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December 1, 2008

Ex Parte Presentation

By Electronic Filing

Marlene H. Dortch, Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W., Room TW-325
Washington, DC 20554

Re: CC Docket No. 96-128 – NST Refunds

Dear Ms. Dortch:

In its latest *ex parte*, the *Verizon State Law Ex Parte*, in total disregard of the *federal law* governing the new services test (“NST”) refund issue, Verizon raises various alleged *state law* barriers to this Commission granting refunds.¹ Some of Verizon’s arguments have been raised and fully rebutted numerous times already.² Others, presented without citations or support, are Verizon’s own newly minted “factual conditions” for refund denial, contrived to fit the factual circumstances (or Verizon’s distorted version thereof) in each state where refunds are at issue. Some of Verizon’s contrivances and factual distortions are shown in the examples below.

New York: Noting that the Independent Payphone Association of New York (“IPANY”) did not formally request a refund until December 1999 (*Verizon State Law Ex Parte* at 2), Verizon asserts as a general principle that refunds should be denied if “payphone providers did not file a petition or complaint . . . seeking refunds within the applicable statute of limitations.” *Id.* at 1-2. Verizon fails to mention IPANY’s three filings in 1997 challenging Verizon’s failure to comply with the NST, and the formal investigation of that issue opened by the New York

¹ Letter to Marlene H. Dortch, FCC, from Ann D. Berkowitz, Verizon (Nov. 25, 2008) (“*Verizon State Law Ex Parte*”). The short answer to all these arguments is that state law requirements are inapplicable to this proceeding. See 47 U.S.C. § 276(c) (“To the extent that any State requirements are inconsistent with the Commission’s regulations, the Commission’s regulations on such matters shall preempt such State requirements”).

² See Notes 9-12 below.

Public Service Commission (“NYPSC”) the same year.³ Thus, even if conflicting state requirements were not preempted, Verizon was already on notice that its payphone line rates were under “unceasing challenge”.⁴ Verizon had no basis to assume that noncompliant rates would not be subject to refunds.

In an additional distortion of the record, Verizon states that “the PSC held that Verizon’s rates satisfied the NST” (*Verizon State Law Ex Parte* at 2) but fails to mention that the PSC’s approval of Verizon’s rates was overturned by the New York state courts, although refunds were ultimately denied.

Massachusetts: Seizing on the fact that the Massachusetts Department of Telecommunications and Energy (“DTE”) “never converted Verizon’s rates to interim rates” (*Verizon State Law Ex Parte* at 2), Verizon asserts as a general principle that the FCC should deny refunds if “the state commission has not converted the BOC’s permanent rates to temporary or interim rates subject to refund.” *Id.* at 1. Yet, as Verizon admits, the New England Public Communications Council (“NEPCC”) specifically requested that Verizon’s rates be converted to interim rates subject to refund. The DTE denied NEPCC’s request -- and then, when directing that the rates be adjusted to comply with the FCC’s NST requirement, refused to order refunds on the grounds that the rates had not been converted to interim rates! Again, contrary to Verizon’s argument, conflicting state requirements cannot preclude refunds, even if they had been coherently applied by the state commission. The Supreme Judicial Court of Massachusetts itself has recognized as much – having explicitly referred to *this* Commission the critical issue of whether NEPCC is entitled to refunds under *federal* law.⁵

Virginia: While acknowledging that the Atlantic Payphone Association (“APA”) timely challenged Verizon’s rates in Virginia, Verizon again claims that its rates were never converted to temporary rates. What Verizon does not reveal is that in March 1997, the Virginia State Corporation Commission (“SCC”) issued an order saying the rates were allowed to take effect “subject to refund.” In May 2001, when the SCC finally concluded it did not have authority to review the rates under the NST standard, the SCC did not recant its earlier order making the rates subject to refund.

Further, while Verizon accuses the APA of a subsequent lack of diligence, it fails to note that when the SCC issued its 2001 order, Verizon itself, in a proceeding pending at the FCC, was challenging the FCC’s authority to set federal guidelines for state payphone rates.⁶ Thus, it

³ See Petition of the Independent Payphone Association of New York, Inc., for an Order of Pre-Emption and Declaratory Ruling at 7-8 (Dec. 29, 2004).

