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BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

Federal Communications Commission
Office of the Secretary

In the Matter of)
The Midwest Independent Coin Payphone Association's) CC Docket No. WC 13-319
Petition for Relief under the Commission's Payphone)
Orders and for Declaratory Ruling)

COMMENTS OF AT&T ON MIDWEST INDEPENDENT COIN PAYPHONE ASSOCI-
ATION'S PETITION FOR DECLARATORY RELIEF

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AT&T Services, Inc., on behalf of its affiliate, Southwestern Bell Telephone Company d/b/a AT&T Missouri (“AT&T” or “AT&T Missouri”), submits these comments on the petition¹ of the Midwest Independent Coin Payphone Association (“MICPA”).

SUMMARY

MICPA and its members (the “Petitioners”) seek an order from the FCC directing AT&T Missouri to submit to the Commission cost documentation supporting its currently effective tariffs for intrastate payphone service offerings (“Missouri Payphone Tariffs”) along with copies of the tariffs. MICPA alleges that the Missouri Public Service Commission (“MoPSC”) has never determined these tariffs comply with section 276 of the Communications Act of 1934, as amended (“Act”) and the Commission’s orders and rules. MICPA also seeks a determination and/or declaratory ruling that the Missouri payphone tariffs are not cost based, nondiscriminatory, and consistent with both section 276 and the Commission’s Computer III tariffing guidelines. Specifically, MICPA claims that the Missouri payphone tariffs fail to satisfy the requirements that the FCC applies to new interstate access service proposed by incumbent LECs subject to price cap regulation (the “New Services Test” or “NST”). Finally, MICPA wants the FCC to order and direct AT&T Missouri to issue refunds of over charges for its payphone service offerings.²

MICPA claims – and AT&T Missouri disagrees – that the MoPSC has never reviewed the Missouri payphone tariffs and has never made any finding that the tariffs in question are in compliance with the FCC’s Payphone Orders. MICPA correctly notes, however, that the

¹ *In the Matter of Midwest Independent Coin Payphone Association’s Petition for Relief under the Commission’s Payphone Orders and for Declaratory Ruling*, Midwest Independent Coin Payphone Association Petition for Relief (December 26, 2013) (“*MICPA Petition*”).

² MICPA also asks the FCC to hold its petition in abeyance until the Circuit Court for the District of Columbia concludes its review of the FCC’s order in *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-12, FCC 13-24 (rel. February 27, 2013) (*NST Refund Order*). See, *In the Matter of Midwest Independent Coin Payphone Association’s Petition for Relief under the Commission’s Payphone Orders and for Declaratory Ruling*, Motion To Hold Petition In Abeyance, CC Docket No. (December 26, 2013). AT&T does not object to this motion.

MoPSC has, since 2008, disclaimed jurisdiction over those AT&T Missouri services, like payphone lines, that the Missouri PSC found “competitive” under Missouri law.

AT&T submits that, under well founded regulatory principles and FCC decisions, MICPA has no right to refunds for alleged over charges for payphone lines. AT&T will show that the MoPSC did, in fact, find that the Missouri payphone rates complied with the FCC’s requirements and were just and reasonable rates. Under the filed rate doctrine, they were lawful rates and to require a refund would constitute retroactive rate making. In addition, because the MoPSC has determined that the AT&T Missouri’s offer of payphone lines is competitive, it makes no sense to undertake a cost-based rate-making to ensure that, prospectively, AT&T Missouri’s rates meet the new services test (“NST”), which in this instance is simply a regulatory tool to assure the result that Missouri has found is now produced by the market. Finally, because AT&T Missouri no longer offers payphone service for its own account, it is not subject to the BOC obligations contained in section 276 of the Act.

