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October 20, 2010

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 October 19, 2010, Michael W. Ward, General Counsel for the Illinois Public Telecommunications Association, Keith J. Roland, General Counsel for the Independent Payphone Association of New York, and Gary L. Pace, Executive Director, and Henry T. Kelly, Counsel, for the Michigan Pay Telephone Association, met with Margaret McCarthy, Advisor to Commissioner Michael J. Copps, to discuss the Associations' respective positions as summarized in the attached documents.

Sincerely,

/s/
Michael W. Ward

Enclosure

cc: Margaret McCarthy
Keith J. Roland
Gary L. Pace
Henry T. Kelly

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Section 276 Compliance

Petitions for Declaratory Ruling

Illinois Public Telecommunications Association
Independent Payphone Association of New York
Florida Public Telecommunications Association
Michigan Pay Telephone Association

October 18, 2010

I. Refunds are Required to Effect the Commission's Orders

- **BOC rates to payphone providers must be NST compliant 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. … Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted." – *First Report & Order*, ¶¶ 146, 147.

- **NST compliant rates by April 15, 1997 are a prerequisite for BOC payphones to receive dial-around compensation**

"We clarify that the LECs may complete all the steps necessary to receive compensation by April 15, 1997. … 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. … 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*, ¶¶ 130, 131. "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; *see also Bureau Clarification Order*, ¶ 10.

- **BOCs must be in actual compliance with providing cost-based rates to be eligible for compensation**

"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 v. MCI*, ¶ 27 (italics added); *in accord Bell Atlantic-Delaware v. Frontier Communications Services, Inc.*, ¶ 28.

- **States must apply the Commission's NST requirements and must follow the methodology set forth in the *Wisconsin Order***

"**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 (italics and emphasis added); "[The *Wisconsin Order*] establishes a rule that affects payphone line rates in every state." *NEPCC v. FCC*, 334 F.3d 69, 75 (D.C. Cir. 2003).

II. Enforce the *Wisconsin Order* for NST Compliant Local Usage Rates

- **States are required to establish NST compliant local usage rates**

"[A]ny rate for local usage billed to a payphone line, as well as the monthly payphone line rate, must be cost-based and priced in accordance with the new services test. … A high usage rate would undermine our and the states' efforts to set the payphone service rates in accordance with a cost-based standard. … A non-cost-based usage rate would also constitute an impermissible "end run" around the requirements of section 276." – *Wisconsin Order*, ¶¶ 64 – 65.

- **A non-uniform overhead loading must be justified**

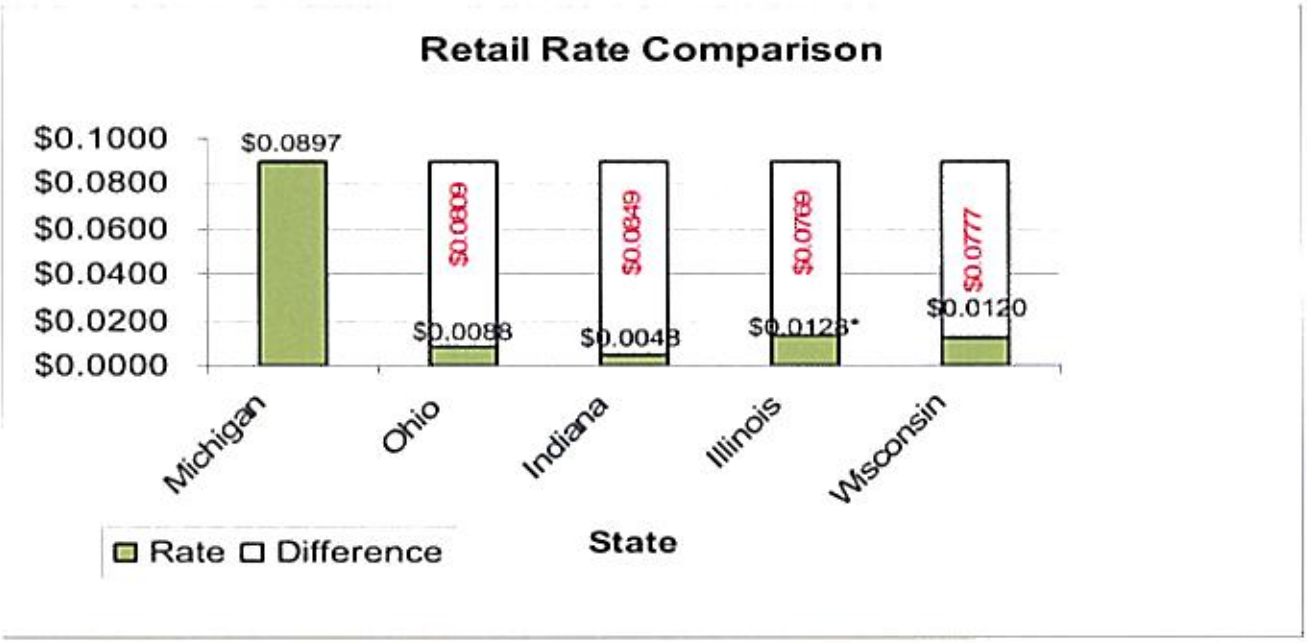
"[O]ur pricing requirements do not mandate uniform overhead loading, *provided that the loading methodology as well as any deviation from it is justified.*" – *Wisconsin Order*, ¶ 52.