⁴ See *Verizon Tel. Cos. v. FCC*, 269 F.3d 1098, 1110 (D.C. Cir. 2001).

⁵ Letter to Kevin J. Martin, Chairman, FCC, from Maura S. Doyle, Clerk, Supreme Judicial Court of Massachusetts (March 6, 2006). See also Public Notice, DA 06-780 (April 3, 2006).

⁶ See *Wisconsin Public Service Commission, Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051 (2002).

would have been futile to initiate another proceeding at the FCC to resolve the very issue Verizon was litigating at the FCC. Verizon carried this challenge to the U.S. court of appeals, where it was resolved against Verizon in Fall 2003.⁷ Thereafter, when it became clear there would be no settlement in Virginia, the APA twice attempted informally to seek intervention by the Virginia SCC, and also participated in the proceedings before this Commission, explicitly raising the question of refunds in Virginia. Thus, Verizon cannot claim that it was unaware of the potential for refunds.⁸

As for Verizon's claim that the statute of limitations has run under state law, Verizon cites no applicable Virginia statute of limitations, and for good reason: even if state statutes of limitation could be applied to preclude refunds required by federal law, there is none that would explicitly apply, or even implicitly apply, except under Verizon's strained interpretation, as Verizon is well aware from its discussions with the APA.

In addition to its state-specific contrivances and distortions, Verizon reiterates in summary form, as mentioned above, several arguments that APCC and others have previously rebutted at length.

For example, Verizon recycles yet again the *res judicata* argument raised in virtually every one of its submissions since the beginning of this proceeding. *Verizon State Law Ex Parte* at 1. As APCC has explained numerous times, Verizon's argument conflicts with relevant *res judicata* case law,⁹ USTA II,¹⁰ and Section 276 itself, which entrusted the implementation of NST safeguards exclusively to the FCC, not state commissions.¹¹

⁷ See *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

⁸ Cf. *Verizon*, 269 F.3d at 1111 (it was unreasonable for BOCs to assume end user access charges assessed on PSPs were not subject to refund when the BOCs were "on notice" that the rates were "in dispute").

⁹ See, e.g., *Arapahoe County Public Airport Authority v. FAA*, 242 F.3d 1213 (10th Cir. 2001); *American Airlines, Inc. v. Dept. of Transportation*, 202 F.3d 788 (5th Cir. 2000). See also Letter to Thomas Navin, FCC, from Albert H. Kramer, Robert F. Aldrich, and Jacob S. Farber, counsel for APCC (October 31, 2006).

¹⁰ *United States Telecomms. Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004), *cert. denied*, 543 U.S. 925 (2004) ("*USTA I*"). See also Letter to Marlene H. Dortch, FCC, from Robert F. Aldrich, counsel for APCC, CC Docket 96-128 (Oct. 25, 2006) (discussing the applicability of *USTA II*).

¹¹ 47 U.S.C. §§ 276(b), (c). See also Letter from Albert H. Kramer and Robert F. Aldrich, counsel for APCC, to Marlene H. Dortch, Secretary, FCC, re CC Docket No. 96-128 – NST Refunds: First Circuit Opinion in *Verizon New England, Inc. v. Maine Public Utilities Commission*[], 509 F.3d 1 (1st Cir. 2007)], discussing the relevance to this case of the First Circuit's ruling that only the FCC, not the states, has authority to adjudicate and enforce a BOC's compliance with Section 271.