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AT&T Services, Inc., on behalf of its affiliate, Southwestern Bell Telephone Company d/b/a AT&T Missouri ("AT&T" or "AT&T Missouri"), submits these comments on the petition of the Midwest Independent Coin Payphone Association ("MICPA"). In its petition, the MICPA asks the Commission for:

1. An order directing AT&T Missouri to submit to the FCC cost documentation supporting its currently effective tariffs for intrastate payphone service offerings ("Missouri Payphone Tariffs") along with copies of the tariffs;
2. A determination and declaratory ruling that the AT&T Missouri Payphone Tariff are not cost based, nondiscriminatory, and consistent with both section 276 and the Commission's Computer III tariffing guidelines;
3. An order directing AT&T Missouri to issue refunds of over charges for its payphone service offerings;
4. An order directing such other proceedings as are appropriate to grant the relief herein requested; and
5. Such other relief as deemed necessary to enforce the Commission's *Payphone Orders*.³

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (Sept. 20, 1996) (*Initial Payphone Order*), Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) (*Payphone Reconsideration Order*), *aff'd in part and remanded in part, Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997); Second Report and Order, 13 FCC Rcd 1778 (Oct. 9, 1997) (*Second Payphone Order*), *vacated and remanded, MCI Telecomms. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); Third Report and Order and Order on Reconsideration of the Second Report and Order, 14 FCC Rcd 2545 (Feb. 4, 1999) (*Third Payphone Order*), *aff'd, American Pub. Communications Council v. FCC*, 215 F.3d 51 (D.C. Cir. 2000); *Wisconsin Pub. Serv. Comm'n; Order Directing Filings*, Bureau/CPD No. 00-01, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2064, para. 42 (2002) (*Wisconsin Payphone Order*), *aff'd New England Pub. Comms. Council, Inc. v. FCC*, 334 F.3d 69 (D.C. Cir. 2003). (The *Initial Payphone Order* and the *Payphone Reconsideration Order* are collectively known as the *Payphone Orders*.)

MICPA also moves⁴ the FCC to hold this petition in abeyance pending the outcome of ongoing proceedings in federal court.⁵ AT&T does not object to the granting of this motion.

MICPA's petition to the FCC for relief arises from the Missouri Public Service Commission's dismissal of the third attempt by MICPA and its members ("the Petitioners") to collaterally attack AT&T Missouri's payphone tariffs, some 16 years after their examination and approval by the Missouri Public Service Commission ("MoPSC").⁶ For the reasons that follow, AT&T urges the Commission to reject the Petitioners' claim for relief.

Background

In 1997, AT&T Missouri submitted to the MoPSC staff financial analysis in support of its payphone access lines for Missouri as required under FCC's *Payphone Orders*.⁷ After review of the analysis by both staff and the Missouri Commission, the MoPSC announced that

The [Missouri] Commission has thoroughly reviewed the many filings in this case, including the motions to suspend by MCI and MICPA, and finds that [AT&T Missouri's] tariff revisions are in compliance with the FCC's orders, and should therefore be approved as amended. *** The [Missouri] Commission further finds that no intrastate rate reductions are necessary in conjunction with [AT&T Missouri's] subsidy calculation, and finds the rates proposed by [AT&T Missouri] for its payphone services just and reasonable.⁸

Neither MCI nor MICPA pursued any further administrative or judicial remedy.

Nevertheless, litigation with MICPA over the payphone line rate has continued to the present. On August 22, 2002, a group of 25 payphone providers filed a complaint against AT&T

⁴ *In the Matter of Midwest Independent Coin Payphone Association's Petition for Relief under the Commission's Payphone Orders and for Declaratory Ruling, Motion To Hold Petition In Abeyance*, CC Docket No. (December 26, 2013).

⁵ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Dkt. No. 96-12, FCC 13-24 (rel. February 27, 2013) (*NST Refund Order*).

⁶ *Tari Christ d/b/a ANJ Communications, et al. v. Southwestern Bell Telephone Company, L.P. d/b/a Southwestern Bell Telephone Company*, ORDER REGARDING AT&T MISSOURI'S MOTION TO DISMISS, Case No. TC-2005-0067 (Missouri Public Service Commission July 5, 2013) ("*MoPSC Dismissal Order*").

⁷ *In the Matter of Southwestern Bell Telephone Company's Revision to the General Exchange Tariff, PSC M. No. 35 Regarding Deregulated Telephone Service*, Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order, and Denying as Moot Discovery Requests (MoPSC) Case No. TT-97-345 (April 15, 1997) ("*MoPSC Order Approving Rates*").

⁸ *Id.* at 10,11.

