

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of	:	
	:	
Implementation of the Pay Telephone	:	CC Docket No. 96-128
Reclassification and Compensation	:	
Provisions of the Telecommunications	:	
Act of 1996	:	

**COMMENTS OF
THE PUBLIC UTILITIES COMMISSION OF OHIO**

BACKGROUND AND INTRODUCTION

The Payphone Association of Ohio (“PAO”) is a non-profit organization comprised and representing the interests of independent payphone providers operating in Ohio. On December 28, 2006, the PAO, through its counsel, filed with the Federal Communications Commission (“FCC”) a petition seeking a declaratory ruling as well as the FCC’s preemption of what the PAO believes to be the state of Ohio’s refusal to implement the FCC’s payphone orders. Specifically, the PAO is seeking a declaratory ruling establishing the rights of its members to refunds for amounts the PAO claims was collected in excess of lawful rates for payphone services dating back to April 15, 1997. The PAO has asked the FCC to preempt the state of Ohio, who the PAO claims has, through the Public Utilities Commission of Ohio (“Ohio Commission” or “PUCO”), refused to implement the orders of the FCC issued in this docket

and its several waiver orders, which the PAO claims requires the assessment of cost-based rates to payphone providers as well as the refund of charges assessed in excess of such rates.

Finally, the PAO is requesting that the FCC order AT&T Ohio¹ to immediately “disgorge” itself and return all dial-around compensation collected pursuant to Sections 276 and the FCC’s rules and orders promulgated thereunder. *In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Petition of the Payphone Association of Ohio to Preempt the Actions of the State of Ohio Refusing to implement the FCC’s Payphone Orders, Including the Refund of Overcharges to Payphone Providers in Ohio, and for a Declaratory Ruling (filed December 28, 2006) at 1-2 (“*PAO Petition*”). The PAO files this petition with the FCC after fully and completely availing itself of all regulatory and legal processes to which it, or its members, is due through the Ohio Commission and Ohio Supreme Court. The FCC established a deadline of February 1, 2007, for interested parties to file comments on the PAO’s petition. Reply comments must be filed on or before February 12, 2007. The Ohio Commission hereby submits its responses and comments concerning the PAO’s petition.

DISCUSSION

A. **The PAO has received a full and fair hearing through the Ohio regulatory and legal processes.**

The PAO, dissatisfied after the full and complete adjudication of this

¹ The PAO refers to AT&T Ohio as “SBC-Ohio” in its petition.

matter through the appropriate regulatory and legal forums available to it under Ohio law, is now seeking another bite at the apple. Unhappy with the outcome at the state level, the PAO is now bringing its arguments before the FCC in what can best be described as a “regulatory mulligan”. In essence, the PAO is asking for a “do-over” as it forum-shops for an outcome that is more favorable to it and its members. The Ohio Commission strongly encourages the FCC to recognize the PAO petition for what it is and asks that the FCC recognize and support the integrity of the regulatory and legal processes of the state of Ohio by denying the PAO petition.

Had the Ohio Commission failed in its responsibility to implement and carry out the requirements of Section 276 of the Telecommunications Act of 1996 (“Act”) as well as the FCC’s decisions in this docket regarding payphone services, then the PAO’s petition would certainly be understandable. The Ohio Commission, however, did not fail or in any way shirk its responsibilities with respect to implementing and carrying out Section 276 or the FCC’s decisions. To the contrary, in December 1996, the Ohio Commission initiated case no. 96-1310-TP-COI for this very purpose. *In the Matter of the Commission’s Investigation into the Implementation of Section 276 of the Telecommunications Act of 1996 Regarding Pay Telephone Services (“Pay Telephone”)*. A thorough reading of the record in this case and the PAO’s subsequent appeal to the Ohio Supreme Court clearly shows the

commitment of the Ohio Commission to implementing and carrying out Section 276, as well as the FCC's decisions with regard to payphones. As such, the Ohio Commission is submitting, as attachments, the major entries, orders, and decisions contained in the record and requests that the FCC include them as part of its record in this matter.

