

Ward & Ward, P.C.

Michael W. Ward
847-682-3100 (cell)
mwward@dnsys.com

One Rotary Center
1560 Sherman Avenue
Suite 310
Evanston, IL 60202

John F. Ward, Jr.,
of Counsel
312-479-1800 (cell)
jward@leverlerllc.com

April 25, 2011

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, D.C. 20554

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association
Petition For A Declaratory Ruling

Dear Commissioner Copps:

On behalf of the Illinois Public Telecommunications Association, I want to express our appreciation to you and Ms. McCarthy for meeting with us last Monday. We are grateful for the opportunity to discuss the pending IPTA Petition For A Declaratory Ruling, seeking refunds to the Illinois payphone providers of the AT&T¹ charges that exceeded the cost based rates ordered by the Commission. As expressed in the meeting, this is a matter of great significance to the individuals and small businesses that compose the IPTA membership. Near the end of the meeting, it was stated that someone had raised a question about the amount of guidance that the Commission had provided to the states to determine whether the BOCs' rates to the payphone providers were cost based. The Commission should be aware that not only would any such concern be insufficient to impede the refunding to the payphone providers of the overpayments of their own money, but it would be unfounded on the facts, the law and the regulatory policies of the Commission.

Initially, if one were to assume (which we do not) that, through some lack of knowledge about what is cost based, AT&T was not responsible for overcharging the payphone providers, it would not justify AT&T retaining the payphone providers' money. If AT&T illegally, even mistakenly, overcharged the payphone providers, AT&T would not be justified in keeping the money once the error has been established, as in the Illinois proceeding.² Refunding the payphone providers' own money, plus the cost of capital, is not punitive. It is remedial, placing the parties in the position they should have been pursuant to the requirements of Section 276(b)(1)(A)&(C). AT&T has also illegally collected hundreds of millions of dollars in dial around compensation

¹ For simplicity sake, Illinois Bell Telephone Company, Ameritech Illinois, AT&T Illinois and their parent companies Ameritech and AT&T will be referred to herein as AT&T.

² The Federal Courts have already determined that the filed rate doctrine is inapplicable. *Davel Communications, Inc. v. Qwest Communications*, 460 F.3d 1075 (9th Cir. 2006); *TON Services, Inc. v. Qwest Communications*, 493 F.3d 1225 (10th Cir. 2007).

before it was eligible, due to its failure to satisfy the Commission's prerequisite of first being in actual compliance with the cost based rate requirement. If, out of some consideration that the Commission should have provided more guidance, the Commission would excuse AT&T from forfeiting the dial around compensation that it collected before it was eligible, there would still be no basis for permitting AT&T to retain both the illegal overcharges to the payphone providers and the illegally collected dial around compensation. This would render the years of Commission and state proceedings meaningless and the orders of the Commission nugatory.

Additionally, it must be noted (1) that in fact there already were established cost based standards for application, (2) that AT&T was on full notice of the cost based policies, and (3) that the Commission's guidance did not impact AT&T's decision to overcharge its competitors.

First, for over 75 years the Commission and the Illinois Commerce Commission ("ICC") have enforced rate requirements with no more guidance than that the rates be just and reasonable. Far more specific guidance was provided in the instant matter. Illinois had been investigating the cost basis for services for approximately a decade prior to the time the Section 276 cost based requirements were implemented. In 1992 Illinois codified its forward looking cost policies by statute with AT&T's agreement. Also agreed by AT&T were the forward looking cost regulations adopted by the ICC in 1995. By 1997 Illinois had conducted numerous proceedings employing forward looking costs and overhead allocations. And, as the Commission has already found, the Commission itself had "longstanding precedent" as to the forward looking cost methodology and the overhead loading required for the new services test.³

Second, in 1995 Illinois had just completed a payphone investigation⁴ and in 1997 AT&T was fully aware that its Illinois rates for local exchange services provided to payphones were not cost based.⁵ Beyond that, AT&T was a participant in the Commission's *ONA Tariff* and *Physical Collocation Tariff* new services test proceedings, as well as in the decade of Illinois ICC, legislative, and rulemaking proceedings establishing cost based policies. Both the ICC and AT&T were well versed in the cost based analyses. Less than a month after the April 15, 1997 deadline for cost based rates, the IPTA filed its complaint with the ICC noting AT&T's noncompliance. Afterwards, AT&T filed with the ICC stating that it was not adjusting its existing rates. The long distance carriers also recognized AT&T's deficiencies and challenged AT&T's new services test compliance. In a subsequent Commission proceeding AT&T was admonished that, its self certification notwithstanding, the Commission would require AT&T's

