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Electronic Filing

Marlene Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, Room TW-A325
Washington, D.C. 20554

Re: *Pay Telephone Reclassification and Compensation Provisions of the
Telecommunications Act of 1996*, CC Docket 96-128

Dear Ms. Dortch:

I write on behalf of AT&T with regard to the Petition for Declaratory Ruling filed by the Michigan Pay Telephone Association (“MPTA”). AT&T filed joint comments with Verizon (filed June 22, 2006), along with separate comments (filed June 22, 2006) and reply comments (filed July 6, 2006) in response to the petition. The purpose of this letter is to refresh the record; to summarize the reasons that MPTA’s petition should be denied; and to make clear that, even if the Commission addresses the validity of the analysis underlying the decision of the Michigan Public Service Commission (“MPSC”) that MPTA purports to challenge, any relief that the MPSC could order in response would be prospective only.

First, the Commission should dismiss or deny MPTA’s petition because it is inconsistent with the Commission’s own determination that the states, not the Commission, are responsible for application of the Commission’s pricing standards to state payphone line rates. The Commission – over the objections of independent payphone providers (“IPPs”) – refused to require the filing of federal payphone line tariff, holding that the Commission would “rely on the states to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276.”¹ The Commission has indicated that it would not take over that state commission role unless state commissions are “unable” to carry it out.² That is not the case

¹ Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21308, ¶ 163 (1996).

here: MPTA presented the same arguments to the MPSC that it seeks to present to the Commission; the MPSC considered and treated as binding all requirements of federal law.

Second, MPTA's challenge to the MPSC's 2004 order and 2005 denial of rehearing is barred by res judicata. MPTA obtained judicial review of the MPSC's orders by filing an action in the Michigan Court of Appeals; in that proceeding, MPTA raised its claims that the MPSC's orders approving AT&T's rates were contrary to federal law. A three-judge panel of the Michigan Court of Appeals unanimously upheld that MPSC order.³ The Michigan Supreme Court then denied MPTA's Petition for Leave to Appeal.

For reasons AT&T has explained at length elsewhere, MPTA's effort to mount a collateral challenge to the MPSC's order before the Commission is therefore barred by principles of claim and issue preclusion – *i.e.*, res judicata and collateral estoppel.⁴ “A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies.” *Montana v. United States*, 440 U.S. 147, 153 (1979) (internal quotation marks omitted) (alteration in original). “Under res judicata, a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation.” *Id.* (citations omitted).

All the requirements for application of res judicata (and for collateral estoppel) are met here. MPTA was a party to the earlier litigation before the Michigan Court of Appeals, and it is pursuing precisely the same claims that were rejected by that court – that is, that the MPSC's orders were inconsistent with federal law – and the state courts had jurisdiction over the providers' claims, including the federal claims. As the Supreme Court has said, a “final judgment in one State, if rendered by a court with adjudicatory authority over the subject matter and persons governed by the judgment, qualifies for recognition throughout the land. For claim and issue preclusion (res judicata) purposes, in other words, *the judgment of the rendering State gains nationwide force.*” *Baker by Thomas v. General Motors Corp.*, 522 U.S. 222, 233 (1998) (emphasis added; footnote omitted); *see also Bath Iron Works Corp. v. Director, Office of Workers' Comp. Programs*, 125 F.3d 18, 20-21 (1st Cir. 1997). Because MPTA has already litigated its federal-law challenge to the MPSC's orders and lost, those claims are forever barred, in whatever tribunal MPTA seeks to raise them.

² Memorandum Opinion and Order, *Wisconsin Public Service Commission; Order Directing Filing*, 17 FCC Rcd 2051, 2056, ¶ 15 (2002) (“*Wisconsin Order*”).

³ *See SBC Michigan v. Michigan Pub. Serv. Comm'n*, Nos. 254980 & 261341, 2006 Mich. App. LEXIS 2845 (Sept. 28, 2006).

⁴ The issue is discussed in a White Paper jointly filed by AT&T and Verizon in this docket on March 23, 2009.

Third, and in any event, as AT&T explained in its June 22, 2006, comments, the MPSC's 2004 decision is fully consistent with the New Services Test and the guidance provided by the Commission in the *Wisconsin Order*. The MPSC relied on expert testimony and this Commission's prior orders applying the New Services Test in finding that the overhead loading factor for AT&T's usage-based services was consistent with overhead loading implied for AT&T's competitive services. MPTA's arguments to the contrary ignore the record before the MPSC and mischaracterize the MPSC's decision. Precisely for this reason, the MPTA's claims were properly considered – and definitively rejected – by the Michigan Court of Appeals, which had the full administrative record and all of the parties' arguments before it.

Fourth, in light of the foregoing, even if the Commission were to address the merits of MPTA's claims, it could do so only for purposes of providing guidance with respect to any claims to prospective relief that MPTA might pursue before the MPSC. The MPSC has adjudicated AT&T's tariffed rates and found them to be lawful under all applicable laws, including the federal New Services Test pricing standard; that determination has been affirmed by the Michigan court applying federal law. AT&T is therefore required to charge those tariffed rates and entitled to rely on those rates until changed *prospectively* by the responsible regulator. That principle – which is one aspect of the decades-old filed rate doctrine – applies under both federal law and Michigan state law. See *Arizona Grocery Co. v. Atchison, Topeka & Santa Fe Ry.*, 284 U.S. 370 (1932); *Detroit Edison Co. v Public Serv. Comm'n*, 416 Mich. 510, 523; 331 N.W.2d 159 (1982). Accordingly, to the extent MPTA seeks to have the Commission somehow undo the prior determinations of the MPSC and the adjudications by the Michigan courts, the relief it seeks is contrary to remedial rules that protect the settled expectations of utilities and rate-payers alike.

In accordance with 47 C.F.R. § 1.1206(b)(1), please include this letter in the record of this proceeding. If you have any questions concerning this matter, please contact me at (202) 326-7900.

Sincerely,

/s/ Aaron M. Panner
Aaron M. Panner

cc: Michael Steffen
Angela Giancarlo
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