

Ward & Ward, P.C.

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By Electronic Filing

Ex Parte Presentation

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

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

Dear Ms. Dortch:

On November 19, 2008, Michael W. Ward, General Counsel for the Illinois Public Telecommunications Association, and Keith J. Roland, General Counsel for the Independent Payphone Association of New York, met with Marcus Maher, Associate Bureau Chief, Albert M. Lewis, Chief, Pricing Policy Division, Alexander A. Minard, Acting Legal Counsel, and Lynne Engledow of the Wireline Competition Bureau, to discuss the Associations' respective positions already on file in their petitions for declaratory ruling in the above-captioned proceedings, the matters summarized in their previous filings, and the following documents.

Sincerely,



Michael W. Ward

Enclosure

cc: Marcus Maher
Albert M. Lewis
Alexander A. Minard
Lynne Engledow
Keith J. Roland

Illinois Public Telecommunications Association Petition for Declaratory Ruling, FCC Docket 96-128

Section 276 Compliance

I. What is already established:

- A. Rates to PSPs must be NST cost-based no later than April 15, 1997
First Report & Order, ¶¶ 146 – 147
Order on Reconsideration, ¶¶ 130 – 131, 163
Bureau Waiver Order, ¶ 30 (4/4/97)
- B. Any inconsistent state requirement is preempted
First Report & Order, ¶ 147
- C. BOC must be in compliance with NST rate requirement to be eligible to receive dial around compensation (DAC)
Order on Reconsideration, ¶¶ 130 – 131
Bureau Waiver Order, ¶ 30 (4/4/97)
Clarification Order, ¶ 10 (4/15/97)
- D. BOC certification of NST compliance does not substitute for the requirement to be in actual NST compliance to be eligible for DAC
Bell Atlantic v. Frontier Comm 'ns, ¶ 28 (9/24/99)
Ameritech v. MCI, ¶ 28 (11/8/99)
- E. PSPs did not receive NST cost-based rates by April 15, 1997 because IL Bell did not comply until December 13, 2003
ICC Investigation into Certain Payphone Issues, ICC Dkt #98-0195
- F. IL Bell collected \$100s millions of DAC prior to becoming eligible for DAC on December 13, 2003
ICC Investigation into Certain Payphone Issues, ICC Dkt #98-0195 (record facts)
- G. FCC procedure to be followed:
 - 1. PSPs should first raise issues about NST rates before the state commission
Order on Reconsideration, ¶ 163
Wisconsin Bureau Order, (3/2/00), aff'd 334 F.3d 69
Done: *ICC Investigation into Certain Payphone Issues*, ICC Dkt #98-0195 (initiated May 8, 1997 as ICC Dkt #97-0225)

2. FCC retained jurisdiction over NST rate compliance
Clarification Order, fn 60 (4/15/97)
NC Utilities Comm'n Order, ¶ 2 (3/20/98)
Wisconsin Bureau Order, ¶ 2, (3/2/00), aff'd 334 F.3d 69
 3. BOC receipt of DAC based on false certification of NST compliance will be addressed by the Commission
Bell Atlantic v. Frontier Comm'ns, ¶ 28 (9/24/99)
Ameritech v. MCI, ¶ 28 (11/8/99)
Submitted: *IPTA Petition for Declaratory Ruling*
- H. The filed rate doctrine does not bar NST refunds
Davel v. Qwest, 451 F.3d 1037 (9th Cir. 2006)
Ton Services v. Qwest, 493 F.3d 1225 (10th Cir. 2007)
- I. A previous inconsistent state decision does not estop a federal regulatory agency's enforcement of federal law and policy
American Airlines v. DOT, 202 F.3d 788 (5th Cir. 2000)
Arapahoe County Pub. Airport v. FAA, 242 F.3d 1213 (10th Cir. 2001)
Iowa Network Services v. Qwest, 363 F.3d 683, 690 (8th Cir. 2004)

II. What remains to be decided:

- A. Whether the FCC will enforce its own orders that PSPs must receive NST cost-based rates no later than April 15, 1997, by ordering refunds of the IL Bell charges from April 15, 1997 to December 12, 2003 that were in excess of the NST cost-based rates as found by the Illinois Commerce Commission.
- B. Whether the FCC will enforce its own orders that a BOC must be in actual compliance with the NST cost-based rate requirement before being eligible to receive DAC, notwithstanding the BOC's incorrect certification of compliance, by ordering IL Bell's forfeiture of DAC collected by IL Bell before it was eligible.

