

STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

Illinois Public Telecommunications Association,)	
an Illinois not for profit corporation)	
)	Docket No. 15-0254
Petition to determine whether Illinois local)	
exchange carriers are in compliance with the)	
Illinois Public Utilities Act and Section 276 of)	
the Communications Act of 1934.)	

STAFF OF THE ILLINOIS COMMERCE COMMISSION'S
REPLY IN SUPPORT OF ITS MOTION TO DISMISS PETITION

NOW COMES the Staff of the Illinois Commerce Commission, by its undersigned counsel, and, pursuant to Section 200.190 of the Commission's Rules, states, in reply to the Illinois Public Telecommunications Association's Reply to the Staff's Motion to Dismiss, as follows:

1. On April 1, 2015, the Illinois Public Telecommunications Association (IPTA), a not-for-profit corporation representing independent payphone providers (IPPs), filed its Petition seeking an order directing the Illinois Bell Telephone Company (AT&T) to refund to the IPTA, with interest, rates charged by AT&T to IPTA members between April 15, 1997 and December 13, 2003 that were in excess of cost-based rates prescribed by Section 276 of the federal Telecommunications Act of 1996. See, *generally*, Petition. In the alternative, IPTA requests that Commission Docket No. 98-0195 be reopened for the same purpose. Id.

2. As Staff has previously noted, Staff Motion to Dismiss, ¶12, this is by no means the first time this matter has been before the Commission, the Federal Communications Commission (FCC) or the courts. The Commission considered, and rejected IPTA's request for refunds in its 2003 Payphone Order. See *Interim Order*, Illinois

Commerce Commission On its Own Motion: Investigation Into Certain Payphone Issues as Directed in Docket 97-0225, ICC Docket No. 98-0195 (November 12, 2003) (hereafter “2003 Payphone Order”). There, the Commission found that the rates subsequently found to be in excess of those prescribed by Section 276 had been approved by the Commission at least twice, were tariffed, were rates to which IPTA had previously concurred in a settlement,¹ and had not been the subject of a formal complaint by IPTA. 2003 Payphone Order, 42-43. The Commission further noted that IPTA had enjoyed “deep discounts” for the eight years prior to the adoption of the 2003 Payphone Order as a result of the settlement noted above. Id. Finally, the Commission noted that the delay in implementing cost-based, Section 276-compliant rates was in no small part due to IPTA’s dilatory pursuit of the matter, observing that IPTA had filed its direct testimony in the proceeding nearly six months late. Id., 43 n.16. The Commission therefore rejected IPTA’s request for refunds. Id., 43

3. The Illinois Appellate court affirmed the Commission’s decision. See *Opinion*, Case No 1-04-0225 (November 23, 2005).² There, the Appellate Court found that, since the rates in effect prior to November 12, 2003 were Commission-approved rates, they were lawfully in effect, AT&T was entitled to rely on them, and IPTA therefore did not have a right of action to recover the difference between the old and new rates. Opinion, 8. The Appellate Court further found, in rejecting an IPTA argument that Section

¹ The IPTA and AT&T jointly stipulated, subject to approval by the ICC, which granted such approval, to agreed-upon payphone rates which were significantly discounted. *Order*, 5,6, 52-54, Independent Coin Payphone Association and Total Communication Services, Inc. -vs- Illinois Bell Telephone Company: Complaint to reclassify Illinois Bell Telephone Company pay telephone services as a competitive service in Illinois Market, ICC Docket No. 88-0412, 1995 Ill. PUC Lexis© 393 (June 7, 1995). Accordingly, AT&T had ICC-approved rates in effect at all times relevant to this controversy. IPTA’s assertion that these rates were somehow not the “lawful” rates is therefore entirely without merit.

² Reported affirmed, IPTA v. Commerce Comm’n, 361 Ill. App. 3d 1081 (2005).

276 preempted the approved rates, that: “the FCC looked to state regulatory Commissions to ensure compliance with the FCC’s regulations.” Id., 9. The Appellate Court concluded that: “the existing rates remained in effect until the ICC determined whether ... they complied with the FCC’s regulations.” Id.

4. The Illinois Supreme Court denied IPTA’s Petition for Leave to Appeal the Appellate Court’s decision. IPTA v. Commerce Comm’n, 219 Ill. 2d 565 (2006). The U.S. Supreme Court denied IPTA’s Petition for Writ of Certiorari. IPTA v. Commerce Comm’n, 549 U.S. 1205 (2007).