Missouri⁹ alleging it did not comply with the FCC's new service test. In that complaint, MICPA sought from the MoPSC relief of the kind sought from the FCC in the instant petition. In an order issued January 9, 2003, the MoPSC granted AT&T Missouri's motion to dismiss, holding its decision in the *MoPSC Order Approving Rates* to be a determination on the merits that had long since been final. Since MICPA's complaint did not include any "allegation of substantially changed circumstances," the Commission found the complaint to be barred by collateral estoppel,¹⁰ and the Cole County Circuit Court, on a writ of review, affirmed the MoPSC's ruling.

"The Commission's 1997 orders approving the tariffs were determinations on the merits. In them, the Commission found that SWBT, Sprint and Verizon's tariffs complied with federal law. Those orders are long-since final and the Relators' Complaint was a collateral attack. The Complaint did not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of Licata, the Commission lawfully concluded that Section 386.550 barred the Commission from reconsidering the lawfulness of the tariffs."¹¹

The Court also affirmed the Commission's finding that MICPA had failed to perfect its complaint. MICPA did not appeal this order.

On August 27, 2004, MICPA filed another complaint alleging that AT&T Missouri's payphone connection rates did not comply with the FCC's new services test. MICPA sought retroactive refunds from 1997. Instead of filing an answer to the complaint, AT&T Missouri requested [Missouri] Commission-supervised mediation of the complaint. MICPA accepted the mediation request and the parties exchanged settlement proposals. MICPA, in August 2011, requested the Commission to suspend the proceeding for 180 days, which the Commission granted and, at MICPA's request, renewed the suspension several times. The Commission, however, denied MICPA's last request, made February 11, 2013, and directed AT&T Missouri to file an an-

⁹ See, *MoPSC Dismissal Order*. Also included in the complaint were Sprint and Verizon.

¹⁰ *MoPSC Dismissal Order* at 7.

¹¹ *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court, November 5, 2003).

swer by April 1, 2013. AT&T Missouri then filed its answer and moved to dismiss MICPA's Missouri complaint, which the MoPSC did on June 5, 2013, finding

Complainants' attempt to challenge AT&T Missouri's payphone rates runs headlong into the previously established fact that the Commission no longer has statutory authority to modify the rates charged by a competitive company¹² such as AT&T Missouri. Thus the [Missouri] Commission no longer has authority to determine whether the rates AT&T Missouri charges for payphone service are in the public interest.¹³

MICPA's petition to the FCC followed thereupon.

1. PETITIONERS HAVE NO RIGHT TO REFUNDS UNDER SECTION 276 OF THE ACT.

As the FCC has noted, section 276 of the Act and the Commission's *Payphone Orders*, states have no obligation to order refunds for any period after April 15, 1997 that a BOC does not have NST-compliant rates in effect.¹⁴ In particular, the FCC found it inappropriate in these circumstances to preempt state findings that refunds should not issue because of the application of one or more regulatory principles.¹⁵ In fact, the *Payphone Declaratory Ruling* noted that states had denied refunds because of the filed rate doctrine,¹⁶ the principle of retroactive ratemaking,¹⁷ and a petitioner's failure to exhaust administrative remedies.¹⁸

As shown below, the Missouri PSC and Missouri state courts have found that MICPA is ineligible for refunds because AT&T Missouri's tariff for payphone services was a just and reasonable lawful tariff falling squarely within the Missouri filed tariff doctrine. Further, issuing a refund to the Petitioners when the rate in question was lawfully in effect would be an act of ret-

¹² AT&T Missouri was declared a competitive company under Missouri law in *In the Matter of Southwestern Bell Telephone Company, d/b/a AT&T Missouri's Application for a Commission Finding that 55% of AT&T Missouri's Total Subscriber Access Lines are in Exchanges Where Its Services have been Declared Competitive. Declaration of Competitive Status*, File No. TO-2009-0063, Issued November 26, 2008.

¹³ *MoPSC Dismissal Order*.

¹⁴ *In the Matter of Midwest Independent Coin Payphone Association's Petition for Relief under the Commission's Payphone Orders and for Declaratory Ruling*, CC Docket No. 96-128, Declaratory Ruling and Order (February 27, 2013 at ¶ 47. ("*Payphone Declaratory Ruling*").

