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June 23, 2006

By Electronic Filing **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, Michael Ward, counsel for the Illinois Public Telecommunications Association, and Keith Roland, counsel for the Independent Payphone Association of New York ("IPANY"), met with Ian Dillner, Legal Advisor to Commissioner Deborah Taylor Tate. We discussed the matters summarized in the attached document handed out during the meeting. In addition, we discussed the issues raised in the petition filed by IPANY, which are reflected in the petition and previously submitted comments.

Sincerely,

Michael W. Ward

Michael W. Ward

Enclosure

cc: Ian Dillner

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Section 276 Compliance

Michael W. Ward
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Illinois Public Telecommunications Association

6/22/06

Rates Must Be Cost Based

No Later Than April 15, 1997

- Computer III compliant tariffs and pricing (NST) required for ILEC's basic payphone services provided to IPPs. – *Report and Order*, ¶ 147
- "Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted." – *Report and Order*, ¶ 147
- States to ensure that compliant tariffs are filed and "effective no later than April 15, 1997." – *Order on Reconsideration*, ¶ 163

NST Rates A Prerequisite for Dial Around Compensation

- "We must be cautious, however, to ensure that LECs comply with the requirements we set forth in the Report and Order. Accordingly, we conclude that LECs will be eligible for (dial-around) compensation like other PSPs when they have completed the requirements for implementing our payphone regulatory scheme to implement Section 276. LECs may file and obtain approval of these requirements earlier than the dates included in the Report and Order, a revised herein, but no later than those required dates. To receive compensation a LEC must be able to certify the following: …

5) it has in effect intrastate tariffs for basic payphone services (for "dumb" and "smart" payphones) …

Order on Reconsideration, ¶ 131

RBOC's Request for Temporary Waiver of the NST Requirement

- April 4, 1997 Order: FCC Common Carrier Bureau clarifies that NST applies to state-tariffed "dumb" payphone lines
- April 10, 1997: RBOCs file letter requesting a temporary waiver to ensure that they are eligible for dial-around compensation while bringing payphone line rates into compliance with the NST
- April 11, 1997: RBOCs letter clarifies the request - "Where new or revised tariffs are required and the new tariff rates are lower than the existing ones, we will undertake (consistent with state requirements) to reimburse or provide a credit back to April 15, 1997, to those purchasing the services under the existing tariffs"

Clarification Order, DA 97-805

Chief, CCB (Released 4/15/97)

- "In the recent Bureau Waiver Order, we *emphasized* that LECs must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived in the Bureau Waiver Order, *before the LECs' payphone operations are eligible* to receive the payphone compensation provided by that proceeding. The requirements for intrastate tariffs are: (1) that payphone service intrastate tariffs be cost-based, consistent with Section 276, nondiscriminatory and consistent with Computer III tariffing guidelines …"

  - ¶ 10 (italics added)

Bell Atlantic v. Frontier Communications, DA 99-1971

Chief, CCB (Released 9/24/99)

- "We *emphasize* that a LEC's *certification letter does not substitute for the LEC's obligation to comply with the requirements* as set forth in the Payphone Orders. The Commission consistently has stated that LECs must satisfy the requirements set forth in the Payphone Orders, subject to waivers subsequently granted, to be eligible to receive compensation. *Determination of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction.*"

  - ¶ 28 (italics added)

Illinois NST Investigation

- On 5/8/97, IPTA files Petition with ICC that SBC Illinois does not meet NST requirements and requests investigation –ICC Docket No. 97-0225
- On 5/15/97, SBC Illinois self-certifies compliance with NST, and begins receiving DAC effective 4/15/97
- ICC grants IPTA Petition and opens ICC NST investigation as ICC Docket No. 98-0195 – ICC Docket No. 97-0225
- On 11/12/03, ICC finds that SBC Illinois payphone rates are not cost based and do not comply with NST requirement – ICC Docket No. 98-0195