5. In the interim, IPTA filed a petition before the FCC seeking preemption of the Commission’s order denying refunds. The FCC declined to preempt the Commission’s order, stating that:

We deny the IPTA ... petition[.]. ... [S]ection 276 states that “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.” [fn] Because we conclude that the requirements in the state commission decisions before us [including Illinois’] are not inconsistent with the Commission’s regulations, we do not preempt those decisions.

Declaratory Ruling and Order, ¶37, In the Matter of Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996 / Illinois Public Telecommunications Association’s Petition for a Declaratory Ruling Regarding the Remedies Available for Violations of the Commission’s Payphone Orders, 28 FCC Rcd. 2615, 28 F.C.C.R. 2615 (rel. February 28, 2013) (FCC Payphone Order) (footnote omitted)

6. In so finding, the FCC determined that the Commission “followed the [FCC]’s orders and fulfilled the duties with which the Commission charged them...[.]” FCC Payphone Order, ¶40. The FCC observed that: “in deciding whether to award refunds, the state commissions properly looked to applicable state and federal law and

regulations, and decided, for reasons specific to each state’s analysis, not to order refunds. In Illinois, the ICC based its rejection of refunds on the Illinois filed tariff doctrine and the IPTA’s failure to file a formal complaint.” Id., ¶41. The FCC concluded that: “denying refunds in those cases where the [IPP]s did not exercise their rights on a timely basis, failed to exhaust their administrative remedies, or otherwise failed to show they were legally entitled to refunds is in no way inconsistent with [FCC Orders].” Id., ¶46.

7. The FCC rejected the IPTA’s argument that Section 276 afforded it an absolute right to refunds. Id., ¶41.

8. Finally, the FCC stated that:

Refund determinations should be made by the various state commissions based on the specific facts of the case before them. We recognize that each individual proceeding involves its own unique set of facts, procedural postures, and relevant state and federal statutes. With regard to similar proceedings and consistent with our previous direction to the states regarding their administration of intrastate payphone rates pursuant to section 276, we therefore leave to the states the responsibility for deciding whether refunds are appropriate. [fn] Because we conclude that the refund issue may properly be adjudicated by the states, we do not reach other issues raised by the parties, and find that those issues also may be considered by the states in their proceedings.

Id., ¶49 (footnote omitted)

9. The IPTA appealed from the FCC’s decision. The U.S. District Court of Appeals for the District of Columbia Circuit affirmed the FCC’s decision, ruling that: (a) Section 276 does not afford an absolute right to refunds; (b) that the FCC’s decision not to preempt the Commission’s 2003 Payphone Order denying refunds was proper, in that the Commission’s 2003 Payphone Order was not inconsistent with Section 276; and (c) the FCC’s decision was not arbitrary and capricious. IPTA v. FCC, 752 F. 3d 1018, 1023-1025 (D.C. Cir. 2014). In so ruling, the Court of Appeals found that:

[T]he fact that states *may* order refunds does not mean that states *must* order refunds. Therefore, a state commission or state court decision that considers a Section 276 claim and denies refunds—as happened in the three states at issue here—is not inconsistent with the FCC’s regulations and is not preempted.

IPTA v. FCC, 752 F. 3d at 1023 (emphasis in original)

10. The U.S. Supreme Court denied IPTA’s Petition for Writ of Certiorari. IPTA v. FCC, -- U.S. --; 135 S. Ct. 1583 (2015).

11. The IPTA is now before the Commission, seeking relief that has been denied it by the Commission, FCC, Illinois Appellate Court, Illinois Supreme Court, U.S. District Court of Appeals, and twice by the U.S. Supreme Court.

12. IPTA advances several arguments in support of its opposition to the Staff’s and AT&T’s respective Motions to Dismiss. IPTA argues that the FCC determined that Regional Bell operating Companies (RBOCs) such as AT&T cannot invoke the filed rate doctrine (essentially, Section 9-240 of the Public Utilities Act, 220 ILCS 5/9-240) as a defense to having failed to file cost-based, Section 276-compliant rates after a date certain. IPTA Reply³, 5, *et seq.* IPTA argues that the Commission has ongoing jurisdiction over the matter, and can reconsider its *2003 Payphone Order*. Id., 7-9. IPTA argues that neither the FCC nor the U.S. District Court of Appeals for the District of Columbia Circuit specifically affirmed the Commission’s decision. Id., 9.

