

STATE OF MICHIGAN
BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter of the complaint of	)	
MICHIGAN PAY TELEPHONE ASSOCIATION	)	Case No. U-11756
<i>et al.</i> , against AMERITECH MICHIGAN and	)	(After Remand)
GTE NORTH INCORPORATED.	)	
_____	)	

At the December 6, 2013 meeting of the Michigan Public Service Commission in Lansing,
Michigan.

PRESENT: Hon. John D. Quackenbush, Chairman
Hon. Greg R. White, Commissioner
Hon. Sally A. Talberg, Commissioner

OPINION AND ORDER

History of Proceedings

The proceedings associated with this case originate from the federal Telecommunications Act of 1996 (FTA), 47 USC 276, and the Federal Communications Commission's (FCC's) rules and orders implementing the relevant provisions of the FTA as pertains to the rates for network services made available to independent payphone providers (IPPs).

Section 276 of the FTA, provides in part:

- (a) . . . [A] 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.

(b) Regulations

(1) In order to promote competition among payphone service providers and promote the widespread deployment of payphone services to the benefit of the general public, within 9 months after date of enactment of the Telecommunications Act of 1996, the [FCC] shall take all actions necessary . . . to prescribe regulations that

(A) 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 payphones, except that emergency calls and telecommunications relay service calls for hearing disabled individuals shall not be subject to such compensation;

(B) discontinue the intrastate and interstate carrier access charge payphone service elements and payments in effect on such date of enactment, 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);

(C) prescribe a set of nonstructural safeguards for Bell operating company payphone service to implement the provisions of paragraphs (1) and (2) of subsection (a), which safeguards shall, at a minimum, include the nonstructural safeguards equal to those adopted in the Computer Inquiry III (CC Docket No. 90-623); . . .

In Section 276(c), Congress expressly provided that state requirements inconsistent with the FCC's regulations promulgated pursuant to this section are preempted.

Beginning in 1996, the FCC issued several orders (collectively, the Payphone Orders¹) to implement the relevant provisions of the FTA. First, the FCC ordered local exchange carriers (LECs) to file tariffs with state commissions setting forth the rates, terms, and conditions for IPP service. The FCC also set forth the standard for evaluating a LEC's payphone rates by providing that LEC payphone services must 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. The FCC further required that LECs price services

¹ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd. 20541 (1996); Order on Reconsideration, 11 FCC Rcd 21233 (Nov. 8, 1996) *aff'd in part and remanded in part*, *Illinois Pub. Telecomms. Assn v FCC*, 117 F.3d 555 (D.C. Cir. 1997).

provided to IPPs according to the new services test (NST). Under the NST, LECs are required to price network services on levels set at the forward-looking direct cost of service plus a just and reasonable overhead.

Section 201 of the Michigan Telecommunications Act (MTA), MCL 484.2201, provides the Commission jurisdiction to administer the MTA and all federal telecommunications laws, rules, orders, and regulations that are delegated to the state. That section further directs the Commission to exercise its jurisdiction and authority consistent with the MTA and applicable federal law.

Section 318 of the MTA, MCL 484.2318, prohibits a LEC from discriminating in favor of its, or an affiliate's, payphone service over a similar service offered by another provider. Further, that section requires each LEC in Michigan to comply with all nonstructural safeguards adopted by the FCC for payphone service.

On May 19, 1997, AT&T Michigan, Inc.² (AT&T) filed tariffs and supporting data setting forth new rates for network services made available to IPPs. On May 20, 1997, the Michigan Pay Telephone Association (MPTA) filed a petition with the Commission to investigate AT&T's compliance with the MTA and the Payphone Orders, which was denied. On August 10, 1998, the MPTA filed a complaint regarding rates for the payphone services offered by AT&T. The MPTA's complaint sought a Commission determination that AT&T had failed to comply with certain provisions of the MTA, FTA, and the Payphone Orders. Specifically, the complaint sought Commission determinations concerning whether: (1) prices for network services were consistent with the NST adopted by the FCC; (2) the providers' payphone operations are required to pass an imputation test pursuant to Section 362 of the MTA; and (3) the payphone services offered by Michigan LECs to IPPs are discriminatory.

