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August 4, 2011

By Electronic Filing
Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, D.C. 20554

NOTICE OF EX PARTE COMMUNICATION

ERRATUM

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association et al. Petitions for Declaratory Ruling

Dear Ms. Dortch:

Earlier today, we submitted an ex parte communication to General Counsel Austin Schlick in the above referenced matter. The letter contained a typographical letter. A corrected copy of the letter is attached for filing in this matter.

Thank you.

Sincerely,

/S/
Albert H. Kramer
Counsel, American Public
Communications Council

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By Electronic Filing
Mr. Austin Schlick
General Counsel
Federal Communications Commission
445 12th Street, SW, 8th Floor
Washington, DC 20554

EX PARTE COMMUNICATION

CORRECTED COPY

Re: CC Docket No. 96-128, Illinois Public Telecommunications Association et al. Petitions for Declaratory Ruling

Dear Mr. Schlick:

As a follow up to our meeting of July 27th, we wish to clarify three of the points addressed.

First, Congress has charged the Commission with both the obligation and the means to order refunds to payphone service providers where a BOC, i.e. AT&T and Verizon, has charged rates in excess of the new services test compliant rates on and after April 15, 1997.

Section 276(a) prohibits any BOC, after the effective date of the Commission's rules, from preferring or discriminating in favor of its payphone service.[1] To implement this provision, the Commission was required to, and did, prescribe nonstructural safeguards requiring cost-based rates that complied with the new services test.[2] The Commission has repeatedly ruled that such NST-compliant rates must be in effect no later than April 15, 1997.[3] Section 276(a) prohibits any BOC from violating these requirements after the effective date of the rules, i.e., April 15, 1997.

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[1] 47 U.S.C. §276(a)(2).

[2] 47 U.S.C. §276(b)(1)(C); *In the matter of the Implementation of the Pay Telephone Reclassification And Compensation Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-128, Report and Order, 11 F.C.C.R. 20541, ¶147 (1996) ("*First Payphone Order*").

[3] *Order on Reconsideration*, 11 F.C.C.R. 21233 (1996), ¶163; *Bureau Waiver Order*, DA 97-678, 12 F.C.C.R. 20997, ¶¶ 2, 30, 35 (Com. Car. Bur. released April 4, 1997) ("*Bureau Waiver Order*"); *Bureau Clarification Order*, DA 97-805, 12 F.C.C.R. 21370, ¶ 10 (Com. Car. Bur. released April 15, 1997) ("*Waiver Order*"). This requires the BOC rates to be in actual compliance with the new services test; the BOC self-certification is insufficient. *In the Matter of Bell Atlantic-Delaware v. Frontier Communications Services,* Bureau Order, DA 99-1971, ¶28 (Com. Car. Bur. released September 24, 1999), 1999 WL 754402 (F.C.C.), 17 Communications Reg. (P&F) 955 *("Bell Atlantic-Delaware")*; *In the Matter of Ameritech Illinois v. MCI Telecommunications Corporation,* Bureau Order, DA 99-2449, ¶27 (Com. Car. Bur. released November 8, 1999), 1999 WL 1005080 ("*Ameritech Illinois*").

The Commission mandated that the "(s)tates must apply these requirements and the Computer III guidelines ..."[4] However, both the Illinois and New York commissions failed to implement the federal requirements for NST-compliant rates to be effective no later than April 15, 1997. Congress has mandated that any state regulation inconsistent with the Section 276 requirements is expressly preempted and the Commission has so ruled.[5] To fulfill its statutory obligations, the Commission is obligated to preempt the rulings of Illinois and New York that are irreconcilably inconsistent with the requirements of Section 276.

It is the inconsistency with federal law – allowing the BOCs to maintain rates after April 15, 1997 that were not NST-compliant and allowing the BOCs to collect dial around compensation when they were not eligible – that the Commission must rectify. Since the Illinois and New York commissions issued orders that allowed the BOCs to operate for years inconsistently with the federal requirements, it is this Commission's responsibility under Section 276(c) to preempt these rulings and undo the effects of these unlawful orders. The only effective means identified for the Commission to preempt the inconsistent state actions and to enforce the federal requirements is to order refunds, with interest, of the charges in excess of the federally required NST-compliant rates.[6]

There is no question but that the Commission has the authority to order refunds. The Commission is charged with enforcing Section 276(a) of the Act. Furthermore, the Commission has previously found that Section 4(i) authorizes the Commission to undertake remedial action if consideration of equity demanded a remedy in the nature of a refund.[7] In agreement, the D.C.