³ *In the Matter of Wisconsin Public Service Commission*, 17 F.C.C.R. 2051, 2065, para.43, and 2067-68, paras. 53-54 (2002) ("*Commission Wisconsin Order*") citing *In the Matter of Open Network Architecture Tariffs of Bell Operating Companies*, CC Docket No. 92-91, Order, 9 F.C.C.R. 440 (Dec. 15, 1993) ("*ONA Tariff Order*") and *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, CC Docket No. 93-162, Second Report and Order, 12 F.C.C.R. 18730 (June 13, 1997) ("*Physical Collocation Tariff Order*").

⁴ *Independent Coin Payphone Association v. Illinois Bell Telephone Company*, ICC Docket 88-0412, Order (June 7, 1995).

⁵ The ICC reiterated the obvious at the conclusion of the Section 276 payphone docket when it stated that the AT&T rates were not cost based as required by the Commission's new services test. *Illinois Commerce Commission On Its Own Motion - Investigation Into Certain Payphone Issues As Directed In Docket 97-0225*, ICC Docket 98-0195, Interim Order, p. 46, Finding 20 (November 12, 2003) ("*Illinois Payphone Order*").

actual compliance with the cost based rate requirement.⁶ AT&T was fully apprised of the cost based rate policies, the challenges to its existing rates and the need to be in actual compliance. Yet, AT&T did nothing to come into compliance, continuing to charge the same rates as before Congress and the Commission mandated that the rates be corrected to a cost basis.

Third, regardless of any guidance provided by the Commission, AT&T ignored the Commission's orders, and overcharged its competitors for six and a half years, through recycled positions that were contrary to the Commission's previous findings. In the 1993 *ONA Tariff* new services test proceedings, the Commission found that the overhead allocations to the forward looking direct costs for Ameritech to be in the 25% - 27% range.⁷ Yet, in the instant case, the Ameritech/AT&T rates to the Illinois payphone providers had overhead allocations of hundreds of percent over direct costs. In the 1997 *Physical Collocation Tariff Order* the Commission rejected AT&T's excessive overhead loadings and instructed it to reduce its rates to reflect the lowest overhead loading factor of its comparable services.⁸ But for the rates to the Illinois payphone providers, AT&T ignored comparable services in allocating overheads and maximized the markup of its rates to the contribution level of noncompetitive retail services. Once again, after the 2000 *Bureau Wisconsin Order*⁹, AT&T made none of the needed changes in its rates to implement the required cost basis. When the 2002 *Commission Wisconsin Order* was issued, although the Illinois hearing had concluded and was being briefed, the ICC ordered a new round of hearings at AT&T's request so AT&T could address the Commission's findings. Yet, in the second round of hearings, AT&T continued to avoid using any of the Commission's overhead allocation methodologies.¹⁰

AT&T ignored the cost standards and policies governing the new services test in an effort to maintain the rates in existence before the requirements of Section 276. To support this effort, AT&T manipulated the lack of enforcement. On April 17, 1997, to obtain dial around compensation, AT&T certified that it had cost based rates that complied with the new services test as of April 15, 1997.¹¹ On March 23, 2009, to avoid refunding the excessive charges, AT&T represented to the Commission that it was *required* under Illinois law *to charge non-cost based rates* until December 13, 2003.¹² AT&T's positions are wholly irreconcilable. The excessive overcharges by AT&T were not due to a lack of direction from the Commission, but due to AT&T's concerted effort to maintain the maximum charges to its competitors, regardless of the Federal requirements, at the same time falsely certifying that it was in compliance and collecting hundreds of millions of dollars in dial around compensation.

⁶ *In the Matter of Ameritech Illinois, et al. v. MCI Telecommunications Corporation*, DA 99-2449, 1999 WL 1005080, Common Carrier Bureau, Memorandum Opinion and Order (November 8, 1999) ("*Ameritech Illinois Order*").