¹⁵ *Id.* at ¶ 40. "Like other tariff and rate-setting procedures, the issue of refunds was properly administered by the states." *Id.* at ¶ 38.

¹⁶ *Id.* at ¶ 41.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

roactive ratemaking. Finally, the MICPA and its members failed to pursue their administrative and judicial remedies.

2. THE MISSOURI PUBLIC SERVICE COMMISSION FOUND AT&T MISSOURI'S PAYPHONE TARIFFS TO BE JUST, REASONABLE AND LAWFUL RATES.

The Petitioners allege that AT&T Missouri's payphone tariffs "have not been determined by the MoPSC to comply with section 276 of the Communications Act of 1934, as amended ("the Act") and the Commission's orders and rules."¹⁹ This statement is incorrect. In the MoPSC's April 15, 1997 order approving the changes AT&T Missouri made to its payphone tariffs, the MoPSC found

1. "The purpose of the filing is to propose initial tariff changes required to deregulate Pay Telephone Service as required by the Federal Communications Commission (FCC). *See In the Matter of Implementation of Pay Telephone Re classification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order (Sept. 20, 1996) and Order on Reconsideration (Nov. 8, 1996)."²⁰
2. "The Commission has thoroughly reviewed the many filings in this case, including the motions to suspend filed by MCI and MICPA, and finds that SWBT's proposed tariff revisions are in compliance with the FCC's orders, and should therefore be approved as amended. Since there is adequate information for the Commission to find that the tariff revisions comply with the directives of the FCC, the Commission finds that the suspension of the tariff revisions is unnecessary."²¹
3. "The Commission further finds that no intrastate rate reductions are necessary in conjunction with SWBT's subsidy calculation, and finds that the rates proposed by SWBT for its payphone services are just and reasonable."²²

In short, the Missouri PSC reviewed and explicitly found that AT&T Missouri's payphone tariff revisions comply with section 276 of the Act and the FCC's orders and rules. Moreover, the MoPSC found the payphone tariffs in question to be just, reasonable and lawful.

Petitioners, then, have failed to state a claim upon which relief may be granted, in that the specific rates of AT&T Missouri - alleged by the Petitioners to be, at worst, unlawful and exces-

¹⁹ MICPA Petition at 2.

²⁰ MoPSC Order Approving Rates at 1.

²¹ *Id.* at 10.

²² *Id.* at 11.

sive or, at best, unreviewed by the MoPSC - were in fact, at all pertinent times, the lawful rates approved by, and on file with, the Missouri Commission. Those rates are, then, presumed to be lawful, just and reasonable pursuant to Missouri law and the filed rate doctrine.

Compounding the Petitioners' problems is their decision in 1997, when AT&T Missouri's payphone tariff revisions were approved by the MoPSC, not to exhaust the administrative and judicial remedies available then to them to overturn the result they now claim patently wrong.²³ Thereafter, MICPA again filed a complaint attacking the charges of AT&T Missouri, Sprint, and Verizon.²⁴ MoPSC denied the Application on February 4, 2003. MICPA filed for a writ of review on 3/4/2003, which the Cole County Circuit Court denied on 11/5/2003.²⁵ MICPA, although it had a right to pursue further appeal to the state Court of Appeals, did not file any further appeals. On July 3, 2013, MICPA sought reconsideration before the MoPSC. The Missouri PSC denied the petition for reconsideration on July 31, 2013 and MICPA sought no further review.²⁶

Moreover, in Missouri, the law is well settled that a tariff that has been approved by the Commission "becomes Missouri law and has the same force and effect as a statute enacted by the

²³ Indeed, in reviewing the MoPSC's dismissal of MICPA's 2002 complaint alleging that AT&T Missouri's revised payphone rates did not satisfy the new services test, the Missouri Cole County Circuit court held

The Commission's 1997 orders approving the tariffs were determinations on the merits. In them, the Commission found that SWBT, Sprint and Verizon's tariffs complied with federal law. Those orders are long-since final and the Relators' Complaint was a collateral attack. The Complaint did not include any allegation of substantially changed circumstances. Therefore, pursuant to the rule of *Licata*, the Commission lawfully concluded that Section 386.550 barred the Commission from reconsidering the lawfulness of the tariffs. *State of Missouri, ex rel. Tari Christ, d/b/a ANJ Communications, et al. v. Public Service Commission of the State of Missouri*, Case No. 03CV323550, slip op. at 4 (Cole County Circuit Court, November 5, 2003). See also *Id.* at ¶ 3 of the Findings of Fact.