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[4] *Order on Reconsideration*, ¶163; see also *New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69, 72 (D.C. Cir. 2003).

[5] 47 U.S.C. §276(c); *First Payphone Order*, ¶147; *In the Matter of Wisconsin Public Service Commission*, Memorandum Opinion and Order, FCC 02-25, released January 31, 2002, 17 F.C.C.R. 2051, ¶¶14-15, *aff'd sub nom. New England Public Communications Council, Inc., supra.*

[6] See Illinois Public Telecommunications Association Reply to AT&T and Verizon Preemption Comments of March 23, 2009, Sections B.2, C & F, filed December 31, 2009 ("*IPTA Reply*"), and American Public Communications Council Memorandum, Section 276 of the Act Requires Refunds of Payphone Line Rates in Excess of NST-Compliant Rates, at 7-8 filed October 25, 2006 ("*October 25, 2006 Memo).*

[7] *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, para. 18, 12 F.C.C.R. 18730 (June 13, 1997). ("18. The inapplicability of our rate investigation authority under section 204(a), however, would not necessarily foreclose remedial action. We might well undertake such action pursuant to section 4(i) of the Act under a theory of *quantum meruit* if considerations of equity demanded a remedy in the nature of refunds to do equity.") Here, the equities cry out for rectification by ordering refunds. Both AT&T and Verizon are not only in violation of the Act by charging rates in excess of the NST rate requirement, but have further violated multiple Commission orders by collecting hundreds of millions of dollars in dial around compensation before being eligible, the latter a

Circuit Court has specifically held that "(i)t is clear that the Commission has the authority to order refunds where overcompensation has occurred ..." when implementing the requirements of Section 276(b)(1).[8] The Court found that both Section 4(i)[9] permitting the Commission to take such actions "as may be necessary in the execution of its functions", and the Section 276(b)(1) directive to "take all actions necessary", authorize the Commission "to order refunds where doing so is necessary to ensure fair compensation."[10] The requirements for NST-compliant rates are subject to the same Sections 4(i) and 276(b)(1) authority as addressed in *MCI*. Just as the Commission ordered refunds to the long distance carriers for overcompensating payphone providers for dial around compensation in excess of that reasonably required by Section 276, the Commission is authorized to order refunds to the payphone service providers for overcompensating the BOCs for local exchange rates in excess of the NST-compliant rates required by Section 276.[11]

Second, separate and apart from the inherent power of the Commission to fashion remedies for violation of the Act and the regulations and orders issued thereunder, this Commission's *Waiver Order*[12] further constitutes a direct command to AT&T and Verizon to give refunds to payphone providers.

The operative language of the *Waiver Order* states:

> "A LEC who seeks to rely on the waiver granted in the instant Order must reimburse its customers or provide credit from April 15, 1997 in situations where the newly tariffed rates, when effective, are lower than the existing tariffed rates."[13]

This language codified formal commitments given to the Commission by the RBOCs in letters of April 10 and April 11, 1997.[14]

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requirement the Commission expressly established to ensure that the payphone providers would receive NST-compliant rates no later than April 15, 1997 . See *IPTA Reply,* Sections II & IV.C.)

[8] *MCI Telecommunications Corp. v. FCC*, 143 F.3d 606, 609 (D.C. Cir. 1998).

[9] 47 U.S.C. §154(i).

[10] *MCI*, 143 F.3d at 609.

[11] See *IPTA Reply*, Section IV.F.

[12] A more complete exposition of the purpose and effect of the *Waiver Order* is set forth in the Memorandum submitted by the American Public Communications Council on September 12, 2006, entitled "The Waiver Order Requires Refunds From The Date NST-Compliant Rates Became Effective Back To April 15, 1997" as well as "Reply of the Independent Payphone Association of New York, Inc. to AT&T and Verizon Pre-Emption Comments of March 23, 2009", dated January 21, 2010, pp. 29-39.