III. IPTA proposed holdings:

- A. Grant the IPTA Petition for a Declaratory Ruling in ruling that: (1) as a matter of uniform federal law and policy, IL Bell is required to refund the amounts charged to PSPs from April 15, 1997 through December 12, 2003 that exceeded the NST cost-based rates as found by the Illinois Commerce Commission in ICC Dkt. #98-0195, with 11.25% simple interest from the date paid by the PSP until the refund is received; (2) the FCC's previous holding, preempting any state requirement inconsistent with the FCC requirement for NST cost-based rates to be in effect no later than April 15, 1997, remains in effect (*First Report & Order*, ¶ 147); and (3) if the refunds are not made within six months of this Order, any party or PSP may enforce this Order by filing a complaint for enforcement with the FCC.
- B. Also, grant the IPTA Petition for a Declaratory Ruling in ruling that, as a matter of uniform federal law and policy, IL Bell is required to forfeit the DAC collected for April 15, 1997 through December 12, 2003, the period before IL Bell was in actual compliance with the NST cost-based rate requirement, and thus before IL Bell was eligible for DAC under the FCC orders.

IV. Partial List of States with Refunds for NST Overcharges

Colorado
Idaho
Indiana
Iowa
Kentucky
Louisiana
Michigan (partial)
Minnesota
Nebraska
New Mexico
North Dakota
Pennsylvania
South Carolina
South Dakota
Tennessee
Utah
Washington
Wisconsin
Wyoming

INDEPENDENT PAYPHONE ASSOCIATION OF NEW YORK, INC.

PETITION FOR PRE-EMPTION AND DECLARATORY RULING

CC DOCKET 96-128

TIMELINE OF NEW YORK STATE PROCEEDING

Verizon (then New York Telephone) underlying payphone rates were filed with New York PSC in late 1980's or early 1990's. Rates were based on traditional, embedded or residuary costs.

December 31, 1996 - Verizon files revised line rates, in response to FCC Payphone Orders, to be effective April 15, 1997. Such revised rates were filed only for "smart" payphone lines used by Verizon payphones. Pre-existing rates for "dumb" payphone lines – used by IPPs – were not changed.

January, 1997 – Independent Payphone Association of New York (IPANY) submits objection to PSC Staff over Verizon tariff filing as not meeting FCC Orders, but is denied access to Verizon cost studies supporting filing.

March 31, 1997 – PSC approves Verizon tariff on temporary basis on ground there was "no subsidy of local coin service currently flowing from other intrastate services". There was no review of whether the FCC's New Service Test standards were followed. In light of IPANY objections, PSC continues review of Verizon's tariff.

April 15, 1997 – FCC Common Carrier Bureau issues “Refund Order” giving Verizon and other RBOCs until May 19 to file NST compliant revisions to state payphone tariffs.

May 19, 1997 – Pursuant to “Refund Order”, Verizon files changes to its state payphone tariff for “Smart Line” phones (used by Verizon) but not “Dumb Line” phones used by IPPs, and incorrectly certifies its IPP rates comply with the NST.

July 30, 1997 – PSC continues review of Verizon’s tariff by issuing Notice Requesting Comments in Case 96-C-1174. Submission date for comments is extended to September 30, 1997.

September 30, 1997 – IPANY submits comments showing Verizon’s payphone rates did not comply with the New Services Test.

October 1997 – December 1, 1999 – PSC keeps proceeding to review tariffs open, but takes no action.

December 2, 1999 - IPANY files supplemental complaint supported by an expert’s affidavit and cost study, asking PSC to resolve issues pending since April 1, 1997, in light of FCC’s NST Orders, i.e., the validity of Verizon’s payphone rates. Complaint also asks for refunds back to April, 1997, once proper NST rates are established.

January 5, 2000 – PSC issues Notice Requesting Comments on IPANY’s December 2, 1999, Complaint.

February – April, 2000 – Verizon and IPANY submit comments and replies to PSC.

March 2, 2000 – FCC Common Carrier Bureau issues First “Wisconsin Order” generally endorsing IPANY positions.

October 12, 2000 – PSC issues Order holding First Wisconsin Order does not apply in New York, and finding Verizon’s pre-existing payphone rates complied with the NST because they “recover direct embedded cost plus a reasonable contribution toward common costs”. (emphasis added).

December 8, 2000 – IPANY timely files Petition for Rehearing of PSC Order of October 12, 2000.

January – March, 2001 – Verizon and IPANY submit comments and legal arguments on IPANY Petition for Rehearing.

September 21, 2001 – PSC issues Order Denying Petition for Rehearing of October 12, 2000, Order.