- **Michigan's non-uniform 600% local usage overhead is without justification**

The Michigan PSC adopted AT&T's proposed overhead allocation for the flat monthly rated portion of the service, resulting in NST compliant rates for this portion of the service. However, the Michigan PSC refused to apply this same overhead allocation to usage, and refused to even determine the appropriate overhead allocation for usage. AT&T offered no evidence to the Michigan PSC, and the Michigan PSC had no basis to conclude, that overhead allocations for local usage rates were NST compliant. The Michigan PSC instead retained the existing rates for local usage, which are priced in excess of 600% above costs. The Michigan PSC thus failed to justify its deviation from using the same overhead allocation as it used for the flat monthly rate.

- **Michigan's local usage rate is multiples of cost-based usage rates**

Due to the unjustified overhead allocation, the Michigan PSC's local usage rate is between 7 and 18 times the cost-based local usage rates established in the other states of the Ameritech region.



III. Implementation of the Commission's Declaratory Ruling

- **Inconsistent state requirements are preempted by the Act and Commission orders**

§276(c) State preemption: 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. 47 U.S.C. 276(c). "Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted." – *First Report & Order*, ¶ 147.

- **Commission retains jurisdiction to ensure that states enforce the Commission orders, including universal application of the methodology in the *Wisconsin Order***

"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." – *Wisconsin Order*, ¶ 35 (1/31/02) *aff'd NEPCC v. FCC*, 334 F.3d 69. *See also Bureau Clarification Order, fn 60; Bureau Wisconsin Order, ¶ 2; North Carolina and Michigan Payphone Associations Petitions for Declaratory Rulings Bureau Order.*

- **Prior inconsistent state decisions must yield to uniform federal law and 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. "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).

- **The Act mandates a uniform and consistent national payphone policy**

Other states have ordered refunds: Tennessee, Kentucky, South Carolina, Pennsylvania, Louisiana, Indiana, Colorado, Georgia, Idaho, Iowa, Michigan, Minnesota, New Mexico, Nebraska, North Dakota, South Dakota, Utah, Washington, Wisconsin, Wyoming, *etc.*

- **The Commission can implement the Declaratory Rulings without remand**

Declare that prior inconsistent state orders are vacated and that:

(a) the AT&T Michigan's overhead allocation for the flat monthly rate shall be applied for local usage;

(b) where the cost basis for rates has only been determined for a period subsequent to April 15, 1997, that cost basis shall be presumed to be the same for cost-based rates as of April 15, 1997; and

(c) where cost-based rates have been established as lower than the rates charged by the BOC from April 15, 1997, and a refund of the charges in excess of the cost-based rates, plus 11.25% simple interest, has not been made within 60 days of this ruling, the affected payphone provider may thereafter file a complaint at the Commission for a violation of this refund order.

- **If the FCC delegates anything further to a state it must require the state to:**
  (a) apply the *Wisconsin Order* in all respects effective as of April 15, 1997; and
  (b) provide for refunds, with 11.25% interest, from April 15, 1997 for charges in excess of the NST compliant rates.

