Robert F. Aldrich

Enclosure

cc: Michelle Carey

THE FCC CAN AND SHOULD LEGALLY GRANT THE NST REFUND PETITIONS

American Public Communications Council

June 19, 2006

I. QUESTIONS PRESENTED

A. Do Section 276 and the Commission's implementing orders require Bell Operating Companies ("BOCs") to refund to payphone service providers ("PSPs") charges collected in excess of payphone line rates that comply with the Commission's new services test ("NST")?

B. Does the Commission have authority to preempt state agency and court rulings that are inconsistent with the NST refund requirement?

II. WHY THE COMMISSION CAN AND SHOULD RULE ON THE PETITIONS

A. Declaratory rulings are appropriate to resolve uncertainty as to applicable law. 47 CFR § 1.2

1. There is uncertainty as to the correct interpretation and application of the NST refund requirement of the *Payphone Orders*[1] and the *Waiver Order*.[2]

   - There are currently pending refund proceedings affecting about 20 states.

     - The Supreme Judicial Court of Massachusetts and the Oregon Public Service Commission are holding proceedings in abeyance and have requested the Commission's guidance on the correct interpretation of the Commission's rulings.

     - The refund issue is pending in a case before the U.S. Ninth Circuit court of appeals involving the 14 states in Qwest's service territory.

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[1] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*First Payphone Order*"), *recon.* 11 FCC Rcd 21233 (1996) ("*First Payphone Reconsideration Order*"), *aff'd in relevant part, Ill. Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997), *cert denied, Virginia State Corp. Comm'n v. FCC*, 523 U.S. 1046 (1998) (collectively "*Payphone Orders*").

[2] *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997) ("*Waiver Order*").

- To date, six state commissions and two state courts have ruled in favor of refunds, while seven state commissions and two state courts have ruled against refunds.

2. The Commission has previously recognized its legal authority and duty to issue declaratory rulings to clarify and "ensure compliance with the *Payphone Orders* and Congress' directives in section 276."[3]

B. The refund issue is a matter of federal law

1. The state proceedings raise common issues of federal law that must be resolved by the Commission.

2. The Commission directed the BOCs to conform state payphone line tariffs to *federal* rules and standards.

   - The only issue here is whether federal rules and standards, i.e., Section 276 and the Commission's orders, require refunds of non-NST-compliant payphone line rates.

3. The Commission retained jurisdiction "to ensure that all [*Payphone Orders*] requirements . . . have been met." *Waiver Order*, 12 FCC Rcd at 21379 ¶ 19, n.60.

4. Especially where "federal concerns are preeminent," as they are in the payphone context, federal agencies need not defer to erroneous state agency or court decisions on matters of federal law.

5. The Commission is the most authoritative interpreter of its own orders.[4]

III. FCC SHOULD CLARIFY THAT THE ACT AND ITS PRIOR ORDERS REQUIRE REFUNDS

A. The *Waiver Order* Mandates Refunds

1. The *Payphone Orders* required the BOCs to bring intrastate payphone line rates into compliance with the NST in order to be eligible to collect dial-around compensation on April 15, 1997.[5]

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[3] *Wisconsin Public Service Commission*, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2052 ¶ 2 (2002) ("*Wisconsin Order*"), *aff'd New England Pub. Comms. Council. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). *See also id.* at 2065 ¶ 44, 2072 ¶ 68.

[4] *Capital Network System, Inc. v. FCC*, 28 F.3d 201, 206 (D.C. Cir. 1994).

[5] *First Payphone Reconsideration Order* ¶ 131; *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 20997, 21013 ¶ 35 (CCB 1997); *Waiver Order*, 12 FCC Rcd at 21370 ¶ 1.

- The BOCs acknowledged this requirement when they requested a waiver enabling them to begin collecting dial-around compensation.

- Although the BOCs now assert that NST compliance was *not* a condition of their eligibility for compensation, the Commission's orders are clear. It is too late for the BOCs to seek reconsideration of this requirement.