The PAO's involvement in case no. 96-1310 began early on. *See, generally, Pay Telephone*, Petition to Intervene, (April 8, 1997) (attached as Attachment A). Throughout the duration of this case, the PAO continually raised the issue that is the primary focus of its petition, that is, refunds dating back to April 15, 1997. The PAO can certainly not say that the Ohio Commission did not hear it on this issue. Through a series of orders issued in this case, the Ohio Commission addressed the issue of refunds, each time finding that there was not entitlement to the refunds claimed by the PAO.² Finally, with the PAO not raising any new issues, facts, or questions of law that had not been previously considered, the Ohio Commission denied its assignments of error on rehearing. *Pay Telephone*, Entry on Rehearing at 16 (October 27, 2004) (attached as Attachment B).

Following the Ohio Commission's Entry on Rehearing, the PAO

² Entry issued April 27, 2000; Entry on Rehearing issued June 22, 2000; Entry issued November 26, 2002;

Entry on Rehearing issued January 16, 2003; Entry issued September 23, 2003; Entry on Rehearing issued November 13, 2003.

exercised its right to appeal the case to the Ohio Supreme Court.³ After a full and complete hearing of all of the PAO's issues, the Ohio Supreme Court unanimously affirmed the Ohio Commission's order, rejecting all five of the PAO's claimed errors including the entitlement to refunds issue. Clearly, the PAO has received an ample hearing in this matter that should satisfy any standard of due process.

B. The PAO's petition mischaracterizes the Ohio record.

In presenting its case, the PAO has mischaracterized the Ohio record.

The PAO explicitly states in its petition that the Ohio Commission "has determined that SBC's payphone rates have been in excess of the applicable costing standards since April 15, 1997." *PAO Petition* at 8. A closer look at the Ohio record, however, reveals that this is not the case. The Ohio Commission did not state that SBC-Ohio's payphone rates had been excessive since 1997, but rather, found that the interim rates, which were based on SBC-Ohio's TELRIC-based rates for UNEs and had been approved by the Ohio Commission, should be adjusted downward in light of the FCC's *In re Wisconsin Public Service Commission*⁴ ("Wisconsin") decision. *See Pay*

³ *Payphone Assn. v. Publ. Util. Comm.*, 109 Ohio St. 3d 453, 849 N.E. 2d 4 (2006).

⁴ *In the Matter of Wisconsin Public Services Commission: Order Directing Filings*, FCC 02-25, Memorandum Opinion and Order, Bureau/CPC No. 00-01; 17 Fed. Communications Comm. Record 2051 (2002).

Telephone, Opinion and Order at 30 (September 1, 2004) (attached as Attachment C). With such a mischaracterization being a major pillar supporting the PAO's argument for refunds, an accurate portrayal of the Ohio record certainly undermines the validity of the PAO's claim.

In its petition, the PAO has not only mischaracterized the Ohio Commission, but, to support its position, has also mischaracterized the Ohio Supreme Court. The PAO asserts that SBC-Ohio never filed payphone tariffs in response to the Ohio Commission's December 19, 1996, Entry. *PAO Petition* at 8. Furthermore, the PAO makes reference to a letter sent to the Ohio Commission by SBC-Ohio's Regulatory Director as "a *post hoc* effort to construct compliance." *Id.* Consequently, the PAO asserts that the Ohio Commission erred when it approved SBC-Ohio's tariff on September 25, 1997. *Id.* at 9. To further bolster this argument, the PAO takes one sentence from the Ohio Supreme Court's decision rendered on the PAO's appeal. The PAO accurately points out that the Court recognized that "no such [tariff] filing was made." *Id.* (quoting the Ohio Supreme Court, "PAO is correct in stating that SBC did not file new tariffs following the PUCO's December 19, 1996 Entry." *Payphone Assn. v. Publ. Util. Comm.*, 109 Ohio St. 3d 453, 849 N.E. 2d 4 at 8 (2006) ("*Payphone Assn.*")) (attached as Attachment D). (The December 19, 1996 Entry is attached as Attachment E). The PAO failed to point out, however, that in the very next sentence, the Court also recognized

that a new filing was not necessary. *Payphone Assn.* at 8-9. According to the Court:

A new filing was unnecessary, however, because SBC Ohio had already filed tariffs for smart pay phones on April 9, 1985, in case No. 84-834-TP-ATA, and for dumb pay phones on September 19, 1996, in case No. 96-844-TP-ATA. The PUCO recognizes that SBC Ohio had filed tariffs for dumb pay phones when it issued the December 19, 1996 entry. In Finding Five of that entry, the PUCO stated: ”

In addition, the Commission observes that it has recently approved an Ameritech application to provide payphone access lines to dumb payphones (Case No. 96-844-TP-ATA).”