² The history of the various mergers and acquisitions among Michigan LECs since 1996 is well documented in this docket and shall not be repeated in this order.

On March 8, 1999, the Commission issued an order in which it found that the MPTA had failed to meet its burden to show that AT&T's payphone service rates did not comply with the NST. The Commission further stated that it was not persuaded that the NST required it to adopt the MPTA's approach, or that the results of that approach would be preferable to the rates then in place. The Commission specifically rejected the MPTA's assertion that the services sold to IPPs should be compared to the costs for wholesale unbundled network elements sold to providers of basic local exchange service, which were established in Case Nos. U-11280 and U-11281. The Commission found that IPPs should be charged as business customers, not as wholesale customers.

The Commission further rejected the MPTA's position that the end-user common line charge must be deducted from rates imposed on IPPs. However, the Commission did find that Section 362 of the MTA, MCL 484.2362, required AT&T and Verizon to each perform and file an imputation analysis and subsidy analysis regarding IPP services within 45 days of the date of the order.

The MPTA appealed the March 8, 1999 order to the Michigan Court of Appeals. The MPTA also filed a petition with the FCC seeking declaratory relief. On October 23, 2001, the Court of Appeals affirmed the Commission's determinations in an unpublished opinion in Docket No. 219950. Thereafter, the MPTA applied for leave to appeal to the Michigan Supreme Court.

While that appeal was pending, on March 4, 2002, the FCC entered an order finding that the Commission's March 8, 1999 order appeared to be inconsistent with the FCC's order in *In the matter of Wisconsin Public Service Commission*, CCB/CPD No. 00-01, Memorandum Opinion and Order, rel'd January 31, 2002 (Wisconsin order). The FCC remanded the proceeding for re-evaluation of the pricing of intrastate payphone line rates and overhead ratios.

In April 2002, the MPTA and the Commission filed a joint motion before the Michigan Supreme Court to remand this matter to the Commission for further consideration in light of the Wisconsin order. On June 24, 2002, the Michigan Supreme Court vacated the Court of Appeals' decision and remanded this case to the Commission. *Michigan Pay Telephone Assn v Public Service Comm*, 466 Mich 883; 646 NW2d 471 (2002). On March 16, 2004, the Commission issued an order on remand (2004 order) that reaffirmed its earlier decision regarding the local usage component of AT&T's payphone rates. In an unpublished decision, the Michigan Court of Appeals affirmed the Commission's order. *SBC Michigan v Michigan Pub Serv Comm*, Nos. 254980 & 261341 (Mich. App. Sept. 28, 2006) (2006 Appeal decision).

On May 26, 2006, the MPTA filed a second petition for declaratory relief with the FCC. The MPTA argued that on remand the Commission failed to implement certain components of the FCC's orders related to AT&T's usage rates. The MPTA argued that the Commission adopted a separate overhead allocation for usage without identifying what the overhead allocation was and did not employ a cost-based service mechanism. Thus, the MPTA requested that the FCC find that the Commission failed to follow the requisite NST with respect to AT&T's local usage overhead allocation and service.

On February 27, 2013, the FCC issued an order addressing the May 26, 2006 petition. The FCC determined that the Commission erred by failing to explain how its usage rate is consistent with the NST and the Payphone Orders.³ Furthermore, the FCC stated that they "...conclude that the Michigan Commission has erred in its findings that a payphone usage rate is consistent with the NST and the Payphone Orders." FCC Remand Order ¶ 50. The FCC Remand Order required

³ *Declaratory Ruling and Order, Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, FCC 13-24 (rel. Feb. 27, 2013) (2013 Declaratory Ruling).

the Commission to either provide an adequate explanation of how its usage rate is consistent with the NST or to require AT&T to justify a payphone usage rate consistent with the NST and Payphone Orders.