Illinois DAC vs. NST since 4/15/97

- From 4/15/97 to 12/12/03, SBC Illinois charged IPPs $8 - 10 million in ILEC payphone service rates in excess of NST
- From 4/15/97 to 12/12/03, SBC Illinois collected $100s millions in DAC through false certification of NST compliance
- For SBC Illinois to have effective NST compliance from when it began receiving DAC, IPPs entitled to reparations to extent ILEC rates exceeded the required NST rates since 4/15/97

Illinois Decisions

- ICC: Although ILEC rates do not comply with NST, ICC does not order refunds due to prohibition against retroactive ratemaking.
- IL App. Ct.: Although rates set by a carrier can be subject to refunds, rates set by ICC according to state requirements remain the lawful rates until 11/12/03 ICC determination of the federal cost-based rates.
- Both refuse to enforce FCC NST rate prerequisite for ILEC eligibility for dial around compensation.

Filed Rate Doctrine - Reparations Are Not Retroactive Ratemaking

- With respect to review of a rate set by a carrier, the Commission acts in an adjudicatory capacity, and adjudication of the facts may involve reparations of an unlawful rate.
  - *Arizona Grocery,* 284 U.S. 370, 388 (1932)

- A prospective rate fixed by the Commission after a hearing is of a legislative quality, and may not later subject a carrier to the payment of reparations upon a different Commission determination as to the fact situation existing at the time the previous order was issued.
  - *Arizona Grocery,* 284 U.S. at 390

- The filed tariff rate is the legal rate, but the "legal rate was not made by the statute a lawful rate – it was lawful only if it was reasonable. …The Act [gave] … the Commission the power … of determining the reasonableness of the published rate. If the finding on this question was against the carrier, reparation was to be awarded …"

  - *Maislin Industries, U.S., Inc.,* 497 U.S. 116, 128 - 129 (1990)

Rates Violating FCC Orders are Unlawful Rates

- FCC repeatedly *emphasized* that NST compliant rates to IPPs effective *no later than* 4/15/97
- FCC held that state requirements authorizing noncost-based rates, such as the pre-1996 ICC orders under IL law, are *preempted* as of 4/15/97 per FCC Payphone Orders
- The ILECs set the rates for NST compliance to be effective 4/15/97, not the ICC after an NST compliance hearing
- ILEC-determined rates to IPPs in violation of FCC Payphone Orders are unlawful per se, entitling IPPs to reparations of excessive charges

Numerous States Have NST Refunds

- Michigan PSC ordered refunds of ILEC charges in excess of NST – MPSC Docket No. U-11756
- Tennessee RA ordered reimbursement of any payments over NST – TRA Docket No. 97-00409
- Kentucky PSC ordered refunds of rates in excess of NST – KPSC Admin. Case No. 361
- South Carolina PSC ordered refunds of rates in excess of NST – SCPSC Docket No. 97-124-C
- Louisiana PSC order approved stipulated agreement providing refunds – LPSC Order No. U-22632
- Pennsylvania PUC order approved stipulated agreement providing refunds – PPUC Docket No. R-0097386700001
- Indiana Utility Regulatory Commission ordered refunds of ILEC charges in excess of NST – Cause No. 40830

NO ESTOPPEL OF FEDERAL POLICY

- A federal agency's discharge of its statutory duty to interpret and implement a uniform and consistent policy applying federal law prevails over common law principles of claim and issue preclusion
  - *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001); *see also American Airlines, Inc. v. Department of Transportation*, 202 F.3d 788 (5th Cir.)

- "Congress intended to supplant the common law principles of claim preclusion when it enacted the 1996 Act"
  - *Iowa Network Services, Inc. v. Qwest Corporation*, 363 F.3d 683, 690 (8th Cir. 2004).

Summary

- FCC ordered ILEC to implement NST payphone service rates *no later than* 4/15/97 – preempted all inconsistent state requirements
- FCC ordered that ILEC not eligible for DAC until in actual compliance with NST requirement
- From 4/15/97 to 12/12/03, ILEC overcharged IPPs $8 - 10 million through payphone service rates exceeding FCC's NST requirement while receiving $100s millions in DAC – both in violation of FCC Payphone Orders
- ILEC payphone service rates and DAC receipts from 4/15/97 through 12/12/03 per se unreasonable and unlawful - reparations are due IPPs