Id. The Court further noted that the FCC had previously determined that state commissions could, in those instances in which a LEC had already filed a tariff for payphone line rates, conclude that the existing tariff was consistent with the requirements of Section 276 and other FCC requirements and, as a consequence, that no other tariff filings would be required. *Id.* at 9 (citing *In re Implementation of the Pay Tel. Reclassification & Comp. Provisions of the Telecommunications Act of 1996*, 11 Fed. Communications Comm. Record 21233, ¶ 163). The Court then stated that no further tariff filing was required of SBC since its predecessor, Ameritech Ohio, had previously filed payphone line rates that were in compliance with Section 276 and other FCC requirements. *Id.* When the observation of the Court being

cited by the PAO is read in the context of the Court's broader discussion on this issue, it is clear it does not lend any credence to the PAO assertion that the Ohio Commission erred in approving the SBC- Ohio payphone tariff. Furthermore, it is worth noting that the statement relied upon by the PAO is taken directly from that portion of the Court's discussion in which the Court ultimately rejected the PAO's claimed error that the Ohio Commission did not comply with state and federal law when it approved the SBC-Ohio tariff. *Id.* at 8-9.

To support its claim that its members are due credits dating back to April 15, 1997, or at least to a point in time prior to the establishment of SBC-Ohio's interim rates in 2003, the PAO raises the issue of the "extraordinary delay" in establishing these interim rates as being inconsistent with the policy mandate of Section 276 to "promptly promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public." *PAO Petition* at 12 (citing 47 U.S.C. § 276(b)(1)). Again, the PAO is not being completely forthcoming in its petition. On January 28, 1999, the Ohio Commission granted the PAO's request for an evidentiary hearing. *Pay Telephone*, Entry at 5 (January 28, 1999) (attached as Attachment F). As later recognized by the Ohio Supreme Court, discovery disputes led to the indefinite continuance of the hearing, which was originally scheduled in

2000. *Payphone Assn.* at 8. A full reading of the voluminous record clearly shows that the Ohio Commission was thorough in its review and was not negligent in its handling and scheduling of this case.

While the issue of payphone rates was being addressed by the Ohio Commission, it also continued to be addressed at the federal level, most notably through the *Wisconsin* case. The *Wisconsin* order further revised and clarified the FCC's previous payphone decisions. *Id.* The revisions and clarifications made by the FCC in the *Wisconsin* order had a direct impact on the interim rates that would be set, subject to a true-up, by the Ohio Commission. As discussed above, the Ohio Commission did not find that SBC- Ohio's payphone rates had been excessive back to April, 1997, but instead found that the interim rates should be adjusted downward based on the *Wisconsin* order's revised New Services Test ("NST"). In fact, SBC-Ohio's payphone rates prior to the revised NST had been found to be in compliance with the federal requirements *in effect at that time.* See *Pay Telephone*, Entry at 3 (September 25, 1997) (attached as Attachment G). Consequently, the Ohio Commission believes the PAO's assertion that this "delay" justifies both preemption of state authority and refunds dating back to April 15, 1997, to be without merit. *PAO Petition* at 12.

- C. **The Ohio Commission has consistently applied federal payphone regulations and should not be preempted by the FCC.**

The PAO posits that the FCC not only has the authority to preempt state action in this case, but also has an obligation to do so. *PAO Petition* at 16. As a basis for this position, the PAO points to Section 276 of the Act, which states that the FCC “shall preempt” those state requirements that are inconsistent with the FCC’s regulations. *Id.* Using this as a basis, the PAO then conjectures that the SBC-Ohio rates approved by the Ohio Commission were in violation of the Section 276 requirement that SBC-Ohio establish cost-based rates and that such violation dated back to April 15, 1997. *Id.* at 17.