Based on the order from the FCC, the Commission reopened the proceedings in this case but did not allow any party to supplement the record with additional evidence. *See*, the April 16, 2013 order (April 16 order). The Commission limited the remand to briefing: (1) the proper payphone local usage rate in light of the Payphone Orders; and (2) the appropriate refund should the Commission determine that a lower local payphone usage rate applies. In addition, the Commission determined that the burden fell on AT&T to justify a payphone usage rate that is consistent with the NST and the Payphone Orders. The Commission further determined that the MPTA had the burden to demonstrate the amount of any refund obligation.

AT&T, the MPTA, and the Commission Staff (Staff) each filed initial and reply briefs to address the issues framed in the April 16 order.

Payphone Local Usage Rate

In its pleadings, AT&T argues that the record amply supports and justifies the Commission's finding in its March 8 order that AT&T's local usage rates and overhead loading satisfy the NST. Accordingly, AT&T contends that no change to those rates is necessary.

AT&T submits that since passage of the FTA, in particular Section 276, and the subsequent implementing orders of the FCC, payphone rates have been required to pass the NST. AT&T further argues that the NST provides a test of the reasonableness of the overhead loading for a service and is calculated by subtracting the direct, forward-looking cost of the service from the rate for the service. The remaining balance, AT&T contends, is the overhead loading, which can then

be translated to a percentage, or an overhead loading allocation factor, by dividing that overhead loading by the direct cost.

AT&T argues that the FCC allows for the overhead loading percentage for a service to be assessed using any one of the following three methods: (1) the physical collocation tariff order method; (2) the open network architecture method; or (3) the unbundled network element method. AT&T argues that under the physical collocation tariff order method, the overhead loading allocation factor for a comparable, competitive service is compared to the overhead loading allocation for the service being tested. AT&T maintains that if the overhead loading allocation for the service being tested is less than the overhead loading allocation for the comparable, competitive service, the NST is satisfied and the inquiry is at an end.

AT&T contends that using the physical collocation tariff order method demonstrates that the rates for local usage passed the NST. AT&T argues that the evidence shows that the rates for local usage do not recover more overhead loadings than the comparable competitive service of intraLATA toll service. AT&T provides that its witness, Dr. Kent Currie, testified that intraLATA toll usage is a comparable service for local usage and that the overhead margins recovered by payphone local usage are lower than those recovered by toll usage. He testified that the overhead loading recovered in local usage rates was below the lowest overhead loading in AT&T's toll rates, even accounting for volume and term discounts.

AT&T submits that it used the physical collocation tariff order method to develop the overhead loading factors for both its payphone line rate, which is not at issue here, and its local payphone usage rate. AT&T argues that because the rates were both set using the same, FCC-authorized physical collocation tariff order methodology, the two overhead loadings are "uniform" in the only way that might matter.

AT&T also contends, in response to the FCC's query, that the use of two different overhead allocations is consistent with the NST because: (1) the FCC's pricing requirements do not mandate uniform overhead loading; (2) the Commission used a consistent overhead methodology for both line rates and usage rates, a methodology that the FCC has expressly approved for use; (3) that methodology necessarily produced two different overhead allocation factors, because it had to look to different services to find comparable, competitive analogs; and (4) if the same overhead allocation factor had been used for both the line rate and the usage rates, the Commission would not have been accurately or consistently following the NST or its mandate to use comparable, competitive services.

Again, AT&T argues that the appropriate comparable, competitive service used for usage at the time this case was being considered was intraLATA toll because the rates for toll service were not set by the Commission, but rather by the competitive marketplace. AT&T again relies on the testimony of Dr. Currie, who determined that the overhead loading for local usage on IPP lines was less than that for toll service and concluded that the two usage related services are comparable.

In its pleadings, the MPTA first argues that the FCC has already determined that the payphone local usage rate in Michigan at issue is not compliant with the NST and that there is insufficient evidence on the record to justify AT&T's usage rate. The MPTA contends that AT&T does not state in its brief what the local usage rate is, what the underlying cost is, what the overhead allocation is, or any of the relevant data for toll usage, which AT&T claims is comparable to local usage.

