

Ward & Ward, P.C.

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

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

September 25, 2012

Ms. Suzanne Tetreault
Deputy General Counsel
Federal Communications Commission
445 12th Street, S.W.,
Washington, D.C. 20554

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

Dear Ms. Tetreault:

I am the General Counsel for the Illinois Public Telecommunications Association in the pending Petition for Declaratory Ruling. The Petition seeks a Commission order directing AT&T to refund the charges made to the Association members from April 15, 1997 to December 13, 2003 that exceeded the cost-based rates required by Section 276 of the Communications Act and the orders of the Commission. These violations of the federal requirements were established through hearings before the Illinois Commerce Commission.

In our conversations regarding the Petition with Ms. Deena Shetler, Associate Bureau Chief, Wireline Competition Bureau, we discussed a number of issues, including the three issues that I address below. Without going into great detail, I am providing a summary of the Association's position on these. More in-depth analysis is available should you deem it necessary. However, since the merits of the Association's position have already been established through the Commission's own orders and through the decisions of the U. S. Circuit Courts of Appeal, we are hopeful that this overview will suffice. Nonetheless, we stand willing to review and discuss any matter addressed herein and any other matter that you believe is relevant to the Petition.

Three of the areas we discussed related to the questions of (1) the Commission's delegation to the states of the implementation of the requirements of Section 276 and the Commission's orders, (2) preemption, and (3) the guidance provided pertaining to the cost-based rate requirements. In each of these areas there are a number of Commission and/or U.S. Circuit

Ward & Ward, P.C.
One Rotary Center
1560 Sherman Avenue, Suite 805
Evanston, IL 60201
224-420-9766

Court decisions supporting the Petition's request for the issuance of refunds. In contrast, there are no such decisions in support of AT&T's opposition to refunding the charges that the Illinois Commerce Commission determined were excessive and in violation of the federal requirements.

1. From the outset, the Commission mandated that the states must implement the Section 276 requirements as issued by the Commission, with the Commission expressly retaining jurisdiction over state proceedings to ensure uniform enforcement.

The Commission delegated the initial implementation of the Section 276 requirements to the states in the *Reconsideration Order*, issued in November 1996.¹ In the sentence immediately after establishing that the tariffs for the new services test compliant rates would be filed in the state jurisdiction, the Commission required that the state rates for the local phone services provided to payphone service providers "must be ... cost-based".² In the following sentence the Commission mandated that the states "must apply these requirements", citing to the Commission's new services test requirements and to its decision in the *Open Network Architecture* proceeding.³ Also in the same paragraph, the Commission mandated that the new services test compliant rates must be in effect no later than April 15, 1997.⁴

Even before the due date of April 15, 1997, the Commission twice more stated the federal mandate that the local rates filed in the states (1) must be cost-based in compliance with the new services test and (2) in effect no later than April 15, 1997.⁵ The Commission also stated that it was retaining jurisdiction over the state proceedings expressly so the Commission may ensure that the requirements of Section 276 and the Commission's orders are met.⁶

The Commission has repeatedly held that this required a Bell Operating Company ("BOC") to have in effect cost-based rates that were in actual compliance with the new services test. It rejected the argument that it was sufficient for AT&T to file any tariff that AT&T

¹ *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, Order on Reconsideration, FCC 96-439 (rel. Nov. 8, 1996), 11 F.C.C.R. 21233, ¶ 163 (1996) ("*Reconsideration Order*") aff'd in part and remanded in part on other grounds *sub nom. Illinois Public Telecommunications Assn. v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) clarified on rehearing 123 F.3d 693 (D.C. Cir. 1997) cert. den. *sub nom. Virginia State Corp. Com'n. v. FCC*, 523 U.S. 1046 (1998).

² The Commission established in the *First Report and Order* that cost-based rates are rates that comply with the Commission's new services test. States were expressly preempted from any contrary requirement. *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, FCC 96-388 (rel. Sept. 20, 1996), 11 F.C.C.R. 20541, ¶¶ 146-147 (1996) ("*First Report & Order*"); *Reconsideration Order*, ¶ 163.

³ *Reconsideration Order*, ¶ 163.