The Ohio Commission does not dispute the PAO’s assertion that Section 276 requires that payphone rates be cost based. The Ohio Commission does take issue, however, with the PAO’s erroneous characterization that the SBC-Ohio rates that were approved by the Ohio Commission dating back to April 15, 1997, were not consistent with federal requirements. *See id.* In its September 25, 1997, Entry, which was recognized by the Supreme Court on appeal,⁵ the Ohio Commission concluded that the SBC-Ohio payphone tariff application was “consistent with the requirements of the 1996 Act, the FCC’s decisions in CC Docket No. 96-128 and the Commission’s May 22, 1997 Entry in this proceeding[.]” *Pay Telephone*, Entry at 3; *see Payphone Assn.* at 9. (The May 22, 1997 Entry is

⁵ The Ohio Supreme Court’s opinion lists the date of the entry as September 26, 1997.

attached as Attachment H). Consequently, the Ohio Commission concurred in the Ohio staff's recommendation and approved the tariffs. *Pay Telephone*, Entry at 3. Clearly, the Ohio Commission has endeavored to ensure compliance with both the federal statute and the FCC's requirements.

The PAO, in an attempt to advance its preemption argument, maintains that the Ohio Commission found the payphone rates of SBC-Ohio to not be in compliance with the NST. *PAO Petition* at 17. The cost-based, forward looking NST was affirmed in the FCC's *Wisconsin* Opinion and Order. *Wisconsin* at ¶ 2. In doing so, however, the FCC significantly revised how the NST is to be applied to payphone services. *See id.* at ¶¶ 43-65. In compliance with the *Wisconsin* Opinion and Order, the Ohio Commission did, in fact, require all payphone services to comply with the revised NST and issued interim rates, subject to true-up, pending the establishment of permanent rates. *Pay Telephone*, Entry at 11 (November 26, 2002) (attached as Attachment I). It is within this context that the Ohio Commission found the SBC-Ohio payphone rates should be adjusted downward in light of the revised NST. In finding such, the Ohio Commission was acting to implement the requirements of Section 276 as further delineated by the FCC in the *Wisconsin* Opinion and Order. At issue was not whether the SBC-Ohio rates were cost-based in compliance with federal requirements, but rather, whether the methodology used in calculating the cost-based rates was reasonable.

See, generally, Pay Telephone, Opinion and Order (September 1, 2004). As much was recognized by the Ohio Supreme Court when it noted on appeal that the Ohio Commission had rejected SBC-Ohio's overhead loadings obtained from the FCC's *Physical Collocation Tariff* ("PCT") Order in favor of unbundled-network element ("UNE") overhead loadings. *Payphone Assn.* at 8. In choosing the UNE methodology over the *PCT* methodology, the Ohio Commission chose a valid methodology that was recognized by the FCC in the *Wisconsin* Opinion and Order. *Wisconsin* at ¶ 52. Furthermore, in choosing the UNE methodology, the Ohio Commission has noted that it has actually acted to further the objectives of Section 276 in that the *PCT* methodology, appearing high for competitive services, may in fact diminish the underlying intent of Section 276 to promote competition and the widespread deployment of payphone services. *Pay Telephone*, Opinion and Order at 27 (September 1, 2004). When one looks past the smoke of the PAO petition, one can clearly see that the Ohio Commission has consistently acted to implement federal payphone requirements and ensure that SBC- Ohio's payphone rates comport with these requirements.

D. Requiring refunds is retroactive ratemaking and should be rejected by the FCC.

Contrary to PAO's assertion otherwise, any requirement that SBC-Ohio pay refunds back to April 15, 1997 would constitute retroactive ratemaking and would violate the filed rate doctrine. Such a requirement

