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November 20, 2008

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 November 19, 2008, Albert H. Kramer and Robert F. Aldrich, on behalf of American Public Communications Council, met with Nicholas Alexander, 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: Nicholas Alexander

APCC

THE FCC MUST ORDER THE BELL COMPANIES TO REFUND PAYPHONE LINE CHARGES IN EXCESS OF NEW SERVICES TEST COMPLIANT RATES

American Public Communications Council
November 2008

BACKGROUND

- Section 276(a)(1) prohibits Bell Operating Companies ("BOCs") from discriminating between their payphone operations and independent payphone service providers ("PSPs").
  - To prevent such discrimination, Section 276(b)(1)(C) required FCC to impose *Computer III* safeguards on the BOCs – including cost-based payphone line rates complying with the "New Services Test" ("NST").
  - Section 276(a) required compliance as of the effective date of the new payphone compensation rules – set for April 15, 1997.
    - The FCC made NST compliance a condition of the BOCs' eligibility to begin receiving dial-around compensation for their own payphones.

- To implement the federal NST requirement, the Commission directed that state regulators determine if specific BOC line rates complied with the federal NST.
  - The Commission let the BOCs continue filing payphone line rates with state commissions.
  - But the Commission noted that inconsistent state requirements are preempted (47 U.S.C. § 276(c)) and explicitly preserved its jurisdiction to determine BOC compliance.

BACKGROUND (cont'd)

- Just before the 4/15/97 compliance deadline, the BOCs asked the Commission for a waiver to let them begin collecting dial-around compensation without first complying with the NST.

- After obtaining the waiver, the BOCs engaged in vigorous efforts in state commissions and courts (and before the Commission) to avoid, minimize and delay compliance – in most cases for 5-10 years.

- Varying decisions were issued by different states. To address the disparity in the states' application of the NST, in January 2002 the FCC issued additional guidance.
  - *Wisconsin Public Service Commission*, 17 FCC Rcd 2051 (2002).

- Most states ultimately found massive overcharging and ordered rate reductions, often exceeding 50%.
  - *E.g.,* in Massachusetts the rate declined from about $46 to $18 per month.

- Many states implemented the statute and FCC regulations by ordering refunds back to 4/15/97.

- But some states did not, resulting in no uniform remedy being provided despite clear violations of federal law.

THE CURRENT PROCEEDINGS

- Beginning in July 2004, five state payphone associations (representing PSPs in Illinois, Mississippi, New York, Florida, and Ohio) filed petitions requesting the FCC to order NST refunds.

- The Oregon PUC, the Massachusetts state appellate court, and the 9th and 10th Circuit federal courts of appeals also referred issues to the FCC seeking guidance on whether refunds should be required.

- Two legal theories independently require the Commission to order refunds:
  - Refunds are required by the statute, i.e., Section 276.
  - Refunds were expressly required as a condition of the April 1997 waiver.

REFUNDS ARE REQUIRED BY SECTION 276

- The BOCs' noncompliance with the NST violated the Section 276(a)(2) nondiscrimination requirement.
  - Discrimination was prohibited and PSPs were entitled to cost-based payphone line rates as of the effective date (4/15/97) of payphone deregulation.
  - There is no dispute that the BOCs continued to charge grossly excessive rates 5-10 years after the compliance deadline.
  - In challenging BOC rates and claiming refunds in state proceedings, PSPs followed the FCC-prescribed procedure.
  - PSPs injured by NST-non-compliant rates are entitled to reparations.
    - *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1242 (10th Cir. 2007).

- Section 276 directed the **FCC** to carry out the statute's requirements.
  - While the FCC chose to have state commissions review the BOC payphone line rates for compliance with federal law, under *USTA II* the FCC cannot delegate its ultimate statutory responsibilities to the states.
    - *United States Telecomms. Ass'n v. FCC*, 359 F.3d 554, 565-568 (D.C. Cir. 2004).
  - If the FCC uses state procedures as a "shortcut," it must "superintend" the state process "in every respect."
  - To "superintend the process," the FCC must correct states' failure to order refunds.
  - Uniquely, Section 276(c) provides and requires that FCC regulations "shall preempt" any inconsistent state requirements.

THE COMMISSION CAN AND MUST ORDER THE BOCs TO PAY REFUNDS

- Congress mandated that the FCC ensure that payphone line rates were nondiscriminatory effective April 1997.

- Denying refunds "would reward intentional [BOC] non-compliance with FCC orders under the 1996 Act."
  - *Davel Comms., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1089 (9th Cir. 2006).

- Two federal courts of appeals have spoken to the refund issue.
  - The 10th Circuit ruled that PSPs are entitled to reparations for BOC violations of the NST.
    - *TON Services*, 493 F.3d at 1242.
  - The 9th Circuit ruled that filed-rate doctrines cannot justify denial of refunds.
    - *Davel*, 460 F.3d at 1085.

- The only remedy that can undo the BOCs' years of noncompliance is for the FCC to order the BOCs to pay refunds.
  - While the petitions were pending at the FCC, most of the state proceedings became final.
  - The Commission should directly order the BOCs to pay refunds to PSPs for the difference between NST-compliant payphone line rates and the rates previously in effect.

THE FCC'S 1997 WAIVER ORDER EXPRESSLY REQUIRES THE BOCS TO PAY REFUNDS

- The BOCs promised to pay refunds if rate reductions were necessary to comply with the NST.
  - The Commission expressly conditioned the waiver on the BOCs filing NST-compliant rates and paying refunds if the rates "when effective, are lower than the existing rates."
  - The NST compliance waiver was of "limited duration."
  - The refund condition and the limited duration of the waiver *had to be imposed* to comply with the statute: The FCC may not waive a statutory requirement.

- To the extent the *Waiver Order* is ambiguous, it should be interpreted in light of the underlying "policy considerations."
  - *Davel*, 460 F.3d at 1089.

- Pursuant to the FCC's waiver, BOCs have collected payphone compensation without complying with the NST as required by statute.
  - Denying refunds deprives PSPs of their right to nondiscriminatory payphone line rates.