⁴ *Id.*

⁵ *Bureau Waiver Order*, DA 97-678 (Com. Car. Bur. rel. April 4, 1997), 12 F.C.C.R. 20997, ¶¶ 2, 30, 35 ("*Bureau Waiver Order*"); *Bureau Clarification Order*, DA 97-805 (Com. Car. Bur. rel. April 15, 1997), 12 F.C.C.R. 21370, ¶ 10 ("*Bureau Clarification Order*"). The Bureau acted pursuant to the authority delegated to it by the Commission. *Reconsideration Order*, ¶ 132; *Bureau Waiver Order*, ¶ 3. The Bureau speaking on behalf of the Commission is generally referred to herein as the Commission.

⁶ *Bureau Clarification Order*, fn. 60.

certified to be new services test compliant.⁷ Twice more the Commission asserted that both the state and the Commission had jurisdiction to ensure enforcement.⁸

When the Commission later exercised its authority, it restated that although the Commission would rely *initially*⁹ on the states, the Commission retained jurisdiction over the intrastate rate proceedings to ensure that its requirements are met in the states.¹⁰ In response, the BOCs challenged the Commission's jurisdiction. Reviewing its role, the Commission found that Congress intended for Section 276 to establish a comprehensive federal scheme to be administered by the Commission, which would occupy the field. It held that Congress' directive in Section 276(b)(1)(C) required the Commission to direct the states in applying the new services test to the payphone line rate.¹¹ Pursuant to that responsibility, the Commission issued rules for all of the states to require compliance with the Commission's new services test.¹² On appeal, the District of Columbia Circuit agreed that Section 276 unambiguously both authorizes and directs the Commission to regulate the BOCs intrastate payphone line rates.¹³

When petitions were filed by payphone associations from North Carolina and Michigan asserting that those state commissions' decisions were not following the Commission's cost-based rate requirements, the Commission ordered the state commissions to implement the federal requirements as determined by the Commission.¹⁴ AT&T's argument that after the *Reconsideration Order* directed the filing of state tariffs the Commission would only get involved in states where the state commission was unable to review the tariffs is wholly rebutted by the decisions of the Commission and the U. S. Circuit Court of Appeals.

This is the substance and the procedure established by the Commission from the outset of its determination to have the cost-based rate tariffs filed in the states. It required that the states must implement the Section 276 requirements as issued by the Commission and that the Commission would exercise its continuing jurisdiction to see that the federal requirements are enforced by the states. This is what the Illinois Petition requests.

⁷ *In the Matter of Ameritech Illinois v. MCI Telecommunications Corporation*, Bureau Order, DA 99-2449 (Com. Car. Bur. rel. Nov. 8, 1999), 1999 WL 1005080, ¶27 (“*Ameritech Illinois Order*”); *In the Matter of Bell Atlantic-Delaware v. Frontier Communications Services*, Bureau Order, DA 99-1971 (Com. Car. Bur. rel. Sept. 24, 1999), 1999 WL 754402 (F.C.C.), ¶ 28, 17 Communications Reg. (P&F) 955 (“*Bell Atlantic-Delaware Order*”).

⁸ *Ameritech Illinois Order*, ¶27; *Bell Atlantic-Delaware Order*, ¶ 28.

⁹ *In the Matter of Wisconsin Public Service Commission*, Bureau Order, DA 00-347 (Com. Car. Bur. released March 2, 2000), 15 F.C.C.R. 9978, ¶ 2 (“*Bureau Wisconsin PSC Order*”); see also *In the Matter of Wisconsin Public Service Commission*, Memorandum Opinion and Order, FCC 02-25 (rel. January 31, 2002), 17 F.C.C.R. 2051, ¶ 15 (“*Commission Wisconsin PSC Order*”), *aff'd sub nom. New England Public Communications Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003), *rehearing and rehearing en banc den.* (Sept. 22, 2003), *cert. den. sub nom. North Carolina Payphone Association v. FCC*, 541 U.S. 1009 (2004).

¹⁰ *Bureau Wisconsin PSC Order*, ¶ 2.

¹¹ *Commission Wisconsin PSC Order*, ¶¶ 35, 39, 42.

¹² *Id.*, ¶¶ 42, 68; *in accord New England Public Communications Council, Inc.*, 334 F.3d at 75 (“[the Commission] establishes a rule that affects payphone line rates in every state. Indeed, the Commission itself acknowledged as much ...”)

¹³ *Id.*, at 75 – 76.