²⁴ *Tari Christ, d/b/a ANJ Communications, et al. v. Southwestern Bell Telephone Company, L.P.,) d/b/a Southwestern Bell Telephone Company; Sprint Missouri, Inc., d/b/a Sprint; and GTE Midwest Incorporated, d/b/a Verizon Midwest*, Application for Rehearing and Contingent Motion for Leave to File Amended Complaint Case No. TC-2003-0066 (January 16, 2003).

²⁵ *State of Missouri, ex rel. Tari Crist, d/b/a ANI Communications, et al. v. Public Service Commission of Missouri*, Findings of Fact, Conclusions of Law and Judgment, Case No. 03CV323550 (Circuit Court of Cole County November 5, 2003).

²⁶ "MoPSC Dismissal Order

legislature.²⁷ Articulating this long-standing doctrine, the Missouri Supreme Court ruled that a tariff schedule of rates and charges filed and published in accordance with the public utility law

[A]cquires the force and effect of law; and as such it is binding upon both the corporation filing it and the public which it serves. It may be modified or changed only by a new or supplementary schedule, filed voluntarily, or by order of the commission. Such is the construction which has been universally put upon analogous provisions of the Interstate Commerce Act and we have so ruled with respect to similar provisions of our Public Service Commission Law relating to telegraph companies ... If such a schedule is to be accorded the force and effect of law, it is binding, not only upon the utility and the public, but upon the Public Service Commission as well.²⁸

This has long been the law at both the federal and state level.²⁹ As AT&T Missouri's tariff rates acquired the force and effect of law when the Commission approved them, the Complaint must be dismissed because there was no legal defect in the rates.

3. THE PROHIBITION OF RETROACTIVE RATEMAKING BARS PETITIONERS' CLAIMS FOR REFUNDS.

The rule against retroactivity is a cardinal principle of ratemaking: a utility may not set rates to recoup past losses, nor may a commission prescribe rates on that principle. If a commission finds rates or charges unreasonable, it may only substitute reasonable rates to be thereafter observed and in force. The retroactive ratemaking rule thus bars utility refunds for past excessive rates or a commission's retroactive substitution of an unreasonably high or low rate with a just and reasonable rate.³⁰ For their relief, Petitioners seek an order from the FCC directing AT&T Missouri to issue refunds of what MICPA claims are "over charges" for its payphone service offerings.

²⁷ *Bauer v. Southwestern Bell Telephone Company*, 958 S.W.2d 568, 570 (Mo. App. 1997).

²⁸ *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm'n of Missouri*, 315 Mo. 312, 317, 286 S.W. 84, 86 (1926) (internal citations omitted).

²⁹ "Specific rates prescribed for the future take the place of the legal tariff rates theretofore in force by the voluntary action of the carriers, and themselves become the legal rates. As to such rates there is therefore no difference between the legal or published tariff rate and the lawful rate. The carrier cannot change a rate so prescribed and take its chances of an adjudication that the substituted rate will be found reasonable. It is bound to conform to the order of the Commission." *Arizona Grocery Co. v. Atchison, T. & S. F. R. Co.*, 284 U.S. 370, 387 (1932).

³⁰ *Piqua v. Federal Energy Regulatory Com.*, 610 F.2d 950,954 (D.C. C.A. 1979.)

As the Commission is aware (and as set out above), the rates at issue here were approved by the Missouri Commission. The MoPSC specifically found that those rates complied with the directives of the FCC and were just and reasonable. Even if the FCC were now to find that those rates should be adjusted (which AT&T Missouri denies), the Commission is barred by law from doing so on a *retroactive* basis. Under the well established prohibition against retroactive rate-making, the Commission may not re-determine rates already established and paid without depriving the utility (or the consumer if the rates were originally too low) of his or her property without due process.

