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October 20, 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 October 19, 2010, 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 Angela Kronenberg, Legal Advisor to Commissioner Mignon Clyburn, to discuss the Associations' respective positions as summarized in the attached documents.

Sincerely,

/s/
Michael W. Ward

Enclosure

cc: Angela Kronenberg
Keith J. Roland

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CC Docket 96-128

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**

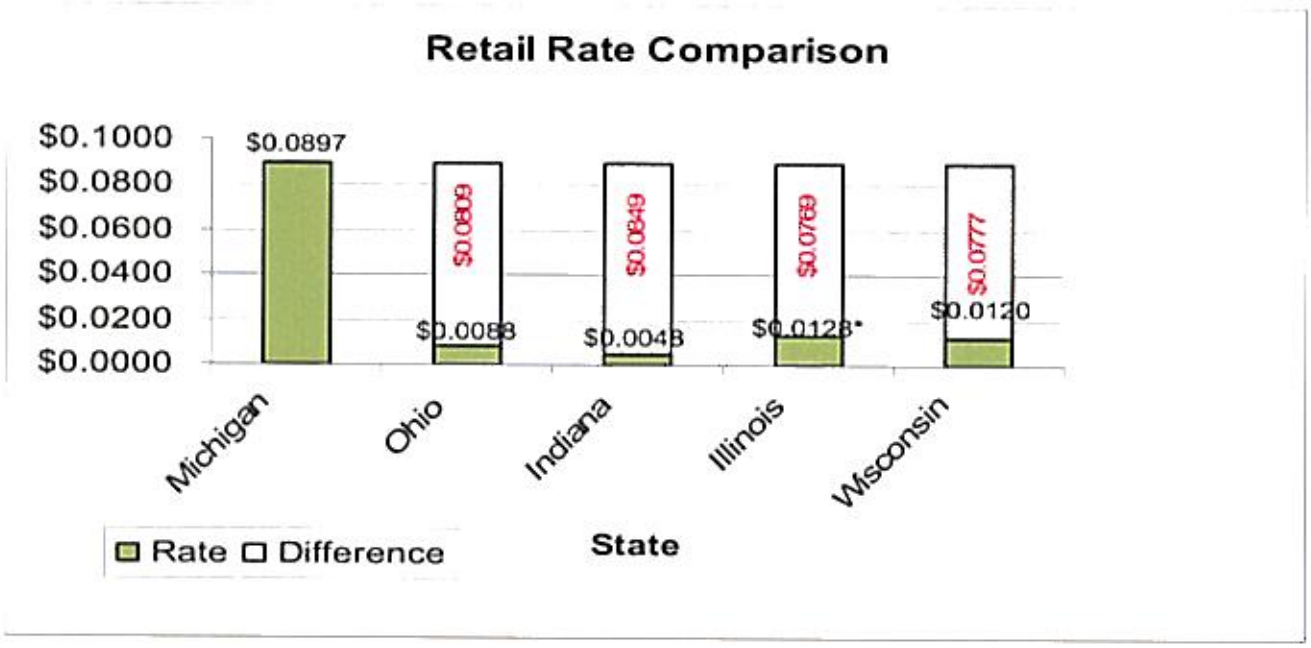
"[O]ur pricing requirements do not mandate uniform overhead loading, *provided that the loading methodology as well as any deviation from it is justified.*" – *Wisconsin Order*, ¶ 52.

- **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.