



Section 276 Compliance

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Congress Directed The FCC, Not The States, To Enforce Section 276

- “Section 276 establishes a **comprehensive federal scheme** of payphone regulation, both intra- and interstate, to be administered by the Commission. ... The importance of federal control is driven home by section 276(c), which expressly preempts ‘any State requirements ... inconsistent with the Commission's regulations’ implementing the statute. ... Thus, a federal policy that payphone line rates be cost-based would be binding on the states. ... In reviewing our authority in the matter before us, **Congress' directive** in section 276(b)(1)(C) to implement, ‘at a minimum,’ *Computer III* safeguards **requires that we direct the states** to apply the cost-based new services test to the payphone line rate.” — *Commission Wisconsin PSC Order*, ¶¶ 35 – 39 (emphasis added), *aff'd sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003).

First Report & Order

- (9/20/96)

- BOC local phone rates to IPPs must be cost based no later than April 15, 1997 – any contrary state requirements are 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. . . . Accordingly, we 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*, ¶¶ 146 - 147 (emphasis added).

Order on Reconsideration

- 11/8/96

- “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 (emphasis added).

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 (emphasis added).

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.* ... for LECs that have not complied with these requirements, their payphone operations will not be entitled to compensation ... in the states in which they do not comply.”
– *Bureau Waiver Order*, ¶¶ 30, 35 (*italics* added).

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

Ameritech Illinois 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 Illinois*, ¶ 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.” – *Bureau Clarification Order*, fn 60 (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 PSC 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 PSC 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).

Section 276 Authorizes The Issuance of Refunds - Refunds Are Not Barred By the Filed Rate Doctrine

- The D.C. Circuit held that Section 276 authorizes the Commission to issue refunds of overcharges. – *MCI Telecommunications Corporation v. FCC*, 143 F.3d 606, 609 (D. C. Cir. 1998).
- The Illinois commission and Appellate Court said that NST refunds are barred by the filed rate doctrine.
- The Federal Circuit Courts have since unanimously held that neither the State nor the Federal 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	Tennessee
South Carolina	Wisconsin
Louisiana	North Carolina
Pennsylvania	Indiana
Colorado	Idaho
Iowa	Wyoming
Minnesota	Nebraska
New Mexico	North Dakota
South Dakota	Utah
Washington	Etc.

The Act and Commission Orders 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).
- “Accordingly, we 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.
- “(The statute) indicates Congress' intent that the Commission occupy the field. . . . The importance of federal control is driven home by section 276(c), which expressly preempts ‘any State requirements . . . inconsistent with the Commission's regulations’ implementing the statute. . . . Thus, a federal policy that payphone line rates be cost-based would be binding on the states.” – *Commission Wisconsin PSC Order*, ¶¶ 35, 38.

The Commission should implement the Declaratory Ruling without remand

- Declare that the prior state order is vacated to the extent inconsistent with this order for the refunding of charges in excess of NST compliant rates as of April 15, 1997;
- Hold that where cost-based rates have been established as lower than the rates charged by the BOC from April 15, 1997, and where 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 member of the Petitioner may thereafter file a complaint at the Commission for a violation of this refund order; and
- Hold that if a BOC collected dial around compensation in a state prior to being in actual compliance with cost-based rates, the BOC must forfeit the compensation so collected with interest. Forfeiture is waived if, within 60 days of this order, the BOC refunded such overcharges with interest.