Michigan Pay Telephone Association's Second Application for Declaratory Ruling FCC Docket No. 96-128

Michigan Pay Telephone Association

October 18, 2010

Outline

- Summary of AT&T Michigan's unlawful prices
- AT&T has Violated the NST Orders for 13 Years
- The FCC Ordered Cost-Based Pricing for the Usage Rate Element
  - First Report and Order: *In the Matter of Implementation of Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-0128, Report and Order, 11 F.C.C.R. 20541 (1996).
  - Order on Reconsideration: 11. F.C.C.R. 21233 (1996).
  - Clarification Order: Bureau Clarification Order, DA 97-805, 12 F.C.C.R. 21370 (Com. Car. Bur. Released April 15, 1997).
  - Bureau Waiver Order, DA 97-678, 12 F.C.C.R. 20997 (Com. Car. Bur. Released April 4, 1997).
  - Ameritech v. MCI: *In the Matter of Ameritech Illinois v. MCI Telecommunications Corporation, Bureau Order*, DA 99-2449 (Com. Car. Bur. Released November 8, 1999).
  - Michigan Orders: *In the matter of the complaint of MPTA, et al. against Ameritech and GTE North, Incorporated*, Case No. U-11756.
  - Wisconsin Order: *In the Matter of Wisconsin Public Service Commission, Bureau Order*, DA 00-347, (Com. Car. Bur. Released March 2, 2000) *aff'd* Memorandum Opinion and Order, FCC 02-25, released January 31, 2002.
- What the Michigan Public Service Commission did wrong
- MPTA Petition and Request

Summary of AT&T's unlawful prices

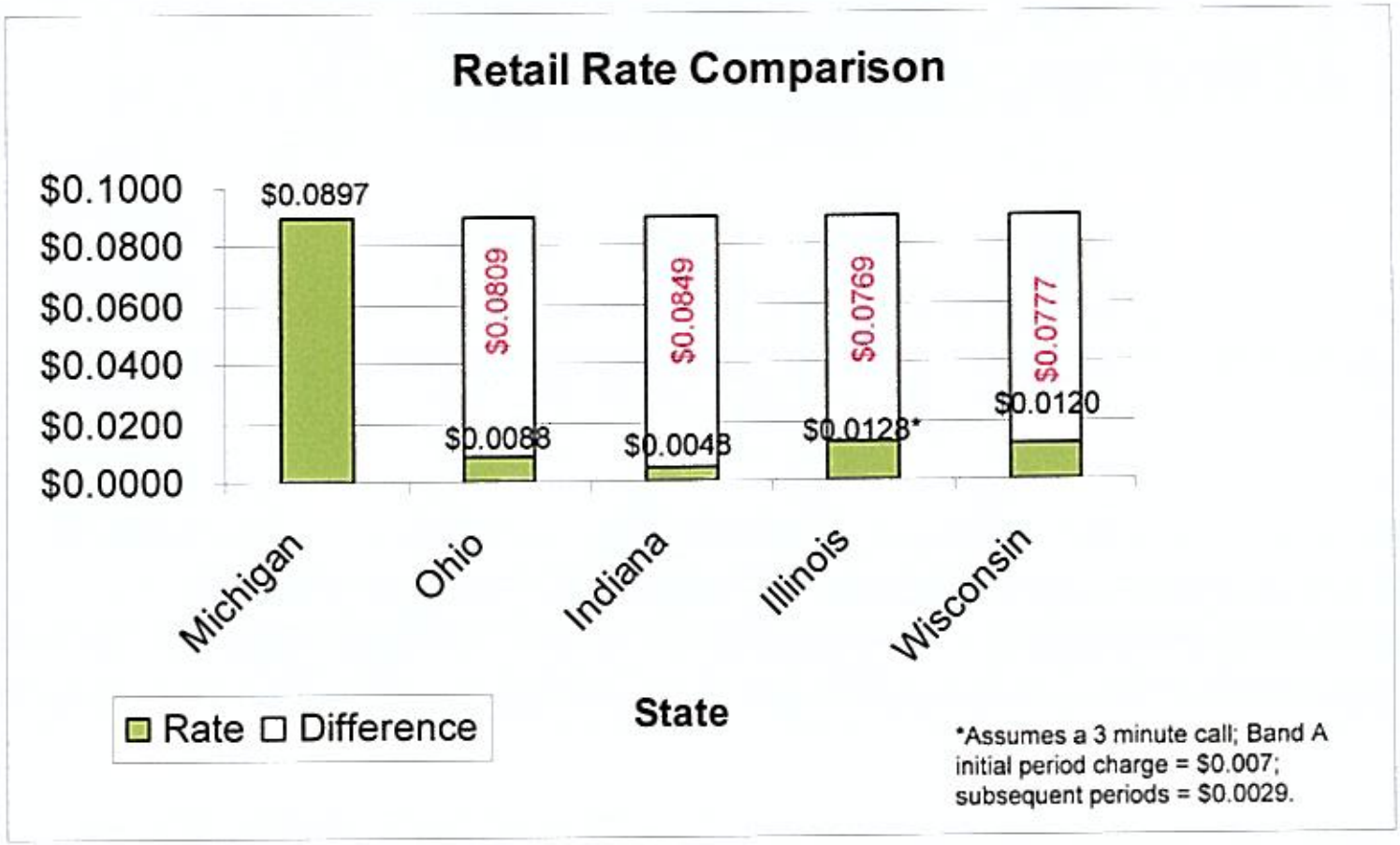
- After over a decade of litigation, AT&T Michigan continues to charge independent payphone providers (IPPs) rates for services that are not cost-based, despite the FCC's established New Services Test (NST) guideline methodology for local usage.