¹⁴ *In the Matter of the North Carolina Payphone Association Petition for Declaratory Ruling, Oklahoma Local Exchange Carrier Petition for Declaratory Ruling, Michigan Payphone Association Petition for Declaratory Ruling*, Bureau Order, DA 02-513 (Com. Car. Bur. rel. March 5, 2002), 17 F.C.C.R. 4275.

The Illinois Commerce Commission held that new services test compliant rates were not required to be effective before December 13, 2003, in violation of numerous Commission orders emphasizing that actual cost-based rates needed to be in effect “no later than April 15, 1997.” The Petition seeks for the Commission to implement these federal requirements and to issue an order for a refund, with interest, of the AT&T charges made from April 15, 1997 to December 13, 2003 that were in excess of the new services test compliant rates as found by the Illinois Commerce Commission and that were in violation of the Commission’s Section 276 requirements.

2. Where Congress and the Commission have expressly preempted state law regarding the cost-based rate requirements, the Commission must ensure that the states comply with the uniform federal requirements.

As noted, Congress directed the Commission to require local phone rates from the BOCs to the payphone providers to be cost-based in accord with nonstructural safeguards at least equal to the Commission’s *Computer Inquiry-III*. 47 U.S.C. § 276(b)(1)(C). Congress expressly preempted any state requirement inconsistent with these regulations. 47 U.S.C. § 276(c). The Commission determined that this required the local phone rates to payphone providers to be cost-based in compliance with the new services test.¹⁵ In the *First Report and Order*, the Commission held that any contrary state requirement to the Commission’s new services test requirements was preempted per Section 276(c).¹⁶ These federal regulations required actual new services test compliant rates to be effective in the states no later than April 15, 1997.¹⁷

To implement “the comprehensive federal scheme ... to be administered by the Commission”, both the statute and the Commission necessarily preempted the states regarding the cost-based rate requirements. This was recognized in the Commission’s holding in the *Commission Wisconsin PSC Order*.

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. Such a comprehensive plan also shows that Congress intended the BOC non-discrimination and non-subsidization provisions to apply to *all* BOC payphone activity, both intra- and interstate.¹⁸

The D. C. Circuit agreed with the Commission, noting Congress’ inclusion of the preemption clause to ensure that state actions did not impede the Commission from executing its direction from Congress to implement uniform federal requirements.¹⁹

However, after finding that AT&T did not provide the federally required cost-based rates from April 15, 1997 to December 13, 2003, the Illinois Commerce Commission refused to remedy the federal violations due to the state filed rate doctrine. The Illinois commission did so

¹⁵ *First Report and Order*, ¶ 146.

¹⁶ *Id.*, ¶ 147.

¹⁷ *Reconsideration Order*, *supra*, ¶ 163; *Bureau Waiver Order*, ¶¶ 2, 30, 35; *Bureau Clarification Order*, ¶ 10.

¹⁸ *Commission Wisconsin PSC Order*, ¶ 35 (emphasis in original).

¹⁹ *New England Public Communications Council, Inc.*, 334 F.3d at 75 – 76.

without any analysis addressing the fact that the state law had been preempted. When dealing with a refund issue as presented in the instant Petition, the U. S. Circuit Court of Appeals found that state law can not bar a refund of charges made in excess of the federal requirements, because all state filed rate doctrines are preempted by Section 276(c).²⁰

There remains no question as to whether a state's failure to comply with the Section 276 cost-based rate requirements is preempted. The statute expressly preempts the states. The Commission has at least twice preempted the states generally, and two federal courts have ruled that the states are preempted. The only remaining matter is the Commission's enforcement of the preemption.

3. The guidance provided by Congress' and the Commission's reliance on longstanding precedents for cost-based rates provides AT&T no support for refusing to refund the charges made in violation of the federal requirements.

Not only would any concern over the guidance that the Commission provided to the states be insufficient to impede refunding the overpayments, but it would be unfounded on the facts, the law, and the regulatory policies of the Commission. First, if there was any hypothetical lack of guidance in the provisioning of cost-based rates, the injured party would be the payphone provider and not AT&T. Second, it is inaccurate to claim that there was insufficient guidance about the Commission's new services test requirements. And third, a review of the facts shows that the guidance the Commission did provide had no impact on AT&T's decision to overcharge its competitors.

