

**STATE OF ILLINOIS  
ILLINOIS COMMERCE COMMISSION**

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Illinois Commerce Commission On Its Own Motion	:	
-vs-	:	
Illinois Bell Telephone Company, Verizon North, Inc. and Verizon South, Inc.: Investigation into the applicability of Section 2-202 of the Public Utilities Act to intrastate coin drop pay telephone revenues	:	Docket No. 06-0562

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**INITIAL MEMORANDUM ON REHEARING OF THE  
STAFF OF THE ILLINOIS COMMERCE COMMISSION**

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January 14, 2008

NOW COMES the Staff of the Illinois Commerce Commission (Staff) by and through its counsel, and, for its Initial Memorandum on Rehearing in the above-captioned proceeding, states as follows:

The Staff submits this Initial Memorandum on Rehearing pursuant to the Administrative Law Judge's Ruling dated December 7, 2007, in which the Administrative Law Judge posed, on behalf of the Commission, the following questions to the parties:

The Commission is interested in the parties' views on several matters regarding the payment of taxes past due and Commission regulation of coin-drop payphones.

1. Assuming, arguendo, that the Commission determines that PUF taxes are owed for revenues derived for coin-drop payphones:
  - a. Does the Commission have any authority to waive the payment of taxes that are past due? If so, under what circumstances?
  - b. How do tax or utility law and case history treat the payment of back taxes owed by utilities? Do the prescriptions against retroactive ratemaking apply to back taxes that are past due?
2. What regulatory requirements does the Commission continue to impose on coin-drop payphones?
3. Does the Commission still have authority over long distance intrastate coin drop calls?

#### ALJ Ruling

The Staff confines this Initial Memorandum on Rehearing strictly to those questions. For purposes of rehearing, the Staff stands on, and realleges its prior pleadings and comments in this proceeding as fully set forth herein, inasmuch as, pursuant to its representation that it is aware of no substantive change in the law since its prior pleadings and comments were submitted.

**1. Assuming, arguendo, that the Commission determines that PUF taxes are owed for revenues derived for coin-drop payphones:**

**a. Does the Commission have any authority to waive the payment of taxes that are past due? If so, under what circumstances?**

The Staff assumes that this question seeks to determine whether the Commission has legal authority to settle or compromise a tax claim for less than the full value of that claim. The Staff is of the opinion that the Commission does indeed have such authority. While no such explicit expression of authority is to be found in Section 2-202 of the Act, several portions of the Act suggest that the Commission is authorized to compromise a claim for taxes for less than the full amount of such claim. Section 2-202(g)(2)(second subsection so marked) provides that:

The Commission may enforce the collection of any delinquent installment or payment, or portion thereof by legal action or in any other manner by which the collection of debts due the State of Illinois may be enforced under the laws of this State.

220 ILCS 5/2-202(g)(2)

The statement that the Commission “may” rather than “shall” enforce collection of delinquent PUF tax payments suggests that the Commission may likewise elect not to do at its sound discretion. In addition, the same section of the statute provides that the Executive Director or his designee may waive any penalty assessed under Section 2-202 if collection thereof appears unjust.

Further, it is well established that where the legislature expressly grants a power, or delegates a duty to an administrative agency, that grant or delegation carries with it a grant of authority to do everything reasonably necessary to perform its delegated function. Lake County Bd. of Review v. Illinois Property Tax Board of Appeal, 119 Ill. 2d

419, 427; 519 N.E.2d 459, 463; 1988 Ill. Lexis 16 at 12; 116 Ill. Dec. 567 (1988). In this case, the authority delegated by the Commission to administer the PUF tax imposed under Section 2-202, extends, in the Staff's view, to the authority to engage in and enter into compromise and settlement of claims associated with the PUF tax, when in its discretion such compromise and settlement is warranted and in the public interest. Moreover, to the extent that such compromise and settlement is contemplated by and permissible under law, it must logically be a discretionary act. Thus, the Commission is afforded the latitude to compromise and settle claims under such circumstances as it deems such compromise and settlement to serve the public interest or to be a reasonable step.

Although it does not appear to be a matter of public record, the Staff is informed and believes that the Commission has compromised and settled such claims in the past.

Finally, it is an exceptionally well-established principle in Illinois that the compromise and settlement of disputed claims is encouraged and favored by the courts. See, e.g., Gilbert v. Sycamore Municipal Hospital, 156 Ill. 2d 511, 528; 622 N.E.2d 788, 797; 1993 Ill. Lexis 97 at 24; 190 Ill. Dec. 758 (1993). Accordingly, in the absence of a specific prohibition against it, the Staff believes that the public policy of the State of Illinois permits such compromise and settlement.

***b. How do tax or utility law and case history treat the payment of back taxes owed by utilities? Do the prescriptions against retroactive ratemaking apply to back taxes that are past due?***

Section 2-202 speaks precisely to this question, providing for a date upon which PUF tax payments are due, and for penalties in the event that payment is not made in a timely manner. 220 ILCS 5/2-202.

As the Staff understands the concept of retroactive ratemaking, it is based on the proposition that the Commission's ratemaking decisions are prospective in operation, and the prohibition thus essentially proscribes refunds when the Commission determines that the just and reasonable rate is lower or higher than the tariffed rate, and orders rates set prospectively at the just and reasonable level. See, e.g., Mandel Brothers v. Chgo. Tunnel Terminal Co., 2 Ill. 2d 205, 210-11; 117 N.E.2d 774, 776-77; 1954 Ill. Lexis 326 at 9-11 (1954). The prohibition against retroactive ratemaking appears to the Staff to be a logical extension of the filed rate doctrine, specifically provided for in Illinois statute, which prohibits public utilities from charging more or less for services than the amounts applicable in its tariffs. 220 ILCS 5/9-240. Thus, the law is clear that the tariffed rate for services is as a general matter the lawful rate, even where the Commission subsequently sets another higher or lower rate to be the just and reasonable rate on a prospective basis.