[13] *Waiver Order*, ¶25.

[14] Both AT&T and Verizon relied on the waiver because they filed tariffs and/or cost support information with the state commissions on May 15 and 19, 1997, respectively.

Understanding the purpose of requiring the RBOC refunds makes clear that the *Waiver Order* requires refunds between April 15, 1997 and the time when *a fully compliant* NST rate went into effect in the states.[15] Reference to "newly tariffed rates, when effective" means the point at which tariff rates that are in actual compliance with the NST requirements are effective; it does not refer to the date that an unresponsive, non-compliant tariff, might have been filed.

The *Waiver Order* confirms this. In paragraph 18, the Commission states it grants a waiver, for 45 days, of "specifically the requirement that . . . *effective* intrastate payphone service *tariffs comply* with the 'new services' test of the federal guidelines ... (emphasis added)""[16] Thus, this Commission defined the term *"effective intrastate payphone service tariffs"* as tariffs which were properly approved as being NST compliant. Similarly, at the end of paragraph 19, the Commission addressed how to handle non-compliant state payphone tariffs which had not been revised to comply with the NST: "Pursuant to the instant Order, (BOCs) must file intrastate tariffs for payphone services . . . consistent with all the requirements set forth in the Order on Reconsideration . . .. The existing intrastate payphone service tariffs will continue in effect until the intrastate tariffs *filed pursuant to this Order* become effective." In order to be "filed pursuant to this Order", the new tariffs had to be NST-compliant. Until those tariffs were in actual compliance, they would not be deemed "effective" for purposes of the *Waiver Order*.

Only a tariff in actual compliance with the new services test will satisfy the requirement set forth in the Commission's *Order on Reconsideration*. The Commission has repeatedly held that a BOC's claim, or even certification, that its filed tariff complies with the NST requirement does not substitute for the BOC's obligation to comply with the requirements in the Commission's orders.[17]

The Commission's retention of jurisdiction in the *Waiver Order* to ensure compliance, hardly necessary if any non-compliant tariff filing was sufficient to be effective, and its consistent interpretation that actual compliance, not the simple filing of a tariff in purported compliance, is required, conclusively establish that the Commission's orders have always intended actual compliance as the standard being applied. It would not make any sense, and indeed would be in direct conflict with the Commission's intent when it issued the *Waiver Order,* to allow a wholly improper, non-compliant tariff to be accepted as "effective" under the

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[15] *See IPTA Reply*, Section IV. C.

[16] In granting the waiver the Commission retained jurisdiction expressly to ensure that all the requirements were actually met. *Waiver Order*, fn. 60.

[17] The Commission has already determined that for a tariff to satisfy the requirements set forth in the Commission's orders, the tariff must be in actual compliance with the new services test and not simply in purported compliance as claimed by the BOC. *Bell Atlantic-Delaware*, ¶28; *Ameritech Illinois*, ¶27.

waiver. Such an interpretation flies in the face of the requirement that NST compliant rates actually be in effect no later than April 15, 1997. The only means identified to achieve that requirement is to make refunds available back to that date.

Accordingly, the specific language of the *Waiver Order*, and its purpose, mandate that refunds be made by AT&T and Verizon, back to April 15, 1997, for the difference between the non-compliant rates charged and the lower compliant rates. This mandate is fully enforceable – and must be enforced – by the Commission.

Finally, as the memorandum[18] we submitted explains, the fact that the rates filed by the BOCs subsequent to and in response to the *Waiver Order* were allowed to go into effect does not bar refunds. Although the Commission must impose an accounting order at the time the tariff takes effect to be able to order refunds *under Section 204(a)*,[19] with one exception not applicable here,[20] nothing in Section 204 prevents a finding of *unlawfulness* in a subsequent complaint proceeding and the ordering of refunds. On the contrary; reparations are a normal and necessary remedy for unreasonable or discriminatory tariffed rates.[21] And, unlike the refunds that the

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[18] *October 25, 2006 Memo.*