Equally tired is Verizon's argument that refunds cannot be granted if the state commission did not convert the BOC's payphone line rates to temporary or interim rates. *Verizon State Law Ex Parte* at 1. Such state-law retroactive-ratemaking/ filed-rate arguments have been raised and rebutted countless times already.¹² As the 10th Circuit court of appeals has held, "[s]tate filed rate doctrines are . . . preempted by 47 U.S.C. §276(c)."¹³

Other Verizon arguments are newer but no more meritorious. While contending that refunds cannot be granted unless PSPs requested refunds "within the applicable statute of limitations" (*Verizon State Law Ex Parte* at 1-2), Verizon fails to identify any applicable state statute of limitations. In any case, as noted, any otherwise applicable state statute of limitations is preempted.¹⁴

Verizon also argues that refunds cannot be granted if PSPs "did not diligently pursue their legal remedies throughout the course of the proceedings such that state procedural rules, like the statute of limitations, bar the claims." *Verizon State Law Ex Parte* at 2. Again, Verizon does not identify the allegedly applicable statute of limitations, nor does it define "diligently."¹⁵

¹² See, e.g., Letter to Marlene H. Dortch from Albert H. Kramer and Robert F. Aldrich (August 8, 2007); Letter to Marlene H. Dortch from Albert H. Kramer and Robert F. Aldrich, *re* CC Docket No. 96-128 – Effect of *TON Services v. Qwest* (October 1, 2007).

¹³ *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1236 n. 14 (10th Cir. 2007). See also *Davel Communications, Inc. v. Qwest Corp.*, 460 F.3d 1075, 1085 (9th Cir. 2006), quoted in *TON Services* at 1236 (the filed rate doctrine "does not bar a suit to enforce a command of the very regulatory statute giving rise to the tariff-filing requirement").

¹⁴ See 47 U.S.C. § 276(c). As for any argument that a federal statute of limitations precludes refunds, nothing in Section 276 imposes a statute of limitations on Congress' mandate to the Commission to require Bell Companies to comply with its Section 276(b) regulations. Rather, Section 276 unconditionally requires the Commission to make the NST and other safeguards effective simultaneously with the Bell Companies' right to collect payphone compensation. See *id.* §§ 276(a) (Bell Companies shall not discriminate "after the effective date of the rules prescribed in subsection (b)"), (b)(1)(A) (requiring the Commission to establish a payphone compensation plan), (b)(1)(C) (requiring the Commission to prescribe Computer III safeguards). The Commission has no authority to selectively waive these requirements, making effective a provision that benefits the BOCs by letting them collect compensation, while indefinitely waiving a provision that burdens the BOCs by requiring them to charge NST-compliant rates. Only by granting refunds can the Commission avoid the illegality of an impermissible, ten-year statutory waiver. This is true regardless of how one interprets the refund condition of the Commission's *Waiver/Refund Order*. See *Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Order, 12 FCC Rcd 21370 (CCB 1997) ("*Waiver/Refund Order*").

¹⁵ Further, Verizon points to nothing in Section 276 or the Commission's implementing orders that conditions Bell Companies' compliance with the NST safeguard on PSPs' "diligence" in pursuing challenges. As noted above, irrespective of individual payphone associations' degree (footnote continued)

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Certainly on the facts recited above, Verizon cannot be heard to argue lack of diligence. In New York and Massachusetts, the associations initiated their challenges to the proposed rates immediately and pursued their claims continuously. In Virginia, as Verizon acknowledges, the Atlantic Payphone Association (“APA”) challenged Verizon’s rates at the outset and its challenge was interrupted only because the SCC erroneously concluded that this Commission could not set guidelines for state commission review of payphone line rates.

Finally, Verizon contends that refunds cannot be granted if PSPs “did not prove that a BOC’s rates did not comply with the NST for the duration of the time they were in effect.” *Id.* at 2. Verizon does not explain how it believes its rates could be initially NST-compliant, remain unchanged and then somehow become noncompliant by the time a state completed its review. Verizon has made no showing, here or in state proceedings, that its actual costs were materially different in 1997, such that the actual costs that existed in 1997 met the Commission’s NST standard even though the costs subsequently computed did not.

Sincerely,



Albert H. Kramer
Robert F. Aldrich

cc: Daniel Gonzalez
Amy Bender
Scott Deutchman
Scott Bergmann
Gregory Orlando
Nicholas Alexander
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(footnote continued)

of “diligence,” the Commission must grant refunds in order to correct what would otherwise be an illegal, ten-year waiver of a Section 276 requirement.