Accordingly, it appears to the Staff that the prohibition against retroactive ratemaking is not implicated here. The PUF tax is not the result of Commission ratemaking decisions (except to the very modest extent that rates increases or decreases affect gross revenues and by extension the PUF tax obligation); rather, it is imposed by an act of the General Assembly which has been in force and effect in substantially its current form at all times relevant to this proceeding.

Further, the PUF tax statute itself is silent on the question of how, or indeed whether, a utility is to recover the PUF tax from ratepayers. Likewise, neither Code Part 270, 83 Ill. Adm. Code 270.5, *et seq.* (dealing with gross revenue reporting for PUF tax purposes), nor Code Part 735, 83 Ill. Adm. Code 735.10, *et seq.* (governing billing of end user telecommunications customers) specifically require utilities to recover the PUF tax from end user customers. Significantly, Section 737.70(b)(1)(j) requires carrier to itemize charges due to the state messages tax, municipal messages tax, municipal consumer tax, and federal excise tax, but not the PUF tax. 83 Ill. Adm. Code 735.70(b)(1)(j). In other words, a utility is not specifically required by law to collect the tax from ratepayers; instead, its obligation is to remit the tax. Since the tax need not be (a) recovered in rates; or (b) recovered through a specific surcharge, the question of retroactive ratemaking does not arise.

**2. *What regulatory requirements does the Commission continue to impose on coin-drop payphones?***

The Staff notes, as an initial matter, that if there is such a thing as a payphone that can only be used in coin-drop functionality, the Staff is unaware of it. That noted, the following is not necessarily an exhaustive list, as Staff continues to review the question.

Code Part 773, 83 Ill. Adm. Code 773.10 *et seq.*, regulates the activities of payphone providers. Payphone providers are required to obtain certificates of service authority. They are further required to display or otherwise provide information regarding payphone operation. They are required to meet operational standards, and provide refunds for uncompleted calls. They are required to provide access to 9-1-1 service at

the level that it is available. The Commission has authority to take action against providers who violate the part.

Section 13-510 of the Public Utilities Act entitles payphone operators to compensation from telecoms that use their facilities, and charges the Commission with enforcement. 220 ILCS 5/13-510.

**3. Does the Commission still have authority over long distance intrastate coin drop calls?**

While it is not clear to the Staff precisely what this question seeks, the Staff notes that Commission retains authority over intrastate telecommunications, including intrastate long distance telecommunications, both under the federal regulatory scheme and under state statute. See 47 U.S.C. §152(a) (federal Telecommunications Act applies to interstate telecommunications)<sup>1</sup>; 47 U.S.C. §152(b) (federal Act generally inapplicable to intrastate communications); see also 220 ILCS 5/13-401(a), 13-403, 13-501 (carriers seeking to provide interexchange service in Illinois must obtain a Certificate of Authority, and file tariffs, prior to doing so).

In its *Payphone Orders*, the FCC is silent on the question of the extent to which it considers Section 276 of the federal Act to affect state regulation of interexchange service associated with payphones. Although not squarely relevant to this proceeding, it perhaps illustrates the FCC's views on the question to note that, in its *First Payphone Order*, the FCC stated that:

We decline to adopt in this proceeding any rules regarding the bundling of payphone [customer premises equipment, i.e., the physical device itself] with the underlying transmission capacity. [fn] We do not

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<sup>1</sup> This provision, however, should be read narrowly with respect to purely local service. *AT&T Communications v. FCC*, 525 U.S. 366, 379; 119 S. Ct. 721, 730-31; 142 L. Ed. 2d 834, 848-50; 1999 U.S. Lexis 903 (2002).

have a sufficient record to revise, with regard to payphone CPE, the Commission's conclusion in the Computer II proceeding that there are public interest benefits in unbundling CPE from the underlying transmission service. [fn]. The issue of IXC CPE bundling will be addressed in the Interstate, Interexchange Marketplace proceeding.

Report and Order, ¶191, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation; Petition of the Public Telephone Council to Treat Bell Operating Company Payphones as Customer Premises Equipment; Petition of Oncor Communications Requesting Compensation for Competitive Payphone Premises Owners and Presubscribed Operator Services Providers; Petition of the California Payphone Association to Amend and Clarify Section 68.2(a) of the Commission's Rules; Amendment of Section 69.2(m) and (ee) of the Commission's Rules to Include Independent Public Payphones Within the "Public Telephone" Exemption from End User Common Line Access Charges, FCC No. 96-98, CC Docket No. 96-128; CC Docket. No. 91-35, 11 FCC Rcd 20541; 1996 FCC LEXIS 5261; 4 Comm. Reg. (P & F) 938 (rel. September 20, 1996) ("First Payphone Order")

It appears to the Staff that the FCC's declination to deal with interstate bundling of CPE and interexchange service constitutes *a fortiori* a declination to deal with intrastate interexchange service. The FCC did not consider the matter further in its *Payphone Order on Reconsideration*. See, generally, *Order On Reconsideration, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Policies and Rules Concerning Operator Service Access and Pay Telephone Compensation*, FCC No. 96-439, CC Docket Nos. 96-128, 91-35, and 96-439, 11 FCC Rcd 21233; 1996 FCC Lexis 6257; 5 Comm. Reg. (P & F) 321 (November 8, 1996) ("Payphone Order on Reconsideration").

Accordingly, it appears to the Staff that the Commission retains significant jurisdiction over intrastate interexchange calls from payphones.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that its recommendations be adopted in their entirety, consistent with the arguments set forth herein.

Respectfully Submitted,

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