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February 23, 2007

By Electronic Filing **Ex Parte Presentation**

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

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

Dear Ms. Dortch:

On February 22, 2007, Albert H. Kramer and Robert F. Aldrich of Dickstein Shapiro LLP, (representing the American Public Communications Council ("APCC")), met with John Hunter, Legal Advisor to Commissioner Robert McDowell. We discussed the matters summarized in the enclosed document handed out during the meeting.

Sincerely,

Robert F. Aldrich

Enclosure

cc: John Hunter

THE FCC MUST GRANT
THE NST REFUND PETITIONS

American Public Communications Council

February 22, 2007

I. BACKGROUND

A. In the 1996 *Payphone Orders*,[1] the FCC required Bell Operating Companies ("BOCs") to bring state-tariffed payphone line rates into conformity with the federal new services test ("NST") no later than April 15, 1997.

1. The BOCs must bring rates into compliance with the NST in order to comply with Section 276(a)(2) of the Communications Act (banning BOCs from discriminating in favor of their own payphones).[2]

2. The Commission made NST compliance a condition of the BOCs' eligibility to collect payphone compensation from interexchange carriers ("IXCs") as of April 15, 1997.

3. Under Section 276, implementation of statutory requirements is the sole responsibility of the Commission; however, the Commission allowed state commissions to initially review payphone line rates for NST compliance.

   a. Under *USTA II*,[3] the Commission can use state commissions as "short-cuts" to achieve compliance with federal regulations only if the state agencies are "superintended by the [Commission] in every respect." *Id.* at 567.

   b. Thus, "[t]he Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the

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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*, 523 U.S. 1046 (1998) (collectively "*Payphone Orders*").

[2] *Wisconsin Public Service Commission, Memorandum Opinion and Order,* 17 FCC Rcd 2051, 2052 ¶ 2 (2002), *aff'd New England Pub. Comms. Council v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003).

[3] *United States Telecomms. Ass'n v. FCC*, 359 F.3d 554, 565-68 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) ("*USTA II*").

[*Payphone Orders*], including the intrastate tariffing of payphone services, have been met."[4]

B. After the Common Carrier Bureau clarified the NST requirement on April 4, 1997,[5] the BOCs sought a waiver extending the NST compliance deadline.

1. The Common Carrier Bureau granted a *limited* waiver "for 45 days [from the April 4 order] . . . of the requirement that [local exchange carrier ("LEC")] intrastate tariffs for payphone service comply with the 'new services test.'"[6]

2. The Bureau allowed th e BOCs to file NST-compliant tariffs with state commissions by May 19, 1997, subject to a condition that a BOC must "reimburse or provide credit to its customers, from April 15, 1997, if the newly tariffed rates, when effective, are lower than the existing rates." *Id.*

3. The FCC specified that states should "act on the tariffs . . . within a reasonable time" so that BOC compliance with the NST would not be delayed for long. *Id.* at 21379 n. 60.

C. Contrary to the FCC's expectation, the BOCs successfully delayed complying with the NST in most states for five to ten years.

1. The BOCs (except Qwest) filed cost data with state PUCs purporting to show that existing payphone line rates, with only minor modifications, complied with NST.

2. Various state payphone associations challenged the lawfulness of the BOCs' rates under the NST.

3. State proceedings continued over the next ten years, resulting in numerous state decisions finding that BOC payphone line rates must be substantially reduced to comply with the NST.

   a. In other states, BOCs agreed to dramatic reductions after the FCC clarified the NST in 2000 and 2002.

4. In response to payphone service providers' ("PSPs'") requests, some state PUCs granted refunds from April 15, 1997, of the difference between NST-compliant rates and existing rates. Other state PUCs denied refunds.

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4 *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370, 21379 n. 60 (CCB 1997)("*Waiver Order*"); *North Carolina Utilities Comm'n*, Order, 13 FCC Rcd 5313, 5314 ¶ 2 (CCB 1998).

5 *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996,* Order, 12 FCC Rcd 20997, 21013 ¶ 35 (CCB 1997).

6 *Waiver Order at* 21379 ¶ 19.

D. Five petitions are currently pending requesting the FCC to order BOCs to refund, back to April 15, 1997, the difference between NST-compliant rates and the non-compliant rates previously in effect:

1. Illinois Public Telecommunications Association, filed July 30, 2004;

2. Southern Public Communications Association, filed November 9, 2004;

3. Independent Payphone Association of New York, filed December 29, 2004;

4. Florida Public Telecommunications Association, filed January 31, 2006;

5. Payphone Association of Ohio, filed December 28, 2006.

E. In three additional pending proceedings, a court or PUC has requested Commission guidance.

1. In a federal court case in which PSPs seek NST refunds from Qwest for excessive charges in eleven states, the 9th Circuit court of appeals made a primary jurisdiction referral to the FCC to interpret the *Waiver Order.*[7]

2. The Oregon PUC requested guidance re the state payphone association's request for NST refunds in a state rate proceeding.[8]

3. The Massachusetts state appellate court made a primary jurisdiction referral of the state payphone association's appeal from the state PUC's rate decision denying NST refunds.[9]

II. THERE ARE TWO THEORIES UNDER WHICH FCC CAN RULE THAT REFUNDS ARE REQUIRED

A. Overarching principle: It is the FCC's responsibility to ensure a remedy for BOC violations of federal law.

1. NST compliance is a matter of federal law.

2. Section 276 places implementation responsibility squarely and exclusively on FCC.

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[7] *Davel Comms., Inc. v. Qwest Corp.*, 460 F.3d 1075 (9th Cir. 2006) ("*Davel*"). *See* Petition of Davel Communications, Inc., *et al.* for Declaratory Ruling (September 11, 2006).