2. In the *Waiver Order*, the FCC granted the BOCs a waiver of the April 15, 1997, deadline, subject to a requirement to refund payphone line charges in excess of NST-compliant rates.

    - In requesting the waiver, the BOCs agreed to refund charges in excess of NST-compliant rates.

    - The *Waiver Order* required the BOCs to "reimburse [their] customers or provide credit from April 15, 1997, in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates." *Id.* at 21371 ¶ 2.

    - The Commission wanted to ensure that protracted NST proceedings did not "unduly delay, and possibly undermine" the transition to the new compensation regime. *Id.* at 21380 ¶ 21.

3. The *Waiver Order* applied to all BOCs – not, as the BOCs now contend, only to those BOCs that submitted reduced payphone line rates by May 19, 1997.

    - The *Waiver Order* required BOCs to have "filed [an] intrastate tariff" by May 19, 1997. Tariffs did not have to be reduced in order to comply with the waiver.

    - The *Waiver Order* rationally sought (1) to protect the BOCs from being ineligible for dial-around compensation and (2) to protect PSPs and the public from regulatory delays that could prolong inflated payphone line rates in violation of the *Payphone Orders*.

    - To require BOCs to pay refunds only if they tried to reduce their rates would have unfairly penalized BOCs that sought to comply while rewarding BOCs that did not seriously attempt to comply.

4. The waiver and the refund requirement apply to the period from April 15, 1997 until the date that NST-compliant rates took effect.

    - The *Waiver Order* did *not* limit refunds to situations where the rate *filed* by the BOC was lower than the existing payphone line rate.

- The rate *filed* by May 19, 1997, was not automatically the NST-compliant rate; it was only the rate the BOC *claimed* to be NST-compliant.

- Refunds are required if the rate that actually *became effective* after review by the state public service commission in accordance with the correct standard was lower than the existing rate.

  - If the Commission had cut off the refund as of May 19, 1997 and based the refund on the filed rate, PSPs would not be protected from continuing to pay inflated rates if – as frequently happened – the filed rate was ultimately found to be non-compliant.

    - Further, a BOC with non-NST-compliant rates would not be protected from being subsequently found ineligible for dial-around compensation.

  - The 45-day period in the *Waiver Order* was a limitation on the BOCs' right to collect dial-around compensation even though they had non-compliant NST rates; it did not limit the BOCs' obligation to pay refunds.

    - The intent of the 45 days was to ensure that BOCs acted promptly to correct their rates.

    - The purpose of the refund was to ensure that, even after the waiver expired, non-compliant BOCs could avoid losing eligibility for dial-around compensation, by effectively ensuring that they were (retroactively) compliant with the NST requirement as of April 15, 1997.

    - Making the 45 days a limitation on refunds would have encouraged the BOCs to delay compliance, the exact opposite of the order's intent.

5. PSPs already had rights to refunds of non-NST-compliant rates (*see* III below).

   - The staff's *Waiver Order* could not have been intended to limit and legally could not limit PSPs existing rights to refunds.

6. State law cannot bar recovery under *Waiver Order*.

   - The *Waiver Order* made the provision of refunds an express condition of granting the waiver. State-law arguments based on "filed rate doctrine" or "retroactive ratemaking" were thus waived and preempted.

- Regardless, state law, including retroactive ratemaking principles or filed rate doctrine is preempted under Section 276(c) to the extent inconsistent with granting refunds.

- In requesting waivers, the RBOCs expressly waived any filed rate doctrine claims.

B. Section 276 and the *Payphone Orders* Mandate Refunds

1. Non-compliance with the NST violated Section 276(a) of the Act and the *Payphone Orders*.

    - NST rates are required pursuant to Section 276(a) nondiscrimination requirement. *Wisconsin Order,* 17 FCC Rcd at 2052, 2061. Non-compliant rates are unlawful.

    - Refunding excessive charges is the normal remedy for unlawful carrier charges.

    - Thus, apart from the *Waiver Order,* BOCs are required to refund the excess over NST-compliant rates.