The MPTA provides that AT&T has continually refused to provide the Commission with information or evidence to support a NST analysis for local usage. The MPTA argues that the lack

of evidence in the record, and the FCC's declaratory ruling, require the Commission to order AT&T to re-price its local usage at \$0.019 per message. The MPTA maintains that this rate is equal to the direct cost of the service plus the same overhead allocation advocated for the line rate. This, the MPTA argues, would be consistent with the FCC's declaratory ruling that the Commission adopt uniform overhead allocations. The MPTA further argues that its proposed rate for local usage must be set effective as of April 15, 1997, the date that AT&T was required to comply with the NST.

The MPTA also disagrees with AT&T's argument that the rates for local usage, overall, do not recover more overhead loadings than the comparable competitive service of intraLATA toll service. The MPTA claims that under the terms of the Wisconsin order, an overhead allocation applied to a particular direct cost for a service can be considered cost-based only if it satisfies the comparative services cost methodology from the physical collocation order. The MPTA argues that in order to satisfy the comparative services cost methodology AT&T is required to review and analyze the direct cost of the supposedly-comparable toll service, determine the lowest overhead allocation among those service offerings, and apply the lowest overhead allocation to the local usage rate. The MPTA contends that AT&T did none of these things in its attempt to apply the physical collocation order methodology.

The MPTA further argues that the NST requires that a LEC's proposed rates should be rejected if it fails to support its proposed rates with cost studies and sufficient work papers and statistical data. The MPTA contends that the NST requires LECs to submit: (1) the direct costs of providing the service under review; (2) the overhead loadings proposed for the service; (3) work papers supporting the LECs' calculation of direct costs and overhead loadings; and (4) the ratios of direct cost to direct investment and price to direct costs. The MPTA argues that AT&T provided

none of this information for toll service, and only some of this information for local usage, and therefore could not be compliant.

In its pleadings, the Staff points out that although the Commission defended its orders regarding usage rates in the Michigan Court of Appeals and was affirmed, it nevertheless acknowledged in its March 21, 2001 letter to the FCC that it was seeking further guidance from the FCC as it relates to the NST. The Commission's letter to the FCC stated in part:

We are writing to inquire about the status of the referenced proceeding involving the pricing for network services provided to independent payphone service providers in Wisconsin. The prompt resolution of this proceeding is important, because it may offer guidance to regulators and courts in other states, including Michigan, on the FCC's views on the application of the new services test. Although the Michigan Public Service Commission (MPSC) recently considered the application of the new services test to network services used by payphone service providers, our decision is currently on appeal in the Michigan Court of Appeals. Our decision was based on our interpretation of the new services test at the time and a further timely clarification of that test would be appreciated.

The Staff argues that the FCC, through its February 27, 2013 declaratory ruling and order, finally provided adequate clarity and guidance on the issue and found that the Commission erred in its rate determination. The Staff concurs with the FCC's order and acknowledges that the Commission did err because the payphone usage rate, approved at the time, was not NST compliant and therefore, unlawful.

The Staff argues that AT&T failed to meet its burden in this remand proceeding because the company has not justified, using the current extensive record, why it used two separate, non-uniform overhead allocations; a line rate that has a cost based overhead allocation and a usage rate that has a non-cost based overhead allocation.

Furthermore, the Staff contends that AT&T has not provided sufficient justification for use of a non-cost based overhead allocation and has not pointed to any specific statistical data or any rate analysis data for usage or for toll service in its initial brief on remand. Additionally, the Staff

argues that AT&T failed to point to any cost study inputs and assumptions in the record used to justify payphone line rates consistent with the cost inputs used in computing rates for comparable services offered to competitors as required by the Wisconsin order.

Discussion

Although the Commission is mindful of its past rulings in this case, it cannot disregard the directive from the FCC on remand to either provide an adequate explanation of how AT&T's usage rate is consistent with the NST or require AT&T to justify a payphone usage rate consistent with the NST and the Payphone Orders. In its April 16 order, the Commission placed the burden on AT&T to prove, through the evidence on record, that its rates are NST compliant according to FCC guidance on the issue. The Commission finds that AT&T has not met this burden and that AT&T payphone usage rates are not NST compliant. The Commission agrees with the Staff's position that the payphone usage rates should be changed so as to satisfy the requirements of the NST.