As regard to the first point, 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. Any lack of guidance by the Commission damaged the payphone providers, not AT&T. It is the payphone providers that are still seeking 15 years later the implementation of their federal rights that were to be in effect "no later than April 15, 1997." AT&T has not been harmed. Regardless of its failure to comply with the Commission's cost-based rate prerequisite for the collection of dial around compensation under Section 276, AT&T nevertheless began collecting its dial around compensation beginning April 15, 1997. AT&T collected the compensation for over six and a half years before it was even eligible and has suffered neither harm nor delay from any purported lack of guidance. The same is not true of the payphone providers.

Even if mistaken, AT&T illegally overcharged the payphone providers. AT&T is not justified in keeping the money once the error has been established, as it has been in the Illinois proceeding.²¹ Refunding the payphone providers' own money, plus the cost of capital, is not

²⁰ *TON Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1236 fn. 14 (10th Cir. 2007).

²¹ 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).

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 illegally collected hundreds of millions of dollars in dial around compensation 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 excuses 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.

Second, it is not accurate to state that the Commission failed to give guidance as to the cost-based requirements for the new services test. Congress and the Commission adopted the nonstructural safeguards of the *Computer Inquiry-III* and the new services test because they were established standards by the Commission and known to AT&T.²² The Commission found that these requirements had longstanding precedents in the Commission's *ONA Tariff*, *Local Competition*, and *Physical Collocation Tariff* proceedings.²³ In the 1993 *ONA Tariff Order*, the Commission had completed two years of cost-based analysis for the new services test. The 1997 *Physical Collocation Tariff Order* concluded another four years of Commission cost proceedings, being issued within a month of the AT&T payphone filing. In these proceedings the Commission determined the standards for direct costs, economic costs, and allocations of overheads. AT&T was an active participant in all of these proceedings, among others, and was well aware of the new services test requirements as applied by the Commission.

For over 75 years the Commission and the Illinois Commerce Commission 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. In addition to the Commission's proceedings, 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 Illinois Commerce Commission in 1995. By 1997 Illinois had conducted numerous proceedings employing forward looking costs and overhead allocations. AT&T's rates to payphone providers were found to violate these standards as well.²⁴

²² The Commission noted that the new services test requirements have been applied to the BOCs since the 1986 *Computer Inquiry-III* decision. *Commission Wisconsin PSC Order*, ¶ 12, fn. 27.

²³ *Id.*, ¶¶ 43, 53–54 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, 454-55, ¶¶ 36, 40, 41 (Dec. 15, 1993) (“*ONA Tariff Order*”), *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 FCC Rcd 15499, 15911-12, ¶¶ 825-26 (Aug. 8, 1996) (“*Local Competition 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, 18855-56, ¶ 307, and 18858 – 59, ¶¶ 313 - 314 (June 13, 1997) (“*Physical Collocation Tariff Order*”).

²⁴ *Illinois Commerce Commission On Its Own Motion Investigation into certain payphone issues as directed in Docket 97-0225*, Interim Order, Part E, pp. 34 – 37 (“*Illinois Payphone Order*”).

In 1995 Illinois had just completed a payphone investigation²⁵ and in 1997 AT&T was fully aware that its Illinois rates for local exchange services provided to payphones were not cost based.²⁶ Both the Commission's *ONA Tariff* and *Physical Collocation Tariff* new services test proceedings and the decade of Illinois commission, legislative, and rulemaking proceedings resulted in the Illinois Commerce Commission and AT&T being well versed in the cost-based analyses.

Less than a month after the April 15, 1997 deadline for cost-based rates the Association filed its complaint with the Illinois Commerce Commission because AT&T's noncompliance was evident. When AT&T filed with the Illinois commission 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 noncompliance by refusing to pay AT&T dial around compensation. In a collateral proceeding, the Commission admonished AT&T that, its self certification notwithstanding, the Commission would still require AT&T's actual compliance with the cost-based rate requirement.²⁷ But even after it was established at hearings that AT&T was not in actual compliance,²⁸ the violation still has not been remedied.

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. Refusing to reduce its rates one cent, AT&T continued to charge the same rates as before Congress and the Commission mandated that the rates be corrected to a cost basis.

Third, regardless of the guidance provided by the Commission, AT&T continuously ignored the Commission's orders, and overcharged its competitors for over six and a half years, through recycled positions that had been rejected by the Commission's holdings.