[19] *But see* note 7, *supra.*

[20] The one exception to this statement is for tariffs filed under Section 204(a)(3), which are presumed lawful if allowed to become effective. As the Commission has noted, this provision creates an anomaly from the usual rule. *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996*, Report and Order, 12 FCC Rcd 2170, 2176 ¶ 8 (1997) ("deemed lawful" treatment of Section 204(a)(3) "differ[s] radically from the current practice, where a rate that goes into effect without suspension and investigation is the legal rate, leaving carriers liable for damages . . . if the tariff is subsequently found unlawful"). For an explanation of the distinction between "lawful' and "legal", *see Virgin Islands Telephone Corp. v. FCC*, 444 F. 3d 666, 669 (D.C. Cir. 2006); *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 410 (D.C. Cir. 2002); *AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) and cases cited therein at nn. 33-46.

[21] *See* 47 U.S.C. 208(b) (authorizing damage awards when the Commission adjudicates "the lawfulness of a charge"); *Arizona Grocery Co. v. Atchison, T. & S. Ry. Co.*, 284 U.S. 370 (1932); *MCI Telecomms. Corp. v. FCC*, 59 F.3d 1407 (D.C. Cir. 1995) (In Section 208 overearnings complaint proceedings, unlike Section 204 actions, a finding that a rate is unreasonable, based on the carrier's earning more than the prescribed rate of return, is by itself sufficient to require an award of damages); *AT&T v. Business Telecom, Inc.*, 16 FCC Rcd 12312 (2001) (in adjudicating a Section 208 complaint that a competitive LEC's access rates were unreasonable, Commission has authority to determine retroactively that rates were unreasonable and to specify the reasonable rate for purposes of awarding damages); *Halprin, Temple, Goodman, & Sugrue v. MCI Telecomms. Corp.*, Memorandum Opinion and Order, 13 FCC Rcd 22568 ¶ (1998) (even though non-dominant carriers' rates are presumed reasonable that presumption may be rebutted and damages awarded in a Section 208 complaint proceeding); *ACC Long Distance Corp. v. New York Tel. Co.*, Memorandum Opinion and Order, 9 FCC Rcd 1659, 1661-62 ¶ 11 (1994) (in

Commission is authorized to provide in its ratemaking process (*id.* § 204(a)(1)), the reparations required by Sections 206-208 of the Act are mandatory, not discretionary. *See MCI Telecomms. Corp. v. FCC*, 59 F.3d at 1414.[22] In sum, the fact that the rates were allowed to go into effect is not a bar to ordering refunds.

Sincerely,

/S/

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Communications Council

/S/

Michael W. Ward
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Association

/S/

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overearnings complaint proceeding, Commission rejects argument that it cannot order refunds under Section 208 unless it first suspended the rates pursuant to Section 204); *MCI Telecomms. Corp. v. Pacific Northwest Bell Tel. Co., et al., Memorandum Opinion and Order*, 5 FCC Rcd 216, 221-22 ¶ 48 (1993) (in Section 208 overearnings complaint proceeding, Commission rejects argument that it cannot order refunds of a legally tariffed rate); *Cruces Cable Co., Inc., v. American Television Relay, Inc.*, 35 FCC 2d 707, 709 (1972) (Where rate was filed on one day's notice, and customer challenged the rate as unlawfully discriminatory and requested interim rate relief, Commission denied interim relief because "under Sections 206 and 207 of the Communications Act, [the customer] is entitled to recover damages for any violation of the Act which may be found either upon complaint to this Commission or upon suit in federal court").

[22] The Commission's referral of NST review to state commissions cannot deprive payphone providers of a federal remedy for the BOC's failure to timely comply with the NST. It is thus of no consequence that this matter comes before the Commission in the form of petitions for declaratory ruling rather than Section 208 complaints. The PSPs were seeking relief from state commissions as instructed by the Commission and it would have made no sense to initiate a Section 208 complaint while state proceedings were pending. See *IPTA Reply*, Section IV.B.1. In any event, Section 208 complaints can only be brought against carriers, not state commissions.

cc: Julie Veach
Diane Griffin Holland
Raelynn Remy
Albert Lewis
Zac Katz