First, it is clear that a service cannot be comparable without also being competitive. The Commission agrees with the MPTA and the Staff that the limited testimony of Dr. Currie is insufficient evidence that the current local usage rate is compliant with the NST. The Commission further agrees that AT&T has failed to demonstrate from record evidence how toll service is a comparable competitive service.

AT&T attempts to justify its rates applying the FCC's physical collocation order methodology. However, in the physical collocation order, the FCC stated that:

To calculate the appropriate overhead loading, the incumbent LECs must (1) compute the direct costs of providing the DS-1 and DS-3 services that compete with the services offered by collocated competitors; and (2) subtract those costs from the lowest rates charged for those services, taking into account all volume and term discounts. The difference between the retail rates and the direct costs

represents the contribution to overhead from these competitive services. The Commission then prescribed overhead loading factors for each LEC's expanded interconnection services that did not exceed the lowest overhead loading resulting from the calculation described above. By limiting the overheads applicable to expanded interconnection rates to the lowest overheads applied by LECs to competitive services, the Commission sought to prevent the incumbent LECs from disadvantaging competitors.

(FCC Order.) The only relevant testimony related to a comparable service is again from Dr. Currie and reads: "The individual services on a stand-alone basis in many cases are not comparable competitive services. Toll is likely to be, and toll probably would be a reasonable approximation for local usage." 18 Tr 2205-2206.

The Commission finds that there is not sufficient justification or explanation in the record for AT&T's use of toll service as a comparable service to local usage. Because the Commission finds that toll service is not a comparable service for NST compliance, the FCC requires that AT&T provide sufficient justification for using a non-cost based service for usage rates.

Specifically, the FCC determined that the Commission adopted a cost-based overhead allocation rate for the monthly fixed rate portion for AT&T's payphone service and a non-cost based overhead allocation for the payphone local usage rate. The FCC determined that applying non-cost based allocation was not NST compliant unless AT&T could justify its use in determining the local usage rate. The Commission finds that overhead allocation for toll service is not cost-based and AT&T has not met its burden to properly justify the use of toll service as a comparable service, and ultimately is not in compliance with the NST.

Refunds

The burden is on the MPTA to determine the amount of any refund obligation. The MPTA argues that under the Payphone Orders, AT&T was required to price its payphone services at the rate of \$0.019 per message as of April 15, 1997. Because AT&T's local usage rates have been

non-compliant with the NST requirement since April 15, 1997, the MPTA argues, AT&T should be required to refund the non-NST compliant amount since that date.

The MPTA contends that AT&T's failure to provide NST-compliant rates is a violation of Section 318 of the MTA, which requires AT&T to comply with all nonstructural safeguards adopted by the FCC for payphone service. Since the NST is an FCC nonstructural safeguard, the MPTA argues that AT&T's local usage rates violate Section 318 and its customers are entitled to a refund under Section 601(c) of the MTA. Section 601(c) states in relevant part:

The commission shall order remedies and penalties to protect and make whole ratepayers and other persons who have suffered an economic loss as a result of the violation, including, but not limited to . . . (c) A refund to the ratepayers of the provider of any collected excessive rates.

The MPTA contends that Section 601 dictates mandatory refunds to AT&T's customers for Section 318 violations because it did not comply with the FCC's NST requirement.

The MPTA argues that the refunds ordered by the Commission must apply to all local usage since April 15, 1997, because AT&T was required to file NST-compliant tariffs to be effective on that date.

The MPTA argues that the evidence demonstrates that the proper local usage rate should be \$0.019 per message, which is equal to the direct cost of service plus the overhead allocation AT&T uses for the line rate. The MPTA submitted a refund analysis for "illustrative purposes" but argues that it does not have the actual IPP line counts or the billed usage charges paid for each MPTA member to produce a complete and accurate report. The MPTA suggests that the Commission compel AT&T to provide the data needed and perform the correct calculation for a refund.