In the 1993 *ONA Tariff* new services test proceedings, the Commission found that the Ameritech/AT&T overhead allocations for the new services test to have an upper limit in the 25% - 27% range.²⁹ When in the following 1997 *Physical Collocation Tariff* proceedings Ameritech/AT&T used excessive overhead loadings, the Commission rejected these as contrary to the new services test. The Commission required Ameritech/AT&T to reduce its rates to reflect the lowest overhead loading factor of its comparable services and ordered refunds of the overcharges.³⁰ Despite these Commission decisions issued before or at the time of AT&T's

²⁵ *Independent Coin Payphone Association v. Illinois Bell Telephone Company*, ICC Docket 88-0412, Order (June 7, 1995).

²⁶ 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 Payphone Order*, Interim Order, p. 46, Finding 20 (November 12, 2003).

²⁷ *Ameritech Illinois Order*, *supra* ¶ 27. See also *Bell Atlantic-Delaware Order*, *supra*, ¶ 28.

²⁸ *Illinois Payphone Order*, *supra*.

²⁹ See *Commission Wisconsin PSC Order*, 17 F.C.C.R. at 2068, ¶ 54, fn. 124 citing *ONA Tariff Order*, 9 F.C.C.R. at 458-59, ¶ 50, and 477-80, Attach. C.

³⁰ *Physical Collocation Tariff Order*, 12 F.C.C.R. at 18857-59, ¶¶ 311-14. The Commission ordered Ameritech/AT&T to refund the difference between what were determined to be the cost-based rates and the rates actually charged. *Id.*, at 18859, ¶ 313.

filing in the instant case, AT&T refused to use the overhead loadings of comparable services. Instead, AT&T used overheads of as much as 369% over direct costs.

Then again in the 2000 *Bureau Wisconsin Order*³¹, AT&T was directed as to the Commission's standards for the new services test. But again, AT&T made none of the needed changes in its rates to implement the new services test requirements.

When the 2002 *Commission Wisconsin Order* was issued, the Illinois Commerce Commission ordered a new round of hearings at AT&T's request so AT&T purportedly could address the Commission's findings. Yet, AT&T did not change any of its positions or any of its rates. It steadfastly refused to apply any of the Commission's overhead allocation methodologies.³²

Despite the Illinois Commerce Commission's well-established regulations for determining cost-based pricing and despite the Commission's numerous rulings in the *ONA Tariff Order*, the *Physical Collocation Tariff Order*, the *Bureau Wisconsin PSC Order*, and the *Commission Wisconsin PSC Order*, AT&T never adjusted its payphone line rates one cent to comply with the new services test. The Commission's guidance had no impact on AT&T's position.

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 enable AT&T to obtain hundreds of millions of dollars in dial around compensation, on April 17, 1997 AT&T certified to the Commission that it had cost-based rates in effect that fully complied with the new services test as of April 15, 1997.³³ To avoid refunding the illegal overcharges, on March 23, 2009 AT&T represented to the Commission that AT&T was required under Illinois law to charge non-cost based rates until December 13, 2003.³⁴ AT&T's positions are wholly irreconcilable. It was not any lack of guidance but, instead, AT&T's concerted effort to maintain the maximum charges to its competitors that resulted in the illegal overcharges.

Conclusion

In summation, it should be clear that from the outset of the Commission's delegation to the states the Commission required the states to fully implement the federal cost-based rate requirements as ordered by the Commission. That includes the Commission's often emphasized requirement that actual cost-based rates must be in effect no later than April 15, 1997. The Commission not only expressly retained jurisdiction over the state proceedings, but acted to correct states that did not implement the requirements as issued. That state law is preempted on these matters is expressly stated in the statute, the Commission's orders, and the decisions of the federal courts. The new services test was chosen as the cost-based standard because it was a

³¹ *Bureau Wisconsin PSC Order*, *supra*.

³² *Illinois Payphone Order*, Interim Order, Part IV(E)(2), pp. 35-36.

³³ *Ameritech Illinois Order*, ¶ 9, fn. 23.

³⁴ 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.

known requirement of longstanding precedent. AT&T failure to comply with the requirements cannot be justified or allowed to go uncorrected.

We would be pleased to discuss these points, and any other matters pertaining to the Petition, that you believe bear on the Commission's issuance of an order requiring AT&T to refund, with interest, the charges made from April 15, 1997 to December 13, 2003 that exceeded the Commission's requirements for cost-based rates that complied with the new services test.

Sincerely,

/s/

Michael W. Ward

cc: Deena Shetler
Marcus Maher
Raelynn Remy