It is well known that utility rates are exclusively prospective in nature.³¹ To compel the refunds the Petitioners seek here would require the FCC to change a pre-existing, lawful rate based upon the result of the analysis MICPA seeks. The FCC would then have to apply that change to some past period during which the payphone tariff was the just, reasonable, and lawfully constituted rate for AT&T Missouri's payphone services. This is the classic illustration of retroactive ratemaking and it is condemned by all sources. To the extent, then, that this Petition seeks retroactive refunds of amounts previously paid under an approved state commission tariff, it must be dismissed.

4. UNDER THE COMPETITIVE CIRCUMSTANCES EXISTING IN MISSOURI, A COST-BASED RATE-MAKING IS NOT REQUIRED TO ENSURE THAT AT&T MISSOURI'S PAYPHONE SERVICES TARIFF MEETS THE NEW SERVICES TEST.

In 2008, the state of Missouri determined that the service offerings of AT&T Missouri are competitive products.³² This means that competitive alternatives are available to AT&T Missouri's service offerings, including its offer of payphone lines. Given that these services are competitive – and Petitioners have made no claim that they are not – then, it makes no sense to impose upon the providers of these competitive services the expensive and unnecessary require-

³¹ *Narragansett Electric Co. v. Burke*, 381 A.2d 1358, 1361 (R.I. 1977).

³² AT&T Missouri was declared a competitive company under Missouri law in *In the Matter of Southwestern Bell Telephone Company, d/b/a AT&T Missouri's Application for a Commission Finding that 55% of AT&T Missouri's Total Subscriber Access Lines are in Exchanges Where Its Services have been Declared Competitive. Declaration of Competitive Status*, File No. TO-2009-0063, Issued November 26, 2008.

ment of showing that their competitive services are cost based. If Petitioners are unhappy with the price AT&T Missouri is charging for a competitive product in a competitive marketplace, their remedy is simply to buy a competing product. Nothing requires the Petitioners to buy only from AT&T Missouri.

In these circumstances, the new services test is simply a regulatory mechanism to assure that the price of a regulated good or service is not too high. Where a state has determined that a service is competitive, it makes little sense to say its price is too high when a potential customer can simply shop elsewhere. Nothing filed by MICPA alleges that AT&T Missouri is not a competitive company as the State Missouri has found or that competitive alternatives are not available to MICPA's members. In light of these circumstances, a cost-based rate-making is unnecessary and wasteful. AT&T urges the Commission to dismiss the request.

5. AT&T MISSOURI IS NOT A PAYPHONE PROVIDER AND IS NOT SUBJECT TO SECTION 276(B)(1)(C) OF THE ACT.

In the Telecommunications Act of 1996, Congress restructured the local telephone industry. Section 276 of the Act,³³ which is specifically aimed at promoting competition in the payphone service industry, prohibits any Bell operating company (BOC) providing payphone service from subsidizing or discriminating in favor of its own payphone service. 47 U.S.C. § 276(a). It also authorizes the Federal Communications Commission to prescribe regulations consistent with the goal of promoting competition, requiring that the FCC take five specific steps toward that goal.³⁴

Those steps are

1. Establish a per call compensation plan to ensure that all payphone service providers are fairly compensated for each and every completed intrastate and interstate call using their payphone, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation. 47 U.S.C. § 276(b)(1)(A).
2. Discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on February 8, 1996, and all intrastate and interstate payphone subsidies from basic exchange and exchange access revenues, in favor of a compensation plan as specified in subparagraph (A). 47 U.S.C. § 276(b)(1)(B).

³³ 47 U.S.C. § 276

³⁴ *New Eng. Pub. Communs. Council, Inc. v. FCC*, 334 F.3d 69, 71 (D.C. C.A. 2003).

3. Prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a) of this section, which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry-III (CC Docket No. 90-623) proceeding. 47 U.S.C. § 276(b)(1)(C).
4. Provide for Bell operating company payphone service providers to have the same right that independent payphone providers have to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry interLATA calls from their payphones, unless the Commission determines in the rulemaking pursuant to this section that it is not in the public interest. 47 U.S.C. § 276(b)(1)(D).
5. Provide for all payphone service providers to have the right to negotiate with the location provider on the location provider's selecting and contracting with, and, subject to the terms of any agreement with the location provider, to select and contract with, the carriers that carry intraLATA calls from their payphones. 47 U.S.C. § 276(b)(1)(E).