would contradict long-established precedent and jurisprudence that dates back several decades in Ohio. In a case decided five decades ago, the Ohio Supreme Court found that rates set by the Ohio Commission were the only rates a company that is regulated by the PUCO could lawfully charge until those rates were lawfully changed. *See Keco Industries, Inc. v. Cincinnati & Suburban Tel. Co.*, 166 Ohio St. 254, 257-259, 141 N.E. 2d 465, 468-469 (1957). Furthermore, a public utility operating in Ohio may not increase or decrease its tariffed rates without prior approval of the Ohio Commission. Ohio Rev. Code Ann. §4909.17 (Baldwin 2005). Consequently, a public utility such as SBC-Ohio may only charge permanent rates that are set by the Ohio Commission until lawfully changed, which may only be done with the prior approval of the PUCO, and may then only charge the newly approved rates prospectively. As demonstrated above, the Ohio Commission approved the rates of SBC-Ohio dating back to April, 1997, determining that such rates were in compliance with federal requirements. Such rates were the only rates SBC could lawfully assess prior to the Ohio Commission's approval of new rates. Such approval was given when the Ohio Commission ordered SBC-Ohio to bring its payphone rates into compliance with the FCC's revised NST. Only then could SBC-Ohio assess rates other than those previously approved by the Ohio Commission. Any requirement that SBC-Ohio pay refunds dating back to April 15, 1997 would, then, be contrary to

the long precedent established long ago in *Keco*.

The filed rate doctrine sets forth a public utility's obligation to assess only those rates that have been filed and approved by a regulatory agency. The PAO argues that the filed rate doctrine has been found to be inapplicable to an unlawful rate or unapproved tariff. *PAO Petition* at 21. In arguing that the SBC-Ohio payphone rates were unlawful or unapproved, the PAO relies on essentially one of the same arguments it made on appeal to the Ohio Supreme Court, namely that SBC-Ohio's rates were never found to be lawful and that SBC-Ohio never filed a tariff with the Ohio Commission. *Id.* at 22. As noted above, the Ohio Supreme Court found that since the Ohio Commission had reviewed the SBC-Ohio payphone tariffs and found them to be in compliance, no further payphone tariff filings were required and the PAO's assignment of error was rejected. *Payphone Assn.* at 9. Furthermore, as set forth previously, the SBC-Ohio tariffs were clearly not unlawful as the Ohio Commission was consistent in its application of the federal requirements. The inadequacy of the PAO's argument notwithstanding, the District of Columbia Circuit Court has made clear that rate changes should be prospective, not retroactive. Rate predictability and the prevention of discrimination among customers are ensured when the filed rate doctrine is applied in this manner. *See Consolidated Edison Co. v. FERC*, 347 F. 3d 964, 969 (D.C. Cir. 2003). For these reasons, the FCC is strongly encouraged to

reject the PAO's argument for retroactive credits.

E. SBC-Ohio should not be required to return all dial-around charges it has received.

Taking a position very closely tied to the argument for retroactive refunds, the PAO asserts that SBC-Ohio should be required to return all dial around compensation it has collected. *PAO Petition* at 25. According to the PAO, SBC-Ohio, in return for the right to collect dial-around compensation, obligated itself to make refunds of any overcharges found by the states to have occurred and in doing so going back to April 15, 1997. *Id.* As set forth above, SBC-Ohio's pay phone rates were only adjusted downward in light of the FCC's revised NST. Any overcharges that may have occurred were properly addressed through the true-up mechanism approved by the Ohio Commission when it approved SBC-Ohio's interim rates. As previously discussed, SBC-Ohio rates for payphone services in effect prior to the FCC's revision to the NST had been found by the Ohio Commission to be in compliance with the then-existing federal requirements. *See Pay Telephone*, Entry at 3 (September 25, 1997). Consequently, the Ohio Commission has not found any overcharges on the part SBC-Ohio with regard to payphone rates that have not been addressed. SBC-Ohio should not, then, be "disgorged" of any dial-around compensation it has received.

CONCLUSION

The Ohio Commission urges the FCC to reject the PAO's petition. The

PAO has made no showing that it, or its members, is entitled to any refunds beyond those that have already been given, nor has the PAO offered a justifiable reason for the FCC to contradict long established Ohio, and national, precedent against retroactive ratemaking through the preemption of the actions of the Ohio Commission. Essentially, the PAO, in a most grand display of sour grapes, is petitioning the FCC simply because it is unhappy with the state outcome. In doing so, the PAO has mischaracterized the Ohio record and distorted the actions of the Ohio Commission. The Ohio Commission trusts that the FCC will recognize the PAO petition as yet another attempt of a dissatisfied party to make its case despite having already been given every opportunity to do so at the state level. The Ohio Commission thanks the FCC for the opportunity to provide comments in this proceeding.

Respectfully submitted,

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