2. Filed rate doctrine does not bar refunds

    - State filed rate doctrine cannot block federally mandated refunds. 47 U.S.C. § 276(c).

    - The filed rate doctrine exists to prevent carriers from *discriminating* among their customers, and does not prevent a regulatory agency from granting *nondiscriminatory* refunds of the unlawful portion of charges to all affected customers.

3. Prior state approval of non-compliant rates does not bar refunds

    - State retroactive ratemaking doctrines cannot block federally mandated refunds. 47 U.S.C. § 276(c).

    - Refunds can be awarded consistently with *Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Rwy. Co.,* 284 U.S. 370 (1932).

        - Nothing in *Arizona Grocery* precludes rates that were prescribed under state law from being refunded if they violate federal law.

        - Even if applicable to state rates, *Arizona Grocery* only restricts refunds of rates previously *prescribed* by regulators.

            - Rates that were merely approved or allowed to take effect are not subject to *Arizona Grocery*.

- Even if a state did prescribe a rate prior to the *Payphone Order*, the prescriptive effect cannot survive radical change of payphone law and regulatory scheme mandated by Section 276.

C. BOC reliance on prior state rulings cannot bar refunds

1. There was no intervening change of law.

    - The *Wisconsin Order* did not promulgate new rules, it clarified the Commission's existing rules and orders.[6]

    - "When it is clarifying existing law, rather than substituting new law for old, the agency need not be as attentive 'to protecting the settled expectations of those who had relied on the preexisting rule.'"[7]

2. NST refund issue is "largely an exercise in error correction." *Verizon* at 1111.

    - "[A]dministrative agencies have greater discretion to impose their rulings retroactively . . . when the purpose of retroactive application is to rectify legal mistakes . . . ."[8]

    - Now that there have been authoritative rulings by this Commission and the D.C. Circuit on the correct application of the NST, refunds are necessary to rectify the state commissions' legal mistakes and "make the parties whole." *Exxon* at 49-50.

3. The BOCs had no reasonable basis for relying on erroneous post-1996 state commission rulings allowing or approving their payphone line rates.

    - The BOCs were on notice that the status of their rates was uncertain.

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[6] *See, e.g.*, 17 FCC Rcd at 2065, ¶ 43 ("the Commission's longstanding precedent shows that we have used forward-looking cost methodologies where we have applied the new services test").

[7] *Pub. Serv. Co. of Colo. v. FERC*, 91 F.3d 1478, 1490 (D.C. Cir. 1996) ("*PSCC*"); *Verizon Telephone Companies v. FCC*, 269 F.3d 1098, 1108-09 (D.C. Cir. 2001) ("*Verizon*").

[8] *See also Pub. Utils. Comm'n of the State of Cal. v. FERC*, 988 F.2d 154, 161-63 (D.C. Cir. 1993) (rule against retroactive ratemaking may be relaxed where original order was found unlawful); *United Gas Improvement Co. v. Callery Props., Inc.*, 382 U.S. 223, 229 (1965) ("an agency, like a court, can undo what is wrongfully done by virtue of its order"); *Natural Gas Clearinghouse v. FERC*, 965 F. 2d 1066, 1073 (D.C. Cir. 1992) (same); *Exxon Co. USA v. FERC*, 182 F.3d 30, 49-50 (D.C. Cir. 1999) ("*Exxon*") ("There is a strong equitable presumption in favor of retroactivity that would make the parties whole"). *See also PSCC*, 91 F.3d at 1490.

- Erroneous state NST rulings were "under unceasing challenge" before this Commission in the *Wisconsin* proceeding and/or at the state level. *Verizon* at 1110; *PSCC* at 1490.

- Some state commissions specifically requested that the Commission issue a clarifying ruling. *Wisconsin Order,* 17 FCC Rcd at 2065 ¶ 44 & n.103.