[8] Letter to Kevin Martin, Chairman, FCC, from Lee Beyer, Chairman, Oregon Public Utility Commission (November 23, 2005).

[9] *New England Public Communications Council, Inc. Filing of Letter from Supreme Judicial Court of Massachusetts Regarding Implementation of the Pay Telephone Compensation Provisions of the Telecommunications Act of 1996*, Public Notice, DA 06-780 (April 3, 2006).

3. Under *USTA II*, FCC could not delegate either interpretation or enforcement of Section 276 to the states.

   a. To the extent that the FCC legitimately allowed initial rate review to be conducted by state commissions, the Commission must "superintend" the state review process "in every respect."[10]

B. Theory I: The *Waiver Order* requires refunds.

1. The *Waiver Order* is clearly more than a "standstill" order that only protected PSPs during the period before new rates were *filed.* The order expressly requires refunds "once the new intrastate tariffs are *effective*," where NST-compliant rates "*when effective*, are lower than the existing rates."[11]

2. The scope of the *Waiver Order* was not limited to BOCs that actually proposed to reduce payphone line rates. BOCs who thought their existing rates were in compliance with the NST nonetheless were required to file rates for review and required a waiver to protect their eligibility for compensation if (as actually happened) their rates were found not to comply. BOCs' state filings purporting to justify their existing rates indicated reliance on the *Waiver Order*.[12]

3. If the *Waiver Order* had required BOCs to pay refunds only if they proposed to reduce their rates, it would have irrationally and unfairly penalized BOCs that sought to comply with the NST while rewarding BOCs that did not seriously attempt to comply. BOCs that successfully dragged out state review proceedings for years and years would be rewarded many times over.

4. While "the current dilemma may not have been contemplated at the outset by the Commission,"[13] this does not preclude or excuse the Commission from enforcing the refund condition of the *Waiver Order*.

   a. At worst, the *Waiver Order* is ambiguous in its application to the current circumstances

   b. As the U.S. Court of Appeals for the Ninth Circuit stated in its primary jurisdiction referral to the FCC, to the extent that the *Waiver Order* is ambiguous, interpreting it "requires consideration of policy considerations similar to those that gave rise to the FCC's

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10 *USTA II,* 359 F.3d at 567.

11 *Waiver Order,* 12 FCC Rcd at 21379 ¶ 20 (emphasis added).

12 *See* APCC Ex Parte, "The Waiver Order Requires Refunds from the date NST-Compliant Rates Became Effective Back to April 15, 1997" at 7-14 and attachments (September 12, 2006).

13 *Davel*, 460 F.3d at 1089.

1996 and 1997 orders applying the new services test to intrastate payphone rates, as well as to the Waiver Order itself." *Id.*

c. Among the relevant policy considerations:

i. Section 276(a) expressly prohibits any BOC payphone discrimination (and thus requires BOC compliance with the NST) after the effective date of the Commission's implementing rules (*i.e.*, as of April 15, 1997).

ii. It is the Commission's responsibility to ensure compliance with Section 276.

iii. In the *Waiver Order*, the Common Carrier Bureau intended to provide a "limited duration" waiver, not an indefinite-duration one.[14] In any event, neither the Bureau nor the Commission had authority to grant an indefinite waiver of Section 276 requirements.

iv. The waiver was granted "in the interests of bringing LECs into compliance with the requirements" (*id.* at 21379 ¶ 19) of the *Payphone Orders* "within a reasonable time" (*id.* n. 60).

v. The *Waiver Order's* refund condition was intended to "help to mitigate *any* delay" in NST compliance (*id.* ¶ 20) (emphasis added).

vi. Pursuant to the waiver, the BOCs were able to avoid NST compliance for years, collecting dial-around compensation all the while even though their payphone line rates far exceeded NST levels.

vii. After years of non-compliance by the BOCs, the only way to ensure timely compliance with the Act is to require compliance retroactively, by requiring refunds.

viii. Withholding refunds not only would leave the PSPs to bear the losses from the BOCs' years non-compliance, but also would reward the BOCs for their persistent noncompliance.

d. These policy considerations overwhelmingly support a broad application of the *Waiver Order* requiring the BOCs to pay refunds from April 15, 1997, until the date that NST-compliant rates became effective.

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14 *Waiver Order,* 12 FCC Rcd at 21380 ¶ 21.

