Ward & Ward, P.C.

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of Counsel

June 15, 2010

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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 June 14, 2010, Michael W. Ward, General Counsel, and Michael L. Vitale, member of the Board of Directors, for the Illinois Public Telecommunications Association, and Keith J. Roland, General Counsel for the Independent Payphone Association of New York, had meetings with Priya Aiyar, Legal Advisor to Chairman Julius Genachowski, Angela Kronenberg, Legal Advisor to Commissioner Mignon Clyburn, Christi Shewman, Legal Advisor to Commissioner Meredith Attwell Baker, Cathy Seidel, Deputy Bureau Chief, Albert Lewis, Division Chief, Pricing Policy Division, Pamela Arluk, Assistant Division Chief, Pricing Policy Division, Jennifer Prime, Acting Legal Advisor, and Lynne Engledow of the Wireline Competition Bureau to discuss the Associations' respective positions filed on December 31, 2009 and January 21, 2010, respectively and the attached documents.

Sincerely,

/s/
Michael W. Ward

Enclosure

Cc: Priya Aiyar
Angela Kronenberg
Christi Shewman
Cathy Seidel
Albert Lewis
Pamela Arluk
Jennifer Prime
Lynne Engledow
Michael L. Vitale
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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.
- 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.

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 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, as 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.

Order on Reconsideration
- 11/8/96

- "LECs must file intrastate tariffs . . . for these LEC payphone services (which) must be: (1) cost based . . . States must apply these requirements and the Computer III guidelines for tariffing such intrastate services. . . . 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.

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 …(and) 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."

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

Ameritech v. MCI

- 11/8/99

- "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 sufficiency of the LEC's compliance, however, is a function solely within the Commission's and state's jurisdiction."

  - *Ameritech,* ¶ 27 (*italics* added).

- *In accord Bell Atlantic-Delaware v. Frontier Communications Services, Inc.,* ¶ 28 (9/24/99).

The Filed Rate Doctrine Does Not Bar NST Refunds Per Federal Law

- The Illinois Commission and Appellate Court Held the NST Refunds Barred by the Filed Rate Doctrine.
- The Federal Circuit Courts Have Since Unanimously Held That Neither the Federal Nor the State Filed Rate Doctrine Bars NST Refunds.
  - *Davel Communications v. Qwest*, 460 F.3d 1075 (9th Cir. 2006).
  - *TON Services v. Qwest*, 493 F.3d 1225 (10th Cir. 2007).

Commission Has Retained Jurisdiction Over Section 276

- "The Commission retains jurisdiction under Section 276 to ensure that all requirements of that statutory provision and the Payphone Reclassification Proceeding, including the intrastate tariffing of payphone services, have been met, 47 U.S.C. § 276." – *Clarification Order,* FN60 (4/15/97).

- "The (Bureau) has *emphasized* that the Commission retains jurisdiction under Section 276 to ensure that all requirements of section 276 . . . are met." – *Bureau Wisconsin Order,* ¶ 2 (3/2/00) (*italics* added).

- "Section 276 establishes a comprehensive federal scheme of payphone regulation, both intra- and interstate, to be administered by the Commission. . . That focus on intrastate regulation alone indicates Congress' intent that the Commission occupy the field." – *Commission Wisconsin Order*, ¶ 35 (1/31/02) *aff'd* 334 F.3d 69.

- See also *North Carolina and Michigan Payphone Associations Petitions for Declaratory Rulings Bureau Order* (3/5/02).

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);
  - *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).

IPTA Illinois NST Proceedings

- 4/15/97 - Cost-based rates are required to be effective.
- 5/8/97 - IPTA petitions ICC that Illinois Bell does not meet NST requirements, requests investigation and refunds of excessive rates – ICC Docket No. 97-0225.
- 5/15/97 - Illinois Bell 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 Illinois Bell payphone rates are not cost based and do not comply with NST requirement, but holds that the filed rate doctrine bars refunds of excessive charges back to 4/15/97.
- 12/29/03 - ICC denies IPTA Petition for Rehearing which cites federal law that filed rate doctrine does not bar refunds.

IPTA Illinois NST Proceedings (cont.)

- 7/1/04 – IL App. Ct. denies motion to refer question of refunds to FCC under primary jurisdiction.
- 7/30/04 - IPTA files Petition for Declaratory Ruling.
- 11/23/05 – IL App. Ct. holds that ICC order setting non-cost-based rates prior to 1996 Act binding until 12/13/03 - ignores FCC express preemption effective 4/15/97.
- 5/24/06 - IL S. Ct. denies petition for leave to appeal.
- 7/20/06 – IL S. Ct. denies motion to reconsider and to refer question to FCC under primary jurisdiction despite 6/26/06 U.S. Circuit Court decision that NST refunds not barred by filed rate doctrine.
- 2/20/07 - U.S. Supreme Court denies certiorari.

NST Overcharges vs. Illinois Bell DAC

4/15/97 – 12/12/03

- Illinois Bell charged IPPs $12.5 million in excess of the required NST cost-based rates in over 6 ½ years of violations of repeated FCC orders.
- Illinois Bell collected $100s millions in DAC before it was eligible through false certification of NST compliance in over 6 ½ years of violations of repeated FCC orders.

Numerous Other States Have Received 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
- Also: Colorado, Idaho, Iowa, Minnesota, Nebraska, New Mexico, North Dakota, South Dakota, Utah, Washington, Wisconsin, Wyoming, etc.

Summary

- FCC repeatedly ordered BOCs to implement NST payphone service rates *no later than* 4/15/97 and preempted all inconsistent state requirements.
- FCC ordered that a BOC is not eligible for DAC until it is in actual compliance with NST requirement.
- From 4/15/97 to 12/12/03, Illinois Bell overcharged IPPs $12.5 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.
- Illinois Bell 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 with interest; the Commission has expressly retained jurisdiction to ensure uniform compliance.
- The 1996 Act's directive for a uniform and consistent national policy supplants principles of common law claim preclusion.