- The Michigan PSC failed to follow the NST methodology for local usage; there is no justification in the record to support a non-uniform overhead allocation for local usage:
  - no "comparable" toll usage overhead allocation;
  - no information as to the toll usage tariff rate being utilized;
  - no evidence demonstrating how toll usage is a "comparable" service.

- The Michigan PSC's determination resulted in the continued application of an overhead allocation that is more than 600% over the direct cost.*

*In April 2006, AT&T increased the local usage rate to PSPs to $0.11 per message. Subsequent to the filing of the MPTA Petition, AT&T has rescinded that rate increase.

Rate Comparison for Local Usage – Former Ameritech States



AT&T Has Violated the NST Orders for 13 Years

- **May 19, 1997:** SBC Michigan filed tariffs and cost studies purportedly supporting the cost-based rates under the FCC's New Service's Test with rates identical to the rates in existence prior to the FCC-ordered NST standard, with usage at $0.0894. MPSC refused to initiate an investigation, requiring the MPTA to file a complaint.
- **1998:** MPTA and 62 IPPs filed a complaint against SBC Michigan alleging that the prices for services provided violated the requirements of Section 276, the FCC *Payphone Orders*, and the Michigan Telecommunications Act.
- **1999:** MPSC issues ruling in U-11756 denying the MPTA's complaint. The MPTA appeals the MPSC ruling with the Michigan Court of Appeals.
- **2001:** Michigan Court of Appeals affirms the MPSC order; MPTA files Appeal with the Michigan Supreme Court; MPTA also files a Petition for Declaratory Ruling with the FCC.
- **2002:** FCC releases its *Wisconsin Order* clarifying its previous *Payphone Orders*; FCC enters its *FCC Michigan Order*, remanding the case back to the MPSC "for further state commission proceedings consistent with the [FCC] *Wisconsin Order*....": The Michigan Supreme Court grants the MPTA's Motion to vacate the Court of Appeals decision, and remands the case to the MPSC for reconsideration; MPSC reopens U-11756.
- **2004:** The MPSC enters its Order after remand, lowering the rates for the flat rate portion of the charges assessed to IPPs, but continues to allow SBC to charge $0.084 per call, over 600% greater than the cost of the service.
- **2006:** MPTA files second Petition for Declaratory Ruling with the FCC; Michigan Court of Appeals affirms MPSC Order; MPTA files Leave to Appeal at the Michigan Supreme Court.
- **2007:** Michigan Supreme Court denies Petition for Leave to Appeal.
- **2010:** Michigan IPPs pay in excess of 600% over AT&T Michigan's costs for providing usage service to IPPs.

The FCC Ordered Cost-Based Pricing for the Usage Rate Element

- **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
  - *Bureau Clarification Order*, ¶ 10
- **BOC certification of NST compliance does not substitute for the requirement to be in actual NST compliance to be eligible for dial around compensation (DAC)**
  - *Ameritech v. MCI*, ¶ 10 (11/8/99)
- **BOCs were not eligible to receive DAC on their own payphones until they were in compliance with the cost-based rate requirement.**
  - *Order on Reconsideration*, ¶¶ 130 – 131
  - *Bureau Waiver Order*, ¶ 30 (4/4/97)
  - *Bureau Clarification Order*, ¶ 10 (4/15/97)
- **AT&T Michigan collected $100s millions of DAC prior to becoming eligible for DAC.**
  - *In the matter of the complaint of MPTA, et al. against Ameritech and GTE North, Incorporated*, Case No. U-11756

The FCC Ordered Cost-Based Pricing for the Usage Rate Element (cont.)