13. IPTA is incorrect for any of several reasons. Section 9-240 of the Act provides that:

Except as in this Act otherwise provided, no public utility shall charge, demand, collect or receive a greater or less or different compensation for ... any service rendered or to be rendered, than the rates or other charges applicable to such ... service as specified in its schedules on file and in effect at the time, except as provided in Section 9-104, nor

³ IPTA styles its pleading responding to the Motions to Dismiss as a reply rather than a Response.

shall any such public utility refund or remit, directly or indirectly, in any manner or by any device, any portion of the rates or other charges so specified, nor extend to any corporation or person any form of contract or agreement or any rule or regulation or any facility or privilege except such as are regularly and uniformly extended to all corporations and persons.

220 ILCS 5/9-240 (emphasis added)

14. IPTA's argument that the FCC determined the filed rate doctrine (as embodied in Section 9-240) does not preclude refunds should be ignored. The rates in question are intrastate rates. Accordingly, state law applies, and neither the FCC nor the U.S. Court of Appeals saw fit to preempt Illinois state law; in fact, each specifically declined to do so. FCC Payphone Order, ¶37; IPTA v. FCC, 752 F. 3d at 1024.

15. This is significant. State law, and specifically Section 9-240 is not preempted, and accordingly remains in force and effect. The Commission's power is derived entirely from the legislature. Business and Prof'l People for the Public Interest v. Commerce Comm'n, 146 Ill. 2d 175, 195 (1991). The Commission is not authorized to ignore a state statute it enforces.

16. However, this is precisely what the IPTA urges the Commission to do. The IPTA seeks from the Commission an order requiring refunds, despite the fact that the rates in question were, at all times, lawfully in effect under Illinois law. Thus, IPTA's position, reduced to its essence, is this: the Commission should reconsider and reverse a decision (which has been affirmed by no fewer than five reviewing courts and agencies), in a manner that violates State law. The Commission, as a creature of State law, cannot do this.

17. Further, as noted above, neither the FCC nor U.S. District Court specifically direct the Commission to reconsider its decision, although the FCC suggests that "states",

generically, might, if they choose to (and, presumably, if they are authorized by statute to do so). As noted, the FCC found the Commission's decision not to be inconsistent with its regulations, FCC Payphone Order, ¶37, a finding which the District of Columbia Circuit affirmed. IPTA v. FCC, 752 F. 3d at 1024. Neither directed the Commission to order refunds.

18. The IPTA engages in an extensive argument that the Commission's 2003 Payphone Order (and, presumably, by extension, the several decisions affirming it) is not res judicata, nor does it constitute law of the case, and does not collaterally estop the IPTA from bringing its Petition here. IPTA Reply, 7-9. Assuming entirely for the sake of argument that this is true, it is also unavailing. Section 9-240 was in effect in 1997, in 2003, and is in effect now. Even if the Commission reconsiders the matter, it must reach the same result.

19. Accordingly, the IPTA's Petition fails to state a claim upon which relief can be based, as the Commission is specifically barred by State law from issuing refunds where the rates in question were, as here, Commission-approved. Further, as noted above, matters at issue in the IPTA's Petition have been (at the very least) fully litigated, and the refund issue has conclusively been resolved against IPTA.

20. IPTA argues, entirely without citation, that "most states have received [sic] refunds of overcharges." IPTA Reply, 9. This, however, is no reason for the Commission to authorize refunds, especially when doing so would require the Commission to ignore a valid, non-preempted state statute which it enforces.

21. Moreover, the equities disfavor IPTA's position. As noted above, and as the Commission found, IPTA benefitted from lower rates than those to which it was otherwise

entitled for an eight-year period, based on a Commission-approved agreement with AT&T. The Commission characterized these lower rates as constituting “deep discounts” for what IPTA members would otherwise have been obliged to pay. 2003 Payphone Order, 42-43. Given the fact that IPTA members enjoyed such discounts, its request for refunds might be viewed as somewhat opportunistic. Further, as the Commission found, IPTA pursued its claim in a dilatory manner, such that the extended lapse of time between the enactment of Section 276 and the implementation of Section 276-compliant rates in Illinois is largely attributable to it.

WHEREFORE, the Staff of the Illinois Commerce Commission respectfully requests that the Petition be dismissed with prejudice.

Respectfully submitted,

Matthew L. Harvey
Counsel for the Staff of the
Illinois Commerce Commission

Illinois Commerce Commission
Office of General Counsel
160 North LaSalle Street
Suite C-800
Chicago, Illinois 60601
(312) 793-2877

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