⁷ See *Commission Wisconsin Order*, 17 F.C.C.R. at 2068, para. 54, fn. 124 citing *ONA Tariff Order*, 9 F.C.C.R. at 458-59, para. 50, and 477-80, Attach. C.

⁸ *Physical Collocation Tariff Order*, 12 F.C.C.R. at 18857-59, paras. 312-14.

⁹ *In the Matter of Wisconsin Public Service Commission*, 15 F.C.C.R. 9978 (March 2, 2000) ("*Bureau Wisconsin Order*").

¹⁰ *Illinois Payphone Order*, Interim Order, Part IV(E)(2), pp. 35-36.

¹¹ *Ameritech Illinois Order*, par. 9, fn. 23.

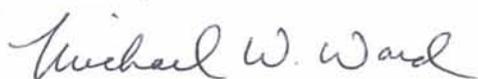
¹² CC Docket 96-128, Comments of AT&T and Verizon: No Federal Rule Preempts State Procedural Rules Governing the Availability of Refunds For State Payphone Line Rates, p. 43, filed March 23, 2009.

Collectively, the Commission and the Court have already issued no less than four (4) orders requiring AT&T to provide cost based rates to the payphone providers by no later than April 15, 1997, five (5) orders holding that AT&T was not eligible to receive dial around compensation until it was in actual compliance with the new services test rate requirement, eight (8) orders requiring the states to apply the Section 276 requirements as implemented by the Commission, with the Commission specifically retaining jurisdiction to ensure enforcement, and two (2) orders preempting any inconsistent state requirements, in addition to Congress' express preemption of any inconsistent state requirements in Section 276(c). The IPTA members ask how many Commission orders are required before they are enforced. One order should be sufficient, but that does not seem to be applied in the instant case. It only took one Commission order of approval for SBC to proceed to merge with Pac Bell, Ameritech, BellSouth, or AT&T. Why does it take more than four, five or eight orders for AT&T to comply with the Section 276 requirements? How can it take only one year for AT&T to get a Commission order to receive past Section 276 dial around compensation payments without even proving that it was eligible,¹³ while it takes seven years for the Illinois payphone providers to get a Commission order for past Section 276 overpayments after having proved their entitlement at hearings?

In the instant proceedings, AT&T had all of the benefit of the Commission's direction that it had in the 1997 *Physical Collocation Tariff* proceedings, and then some.¹⁴ When AT&T failed to comply with the Commission's new services test requirements in the *Physical Collocation Tariff* proceeding, the Commission ordered AT&T to refund the difference between the rates actually charged and the new services test compliant rates.¹⁵ Here, the Circuit Court of Appeal for the District of Columbia has already found that the Commission is authorized to order refunds for violations of the governing Section 276(b)(1).¹⁶ The ICC's failures to require (a) that the cost based rates be effective no later than April 15, 1997, or (b) that AT&T be in actual compliance before receiving dial around compensation, are each inconsistent with the implementation of Section 276 as required in the Commission's orders and as applied in most states. This directly violates Congress' express mandate to the Commission preempting inconsistent state regulations. 47 U.S.C. §276(c). It is the Commission's responsibility to see that Section 276(c) is enforced.

The IPTA respectfully submits that Federal law and policy requires the Commission to order the refunds due to the payphone providers in the instant Petition. The refund order should require the payment of the difference between the rates actually charged and the new services test compliant rates as found by the ICC, together with the 11.25 % interest for the cost of capital as found by the Commission in other Section 276 proceedings. We appreciate your consideration.

Sincerely,



Michael W. Ward

¹³ *Ameritech Illinois Order, supra.*

¹⁴ The state commission also had the benefit of the Commission's direction. In fact, the ICC recognized that the Commission had identified numerous permitted methodologies, none of which AT&T applied. See fn 10 above.

¹⁵ *Physical Collocation Tariff Order*, 12 F.C.C.R. at 18859, para. 313.

¹⁶ *MCI Telecommunications Corporation v. FCC*, 143 F.3d 606, 609 (D. C. Cir. 1998).

cc: Chairman Julius Genachowski
Commissioner Robert M. McDowell
Commissioner Mignon Clyburn
Commissioner Meredith Attwell Baker
Zachary Katz
Margaret McCarthy
Angela E. Giancarlo
Angela Kronenberg
Brad Gillen
Austin Schlick
Julie Veach