- *Wisconsin Order*
  - Held that "**any rate for local usage** billed to a payphone line, as well as the monthly payphone line rate, **must be cost-based** and priced in accordance with the new services test." ¶ 64.
  - "**Providing only a line, without allowing local calls over the line, does not satisfy this requirement**. We required these payphone line services to be priced at cost-based rates in accordance with the new services test. . . .

    "This conclusion advances our purpose in requiring cost-based payphone line rates in the first place. **A high usage rate would undermine our and the states' efforts to set the payphone service rates in accordance with a cost-based standard.**

    A non-cost-based usage rate would also constitute an impermissible "end run" around the requirements of section 276." ¶¶ 64-65

The FCC Ordered Cost-Based Pricing for the Usage Rate Element (cont.)

- **The new services test does "not mandate uniform overhead loading, provided that the loading methodology as well as any deviation from it is justified."**
  - *Wisconsin Order*, ¶ 52

- **The FCC has already declared once that the Michigan Public Service Commission did not properly apply the NST and remanded the matter to the MPSC with directions to properly apply the NST.**
  - *MPTA Petition for Declaratory Ruling*, CCP/CPD 99-35, March 2, 2002.

- **Commission retained jurisdiction and preempted any inconsistent state requirement**
  - *First Report & Order*, ¶¶ 147
  - Bureau Clarification Order, n.60
  - Wisconsin Order, ¶ 2

What the Michigan PSC Did Wrong

- The MPSC ordered a methodology not supported by any party, not even AT&T.

- The MPSC failed to follow the NST guideline methodology for local usage, there is no justification in the record supporting the non-uniform overhead allocation for local usage:
  - no "comparable" toll usage overhead allocation;
  - no toll usage tariff rate;
  - no evidence demonstrating how toll usage actually is a "comparable" service.

MPTA Petition: Establish Cost-Based Rates for Local Usage Service

- In light of the MPSC's failure to justify the variance, it was improper for the MPSC to apply non-uniform overhead allocations to the payphone services; one for the flat monthly rates charged by AT&T Michigan, and a different, non-cost based overhead allocation for local usage

- There are no factual issues:
  1. the underlying cost studies or AT&T's proposed methodology adopted by the Michigan PSC;
  2. the overhead adopted by the MPSC for non-usage rates was proposed by AT&T;
  3. the effective date of applying the cost-based rates.

MPTA Petition: Establish Cost-Based Rates for Local Usage Service

- Because local usage is one of the largest rate elements the IPPs face on a monthly basis, the MPSC's use of an overhead allocation for local usage that is more than 6 times the direct cost is not a cost-based overhead allocation factor, and violates the new services test.

- AT&T Michigan's current tariffed rate for local usage services is unlawful and in violation of the new services test regulations, the Commission's *Payphone Orders,* and Section 276.

MPTA Request

- Grant the MPTA Second Petition for a Declaratory Ruling, and declare that AT&T Michigan did not set its usage rate in compliance with the New Services Test.
- Grant the MPTA Second Petition for a Declaratory Ruling and declare that the MPSC did not follow the Commission's New Services Test in approving AT&T's local usage overhead allocation service and rate.
- Direct AT&T Michigan and the MPSC to set usage using the same overhead allocation that AT&T Michigan used, and that the MPSC approved, for the other rates for services made available to payphone providers.

Section 276 Compliance

Michael W. Ward
General Counsel

Illinois Public Telecommunications Association

10/18/10

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).

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).

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).

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).

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.

Both The Act and Commission Order Prohibit State Inconsistency

- §276(c) State preemption: 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. 47 U.S.C. 276(c).

- "(W)e conclude that Computer III … (new services test) pricing are more appropriate for basic payphone services provided by LECs to other payphone providers. Pursuant to Section 276(c), any inconsistent state requirements with regard to this matter are preempted." – *First Report & Order*, ¶ 147.