DICKSTEINSHAPIRO LLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com
Writer's Direct Dial: (202) 420-2236
E-Mail Address: AldrichR@dicksteinshapiro.com

March 8, 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 March 7, 2007, Michael W. Ward, General Counsel of the Illinois Public Telecommunications Association, Keith Roland of the Herzog Law Firm, representing the Independent Payphone Association of New York and Robert F. Aldrich of Dickstein Shapiro LLP, representing the American Public Communications Council ("APCC"), met with Scott Bergmann, Legal Advisor to Commissioner Jonathan Adelstein. We discussed the matters summarized in the enclosed document handed out during the meeting.

Sincerely,

Robert F. Aldrich

Enclosure

cc: Scott Bergmann

Section 276 Compliance

Michael W. Ward
General Counsel

Illinois Public Telecommunications Association

First Report & Order - (9/20/96)

- ILEC rates to IPPs must be cost based no later than April 15, 1997 – any contrary state requirement is preempted.
- "Because incumbent LECs may have an incentive to charge their competitors unreasonably high prices for these services, *we conclude that the new services test is necessary to ensure that central office coin services are priced reasonably."* – *First Report & Order*, ¶ 146 (italics added).
- Computer III compliant tariffs and pricing (NST) are required for ILEC's basic payphone services provided to IPPs. – *First Report & Order*, ¶ 147.
- "Pursuant to Section 276(c), *any inconsistent state requirements with regard to this matter are preempted*." – *First Report & Order*, ¶ 147 (italics added).

Order on Reconsideration - 11/8/96

- "The RBOCs, BellSouth, and *Ameritech request* that … (they) be eligible to receive payphone compensation, by April 15, 1997, as opposed to on that date. We clarify that the LECs may complete all the steps necessary to receive compensation by April 15, 1997." – *Order on Reconsideration,* ¶ 130.

- "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* (DAC) 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 (italics added).

Order on Reconsideration
- 11/8/96

- "*We will rely on the states to ensure* that the basic payphone line is *tariffed by the LECs in accordance with the requirements* of Section 276. As required in the Report and Order, and affirmed herein, all required tariffs, both intrastate and interstate, must be filed no later than January 15, 1997 and *must be effective no later that April 15, 1997*."

  - *Order on Reconsideration,* ¶ 163 (italics added).

Bureau Waiver Order
- 4/4/97

- "*We emphasize* that LECS must comply with all of the enumerated requirements established in the Payphone Reclassification Proceeding, except as waived herein, before the LECs' payphone operations are eligible to receive the payphone compensation provided in that proceeding … These requirements are: (1) that payphone service *intrastate tariffs be cost-based*, consistent with Section 276 … LEC intrastate tariffs *must comply with these requirements by April 15, 1997* in order for the payphone operations of the LECs *to be eligible to receive payphone compensation.*"

  – *Bureau Waiver Order*, ¶ 30 (italics added).

Clarification Order
- 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 …"

  - *Clarification Order,* ¶ 10 (italics added).

Bell Atlantic v. Frontier Communications

- 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*." – *Bell Atlantic*, ¶ 28 (italics added).

IPTA Illinois NST Proceedings

- 4/15/97 Cost-based rates are required to be effective.
- 5/8/97 IPTA petitions ICC that SBC Illinois does not meet NST requirements, requests investigation and refunds of excessive rates – ICC Docket No. 97-0225.
- 5/15/97 SBC Illinois self-certifies compliance with NST, and begins receiving DAC effective 4/15/97.
- 12/17/97 ICC grants IPTA Petition and opens ICC NST investigation as ICC Docket No. 98-0195.
- 11/12/03 After two complete rounds of hearings, ICC finds that SBC Illinois payphone rates are not cost based, do not comply with NST requirement, but holds that the filed rate doctrine bars refunds.

IPTA Illinois NST Proceedings (cont.)

- ICC - IPTA Petition for Rehearing citing federal law that filed rate doctrine does not bar refunds – denied.
- IL App. Ct. – Motion to refer question of refunds to FCC under primary jurisdiction – denied.
- FCC - IPTA files Petition for Declaratory Ruling (7/04).
- IL App. Ct. – IL App Ct agrees that filed rate doctrine does not bar refunds of tariffed rates not approved by ICC, but holds 1995 ICC order setting rates binding until 12/13/03 – ignores FCC express preemption as of 4/15/97.
- IL S. Ct. – denies petition for leave to appeal.
- IL S. Ct. – denies motion to refer question of refunds to FCC under primary jurisdiction, despite U.S Court of Appeals decision that NST refunds not barred by filed rate doctrine.
- U.S.S.Ct. – denies certiorari.

NST Overcharges vs. SBC Illinois DAC

4/15/97 – 12/12/03

- SBC Illinois charged IPPs $8 - 10 million in ILEC payphone service rates in excess of NST over 6 ½ years, in violation of repeated FCC orders.
- SBC Illinois collected $100s millions in DAC through false certification of NST compliance over 6 ½ years, in violation of repeated FCC orders.

Numerous States Have Ordered 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. 2000).

- "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 repeatedly ordered ILECs to implement NST payphone service rates *no later than* 4/15/97 and preempted all inconsistent state requirements.
- FCC ordered that an ILEC is not eligible for DAC until it is in actual compliance with NST requirement.
- From 4/15/97 to 12/12/03, SBC Illinois overcharged IPPs $8 - 10 million through payphone service rates that exceeded the FCC's NST requirement, while receiving $100s millions in DAC – both in violation of the FCC Payphone Orders.
- ILEC payphone service rates and DAC receipts from 4/15/97 through 12/12/03 are per se unreasonable and unlawful; reparations are not barred by the filed rate doctrine and are due IPPs.
- The 1996 Act's directive for a uniform and consistent national policy supplanted principles of common law claim preclusion.