The FCC has concluded that, in this matter, its jurisdiction is limited to regulating BOCs' (and not LECs') payphone line rates, since the provisions of 47 U.S.C. ¶ 276(b)(1)(C) and (D), by their terms, apply only to BOCs, and Congress had not expressed with the requisite clarity its intention that the FCC exercise jurisdiction over the intrastate payphone prices of non-BOC local exchange carriers.³⁵ By the terms of section 276, the FCC's regulation of BOC payphone line rates requires first a "Bell operating company that provides payphone service."³⁶ In terms of section 276's overall goal of promoting "competition among payphone service providers and promot[ing] the widespread deployment of payphone services to the benefit of the general public,"³⁷ the Act requires the FCC to "prescribe a set of nonstructural safeguards for Bell operating company payphone service."³⁸

If a BOC does not provide payphone service, it is subject only to the provisions of section 276 that apply to all other carriers; *viz.*, section 276 (b)(1)(A),(B), and (E); 276(b)(1)(C) and (D) are inapplicable by their terms. Indeed, the *raison d'être* of section 276 as expressed in (a)(1)

³⁵ *Id.* at 73.

³⁶ 47 U.S.C. § 276(a).

³⁷ 47 U.S.C. § 276(b)(1)

³⁸ 47 U.S.C. § 276(b)(1)(C)

and (2) is entirely vitiated if a BOC does not provide payphone service.³⁹ Furthermore, the FCC's reason for regulating the price of payphone lines is similarly abrogated; for the basis of that regulation is the Commission's determination that

[T]he appropriate cost methodology for payphone lines [...] expressly required that the tariffs for LEC payphone services be: "(1) cost based; (2) consistent with the requirements of section 276 with regard, for example, to the removal of subsidies from exchange and exchange access services; and (3) nondiscriminatory."⁴⁰

Thus, without a BOC payphone service offer, there are no subsidies possible from exchange and exchange access services just as no discrimination in favor of a non-existent BOC payphone service is possible.

AT&T Missouri does not now and has not offered payphone service since 2010.⁴¹ Consequently, even if the FCC were to determine that the Missouri PSC had erred in its past determination of the BOC's rate for payphone lines or that the BOC's current charge for payphone lines does not meet the NST, it would not establish any basis for relief; AT&T Missouri is not subject to section 276(b)(1)(C) because it does not provide payphone service.

³⁹ Nondiscrimination safeguards

After the effective date of the rules prescribed pursuant to subsection (b) of this section, any Bell operating company that provides payphone service—

(1) shall not subsidize its payphone service directly or indirectly from its telephone exchange service operations or its exchange access operations; and

(2) shall not prefer or discriminate in favor of its payphone service.

⁴⁰ *Payphone Declaratory Ruling* at ¶ 6, citing *Payphone Reconsideration Order* at 21308, para. 163.

⁴¹ See Attachment 1, Order Canceling Certificate, Public Service Commission of Missouri, File No. PD-2010-0318 (June 18, 2010).

CONCLUSION

For the foregoing reasons, AT&T respectfully urges the Commission to deny the petition of MICPA and the relief requested therein. However, AT&T does not object to MICPA's motion to hold the petition in abeyance pending the Court of Appeals' review of the Commission's *NST Refund Order*.

Respectfully submitted,



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February 7, 2014

ATTACHMENT 1

may be altered or modified by the commission after notice and hearing, upon its own motion or upon application of the person or company affected.”

Based on the Company’s motion and Staff’s recommendation, the Commission finds that the certificate of service authority granted to Southwestern Bell Telephone Company, d/b/a AT&T Missouri, shall be canceled.

IT IS ORDERED THAT:

1. The certificate of authority to provide private pay telephone services granted to Southwestern Bell Telephone Company, d/b/a AT&T Missouri, in File Number TA-97-544, is canceled.
2. This order shall become effective on June 18, 2010.
3. This case may be closed on June 19, 2010.

BY THE COMMISSION



Steven C. Reed
Secretary

(SEAL)

Nancy Dippell, Deputy Chief Regulatory Law
Judge, by delegation of authority pursuant to
Section 386.240, RSMo 2000.

Dated at Jefferson City, Missouri
on this 8th day of June, 2010.