The Staff recommends that the Commission correct the payphone local usage rate and apply an appropriate overhead loading rate. When arriving at a rate, the Staff argues that the NST

requires that the service establish a price floor using direct costs of the service, then add a reasonable amount of overhead. The Staff recommends that the Commission apply the cost per message for local usage at \$.012 and the overhead loading rate at 58.48%. The Staff contends that its proposed rate of \$.0190176 per message is a NST compliant rate and is consistent with the rate that has been calculated by the MPTA. The Staff, however, is not wholly convinced that the refund methodology submitted by the MPTA is appropriate because it does not account for the period that AT&T stopped providing payphone services.

AT&T argues in reply that Section 601 of the MTA does not require refunds. AT&T contends that the Commission has stated previously that under certain circumstances a fine is not warranted under Section 601 as a means of “protect[ing] and mak[ing] whole ratepayers and others who have suffered economic loss.” The Commission’s March 24, 1998 order in Case No. U-11507, p. 14. AT&T argues that a similar result is warranted in this case because if the Commission were now to find that AT&T’s overhead loadings in usage rates were improper, it would be doing so based on a new approach to the record and the law that AT&T could not have anticipated.

AT&T also argues that the FCC has not required that all refunds date back to April 1997. AT&T maintains that the FCC has made clear in its 2013 Declaratory Ruling that that AT&T was not subject to an open-ended refund obligation, but left it to the state commissions to decide the scope and duration of any refunds consistent with applicable state law under state regulatory procedures. AT&T also argues against refunds for usage rates for any period before release of the Wisconsin order because until then the NST did not apply to local usage rates. Additionally, AT&T states that it announced it was exiting the Michigan payphone business in 2007, and has had no payphones in the state since September 2010. Thus, AT&T argues, any refund could apply only prior to the date it ceased payphone operations in Michigan.

AT&T did not provide an analysis of the proper refund amount should the Commission find that its rates are non-compliant. However, AT&T did argue that should the Commission determine a refund obligation, it should be limited to IPPs named in the complaint and that are still in business today. AT&T also contends that determining the appropriate refund calculation and methodology would be tenuous, at best. Additionally, AT&T argues that several legal and equitable doctrines prevent the Commission from issuing refunds altogether.

AT&T argues that the FCC expressly did not preempt prior decisions that approved AT&T's overhead loadings for usage rates but has made clear that state commissions are to apply their own state law doctrines in filling that role. AT&T contends that the law of the case doctrine prevents the Commission from reaching any conclusion here that is inconsistent with the 2006 Appeal decision, which found that AT&T's overhead loadings for usage were lawful and that there are no extraordinary circumstances here that would justify ignoring the Commission's and Court of Appeals' prior decisions. AT&T maintains that law and facts have remained consistent with the only difference is that the FCC believed further justification was necessary.

Next, AT&T argues the doctrines of *res judicata*, collateral estoppel, and judicial estoppel prevent a conclusion that is inconsistent with the 2004 order or 2006 Appeal decision regarding AT&T's overhead loadings in usage rates. AT&T's brief, at pp. 27-31.

Finally, AT&T argues that the rule against retroactive ratemaking and the filed-rate doctrine prevent an order for refunds. AT&T further argues that the rule against retroactive ratemaking prevents a state commission from ordering refunds of previously approved rates based on a later finding that the rates were for some reason too high or too low. AT&T contends that the MPTA's and the Staff's reliance on the exception to the rule against retroactive ratemaking when an approved rate is later held to have been "unlawful" is misplaced.

AT&T also contends that the MPTA's reliance on the theory that the filed-rate doctrine does not apply to an "unlawful" rate is also misplaced. AT&T argues that the filed-rate doctrine is an established fixture of state and federal law and continues to apply except where the legislature expressly repeals the doctrine or limits its application. *Maislin Industries, U S Inc v Primary Steel, Inc*, 497 US.116, 135, 110 S Ct 2759, 111 L Ed 2nd 94 (1990). AT&T alleges that nothing in the FTA or in the MTA has repealed or limited the application of the filed-rate doctrine.

