

## DICKSTEINSHAPIRO<sub>LLP</sub>

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February 20, 2009

### 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**

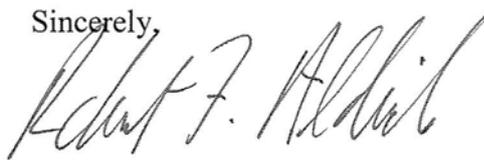
Dear Ms. Dortch:

On February 20, 2009, Albert H. Kramer and Robert F. Aldrich, on behalf of American Public Communications Council, met with Julie Veach, Deputy Chief of the Wireline Competition Bureau, Marcus Maher, Associate Bureau Chief, Randy Clarke, Legal Counsel to the Bureau Chief, Albert Lewis, Pricing Policy Division Chief, and Pam Arluk, Assistant Division Chief. We discussed generally the status of the proceeding and APCC Services' positions on the issues. The enclosed, slightly updated version of a handout previously submitted, as well as the following documents, also previously submitted in this proceeding, were provided at or prior to the meeting:

APCC Ex Parte *re* Theory I – *Waiver Order* (Sept. 12, 2006)  
APCC Ex Parte *re* Theory II – Section 276 (Oct. 25, 2006)  
APCC Ex Parte *re* *Davel* (Oct. 26, 2006)  
APCC Ex Parte *re* *Res Judicata* Issue (Oct. 31, 2006)  
APCC Ex Parte *re* *USTA II* (Dec. 22, 2006)  
APCC Ex Parte *re* *TON Services* (August 8, 2007)

Also discussed was the enclosed letter of February 18, 2009, from Willard R. Nichols, President, APCC to Acting Chairman Michael J. Copps.

Sincerely,



Robert F. Aldrich

**DICKSTEINSHAPIRO<sub>LLP</sub>**

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Enclosures

cc: Julie Veach  
Marcus Maher  
Randy Clarke  
Albert Lewis  
Pam Arluk



**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 9<sup>th</sup> and 10<sup>th</sup> Circuit federal courts of appeals also referred issues to the FCC seeking guidance on whether refunds should be required.
  - ***9<sup>th</sup> and 10<sup>th</sup> Circuit cases have settled – referral petitions withdrawn***
  - ***Oregon PUC and Massachusetts court referrals remain pending***
- 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 (9<sup>th</sup> Cir. 2006).
- Two federal courts of appeals have spoken to the refund issue.
  - The 10<sup>th</sup> Circuit ruled that PSPs are entitled to reparations for BOC violations of the NST.
    - *TON Services*, 493 F.3d at 1242.
  - The 9<sup>th</sup> 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.



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**American Public Communications Council, Inc.**

Willard R. Nichols  
President

February 18, 2009

Chairman Michael J. Copps  
Federal Communications Commission  
445 12th Street, S.W., Room 8B115  
Washington, DC 20554

**Re: Matters Appropriate and Ripe For Immediate Disposition: CC Docket No. 96-128, Illinois Public Telecommunications Association et al., Petitions for Declaratory Ruling**

Dear Chairman Copps:

I am writing on behalf of the American Public Communications Council ("APCC") to urge you to decide, and grant, as promptly as possible, the long-pending petitions of five state payphone associations seeking a Commission order granting refunds of excessive Bell Operating Company line charges.<sup>1</sup> The petitions before you are ripe for decision and fit comfortably within the parameters you have outlined in recent statements regarding the issues that are appropriate for decision during your tenure as Chairman.

Indeed, the petitions are exactly the type of "backlog" items that you have stated you will give high priority during the transition to a permanent chairman. Three of the five petitions were filed in 2004; the other two were filed in 2006. In addition to the petitions, there is a pending referral of the refund issue from the Massachusetts Supreme Judicial Court, dated

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<sup>1</sup> See Illinois Public Telecommunications Association, Petition for Declaratory Ruling (filed July 30, 2004); Southern Public Communication Association, Petition for Declaratory Ruling (filed Nov. 8, 2004); Petition of the Independent Payphone Association of New York, Inc. for an Order of Pre-Emption and Declaratory Ruling (filed Dec. 29, 2004); Petition of the Florida Public Telecommunications Association, Inc. for a Declaratory Ruling and for an Order of Preemption (filed Jan. 31, 2006); Petition of the Payphone Association of Ohio to Preempt the Actions of the State of Ohio Refusing to Implement the FCC's Payphone Orders, Including the Refund of Overcharges to Payphone Providers in Ohio, and for a Declaratory Ruling (filed Dec. 28, 2006).

March 6, 2006, requesting “prompt” guidance from the Commission.<sup>2</sup> There is also a letter from the Oregon Public Utility Commission, dated November 23, 2005, requesting that the Commission act “as expeditiously as possible” to provide guidance on the refund issue so that a long-pending proceeding in that agency can be resolved.<sup>3</sup>

While the petitions are not “routine items,” the issues they raise are narrow and specific to the industry segment and parties involved – the payphone service providers and the Bell Operating Companies. A decision granting the petitions would have no application to or policy implications for any other segment of the industry. All that must be decided is whether the Commission’s prior payphone decisions and Section 276 of the Communications Act require the Bell Operating Companies to refund the excess charges collected from payphone service providers in the past, as far back as 1997. Thus, the petitions concern the enforcement of previously issued Commission orders.

Moreover, deciding these petitions would not detract from the Commission’s current focus on smoothing the Digital TV transition. The petitions are *not* the sort of “wildly controversial,” time- and attention-consuming items that you have suggested should be deferred to the next Chairman. Indeed, deciding the petitions would not involve *any* prospective policy decisions at all. The issues at stake are wholly *retrospective*. The charges at issue were long ago found to be unreasonable by state public service commissions and were adjusted by those commissions on a prospective basis, applying Commission decisions and regulations. There are no factual issues to be resolved, and this Commission is not being asked to overturn any factual findings of any state Commission. All that is involved is an interpretation of federal law as applied to past events. Thus, a decision granting the pending refund petitions would in no way tie the hands of a future chairman in setting telecommunications policy going forward. Moreover, although the petitions involve interpretations of federal law made by a handful of state commissions, as is the case with regard to the impact on the future Chairman, this Commission’s decision would have no effect on the ability of the states to pursue their own policies in the future. Nor are these petitions and requests for guidance likely to be quickly addressed upon the new FCC taking office, particularly in the face of the other pressing, complex and broad issues that you have recognized will immediately face the new FCC.

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<sup>2</sup> See Letter to Chairman Kevin Martin, FCC, from Maura S. Doyle, Clerk, Commonwealth of Massachusetts Supreme Judicial Court for Suffolk County (Mar. 6, 2006); *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 (Apr. 3, 2006).

<sup>3</sup> See Letter to Chairman Kevin Martin, FCC, from Chairman Lee Beyer, Commissioner John Savage, and Commissioner Ray Baum, Oregon Public Utility Commission (Nov. 23, 2005).

Chairman Michael J. Copps  
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By contrast, a decision granting the petitions is urgently needed by the members of APCC. Timely refunds would provide critical economic relief in these difficult times to the small payphone businesses that make up the vast bulk of the independent payphone industry. On their behalf, I urge you to give high priority to a prompt decision granting the pending "backlogged" payphone association petitions.

Sincerely,



Willard R. Nichols

cc: Jennifer McKee  
Julie Veach  
Marcus Maher