IV. THE COMMISSION MUST RULE THAT INCONSISTENT STATE DECISIONS ARE PREEMPTED

A. The Commission has authority to declare that inconsistent state decisions are preempted

1. Refunds are mandated by the Commission's rules and orders.

2. The Commission retained jurisdiction "to ensure that all [*Payphone Orders*] requirements . . . have been met." *Waiver Order,* 12 FCC Rcd at 21379 ¶ 19, n.60.

3. The Commission is the most authoritative interpreter of its own orders.

4. Section 276(c) preempts state requirements "that are inconsistent with the Commission's regulations."

B. The Commission must exercise its authority to declare that inconsistent state decisions are preempted

1. Section 276(c) does not leave the Commission discretion to let inconsistent state requirements stand.

2. If the Commission allowed state decisions denying refunds to stand, it would have to find that during the period that the BOCs failed to comply with the NST, they were ineligible for payphone compensation.

    - The Commission expressly reserved the authority to make this determination. *First Payphone Reconsideration Order,* 11 FCC Rcd at 21294, ¶ 132. *See also Waiver Order* at 21379, ¶ 19, n.60.

    - The Commission can avoid a finding that the BOCs were ineligible by requiring refunds to establish the BOCs' eligibility retroactively.

    - The Commission must do one or the other – either require refunds or find that the BOCs were ineligible for payphone compensation.

3. The Commission has an institutional interest in enforcing the refund condition for its waiver of the *Payphone Order*'s compensation eligibility requirement based on the BOCs refund assurances.

    - In requesting a waiver of the compensation requirement, the BOCs acknowledged the NST requirement, stated they would bring rates into compliance with it, promised to refund charges in excess of non-NST-compliant rates, *and* expressly waived the filed rate doctrine.

    - Later, the BOCs:

        - challenged the NST requirement on jurisdictional grounds before the Commission and the court of appeals. *Wisconsin Order,* 17 FCC Rcd at 2060 ¶ 31 & n.74.

        - denied that they are required to provide refunds – asserting, among other defenses, the filed rate doctrine.

    - The Commission must affirm that carriers must deliver when they make promises in exchange for regulatory benefits.

C. *Res judicata* and collateral estoppel principles do not govern

1. Sections IV.A and B above establish that the Commission must preempt inconsistent state decisions regardless of *res judicata* or collateral estoppel issues.

2. In any event, *Res judicata* and collateral estoppel do not apply.

    - The prior decisions here are state court and commission decisions, not federal court decisions.[9]

    - The Full Faith and Credit Act (28 U.S.C. § 1738) does not bind federal *agencies* to recognize state court decisions.

3. Assuming *arguendo* that issues of *res judicata* or collateral estoppel are properly raised, a balancing test should apply.[10] Here, federal interest overrides state law principles.

    - The state commission and court decisions at issue involve interpretations of this Commission's own orders.

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[9] *Cf. Town of Deerfield v. FCC*, 992 F.2d 420, 428 (2d Cir. 1993).

[10] *Arapahoe County Public Airport Authority v. Federal Aviation Administration*, 242 F.3d 1213, 1219 (10th Cir. 2001), *cert. denied*, 534 U.S. 1064 (2002) ("*Arapahoe*"). *See also American Airlines, Inc. v. Dep't of Transp.*, 202 F.3d 788, 800 n.6 (5th Cir.), *cert. denied*, 530 U.S. 1284 (2000).

- The Commission was not a party to the state proceedings. Therefore, the state decisions "do not satisfy a fundamental requirement of issue preclusion under federal or [state] law." *Arapahoe* at 1219-20.

- "Federal concerns are preeminent" (*id.* at 1220) in the arena of payphone regulation.

- The Commission is not merely a "disinterested adjudicator" acting "to resolve a . . . dispute between two outside parties." *Id.* at 1220 n.8.

    - Inconsistent application of NST refund requirement would "frustrate the [FCC's] ability to discharge its statutory duty." *Id.* at 1221.

    - The Commission has a strong institutional interest in enforcing the refund condition that the Commission itself attached to waivers of the *Payphone Order*'s compensation eligibility requirement based on the BOCs refund assurances.