The Commission is not persuaded that any of the arguments offered by AT&T related to the refund apply. First, in its March 16 order, the Commission reviewed similar arguments regarding the filed-rate and retroactive ratemaking doctrines made by AT&T opposing imposition of refunds for end user common line charges that were non NST compliant. The Commission determined that federal and state law provided ample authority for it to order refunds from April 15, 1997, the date that rates were required to be NST compliant.

With regard to AT&T's arguments concerning the preclusive effect of prior state decisions, the Commission finds that common law doctrines of *res judicata*, collateral estoppel, and law of the case are inapplicable where the state court opinion is in conflict with the FCC's regulations. *Arapahoe County Public Airport Authority v FAA*, 242 F3d 1213, 1221 (CA 10 2001). Additionally, Section 276(c) of the FTA specifically provides that state requirements that are inconsistent with the FCC regulations are preempted. As such, the Commission finds that prior state decisions do not preclude an order for refunds related to correcting AT&T's unlawful usage rates.

Additionally, on April 10, 1997, a coalition of LECs, including AT&T, requested an extension from the FCC for filing rates that were NST compliant. In consideration for the extension, the coalition of LECs agreed to reimburse or provide a credit back to April 15, 1997, if the new rates

were lower than the previous noncompliant rates. The FCC granted the extension to the coalition and stated “[a] LEC who seeks to rely on the waiver granted in this instant order must reimburse its customers or provide credit from April 15, 1997, in situations where newly tariffed rates, when effective, are lower than the existing tariffed rates.” *In re Implementation of Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of 1996*, Order, DA 97-805, 12 FCC Rcd 21,31 ¶ 25 (Waiver order).

The Commission finds that the local usage rate of \$.0190176 per message to each IPP, as proposed by the Staff, is appropriate. The Commission further finds that the new effective usage rates are NST compliant rates and are lower than those previously charged by AT&T. The Commission therefore finds that in accordance with the Waiver order, the difference in the new effective local usage rates and those previously charged by AT&T should be refunded to each IPP beginning April 15, 1997 and continuing until AT&T ceased payphone service in Michigan.

THEREFORE, IT IS ORDERED that:

A. The local usage rate charged by AT&T Michigan to independent payphone providers in Michigan is not compliant with the Federal Communications Commission’s new services test.

B. The appropriate local usage rate of \$.0190176 per message should apply to each independent payphone provider from April 15, 1997, until the date that AT&T Michigan ceased payphone service in Michigan.

C. Within 30 days of this order, AT&T Michigan shall file a report that details the date it ceased payphone service in Michigan and the amount by which its local usage rate exceeds the ceiling to each provider calculated pursuant to the new services test as set out in this order.

D. If no objections to those reports are filed within 15 days of their submission, AT&T Michigan shall issue refunds pursuant to those reports as soon as is practicable.

The Commission reserves jurisdiction and may issue further orders as necessary.

Any party desiring to appeal this order must do so by the filing of a claim of appeal in the Michigan Court of Appeals within 30 days of the issuance of this order, under MCL 484.2203(12).

MICHIGAN PUBLIC SERVICE COMMISSION



John D. Quackenbush, Chairman



Greg R. White, Commissioner



Sally A. Talberg, Commissioner

By its action of December 6, 2013.



Mary Jo Kunkle, Executive Secretary

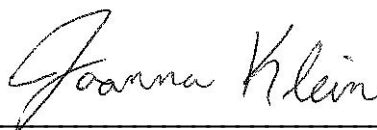
P R O O F O F S E R V I C E

STATE OF MICHIGAN)

Case No. U-11756

County of Ingham)

Joanna Klein being duly sworn, deposes and says that on December 6, 2013 A.D. she served a copy of the attached Commission order by first class mail, postage prepaid, or by inter-departmental mail, to the persons as shown on the attached service list.



Joanna Klein

Subscribed and sworn to before me
This 6th day of December 2013

Gloria

Pearl Jones

Digitally signed by Gloria Pearl Jones
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Gloria Pearl Jones
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My Commission Expires June 5, 2016
Acting in Eaton County

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