C. Theory II: Refunds are required as reparations for the BOCs' violations of the Act.

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

2. PSPs injured by rates assessed in violation of the Communications Act are entitled to reparations.

    a. Sections 206-208 of the Act explicitly provide for such reparations.

    b. Because the FCC assigned to state commissions the initial task of reviewing payphone line rates for NST compliance, PSPs that claimed reparations before state commissions were following a Commission-prescribed procedure for seeking reparations for violations of Section 276 – functionally equivalent to filing under Sections 206-208.

3. Refunds are necessary to ensure that BOCs have met all conditions for eligibility for payphone compensation.

    a. 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 starting April 15, 1997

    b. Having indisputably violated the NST for years, BOCs were in continuing violation of the compensation eligibility conditions and collected billions of dollars in dial-around compensation while ineligible to do so.

    c. There is no other adequate remedy.

        i. Fines are inadequate.

        ii. Requiring the BOCs to return the compensation collected from IXCs would not be a fair remedy, and would be ineffective today; because of the BOC-IXC mergers, the BOCs would be mostly just moving money from one pocket to another.

    d. Pursuant to Section 4(i) of the Act, it is necessary for the Commission to order the BOCs to pay NST refunds in order to enforce retroactive compliance by the BOCs with the compensation eligibility conditions.

D. Filed-rate and retroactive-ratemaking doctrines do not bar refunds

1. The federal filed-rate doctrine "does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement."[15]

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15 *Davel,* 460 F.3d at 1085. *See also Reiter v. Cooper*, 507 U.S. 258, 266 (1993).

2. The retroactive ratemaking doctrine means only that an agency may not award refunds if it previously found the rates *lawful* under the applicable statute.[16] If a state prescribed or approved rates under *state law* prior to the *Payphone Orders*, the finding of "lawfulness" clearly cannot preclude a finding of unlawfulness under the federal NST standard of Section 276.

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

III. THE COMMISSION MUST GRANT EFFECTIVE RELIEF

A. Section 276 placed implementation responsibility squarely on the FCC, providing *no* role whatsoever for the states.

1. In assigning the initial NST review role to the states, the FCC was bound by *USTA II* to "superintend[]" the state processes "in every respect."

2. Under Section 276, the Commission retains jurisdiction to ensure that the BOCs comply with the NST and to determine their eligibility for compensation.[17]

3. To respond to referrals from federal and state proceedings, the Commission must at a minimum issue a declaratory ruling that the *Waiver Order* and Section 276 require BOCs to refund, back to April 15, 1997, the difference between NST-compliant payphone line rates and the non-compliant rates previously in effect.

B. To respond to the pending petitions, it is not sufficient for the FCC to issue a declaratory ruling and leave implementation to the states.

1. Under *USTA II*, the Commission could not assign to state commissions the task of reviewing payphone line rates for NST compliance without retaining effective authority to supervise and correct erroneous state decisions, including denial of refunds.

2. State decisions denying refunds have mostly become final while the petitions were pending.

3. To comply with *USTA II*, the Commission must make its ruling applicable to all states involved in the pending petitions.

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16 *Arizona Grocery Co. v. Atchison, Topeka & Sante Fe Rwy. Co.*, 284 U.S. 370 (1932).

17 *First Payphone Reconsideration Order*, 11 FCC Rcd at 21294, ¶ 132; *Waiver Order,* 12 FCC Rcd at 21379, ¶ 19, n.60.

C. The Commission itself can and must order the BOCs to pay refunds.

1. Under Section 4(i) of the Act, "the Commission may perform any and all acts, make such rules and regulations, and issue such orders, as may be necessary in the execution of its functions."

   a. Under Theory I, ordering the BOCs to pay refunds is necessary to enforce the *Waiver Order.*

      i. Under the *Waiver Order*, the Commission made payment of refunds a condition of waiving the April 15, 1997, compliance deadline.

      ii. Ordering BOCs to pay refunds in accordance with a prior Commission order clearly qualifies as an "order [that is] necessary in the execution of [the Commission's] functions."

   b. Under Theory II, ordering the BOCs to pay refunds is necessary:

      i. To ensure that PSPs have an effective remedy for the BOCs' violations of the Act;

      ii. To remedy the BOCs' ineligibility to receive payphone compensation.

D. The Commission can and must overrule inconsistent state rulings.

1. Section 276 does not leave the Commission discretion to let inconsistent state rulings stand. *E.g.*, the Illinois Commerce Commission's interpretation of the state retroactive ratemaking doctrine as precluding refunds is clearly an "inconsistent state requirement" preempted by Section 276(c).

2. Under *USTA II*, the Commission had to retain ultimate authority to supervise state determinations regarding NST compliance.

3. Even without considering the Commission's supervisory role under *USTA II*, *res judicata* and collateral estoppel principles do not prevent the Commission from making its own determination as to whether refunds are warranted, independently of state commission and court decisions.

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

   b. Under the *Arapahoe*[18] balancing test, federal interest overrides state law principles.

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18 *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001).

i. Federal concerns are preeminent in the arena of payphone regulation.

ii. Inconsistent application of NST refund requirement would frustrate the [FCC's] ability to discharge its statutory duty.