

Before the
Federal Communications Commission
Washington, D.C. 20554

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

ORDER

Adopted: February 26, 2018

Released: February 26, 2018

By the Chief, Wireline Competition Bureau:

I. INTRODUCTION

1. In this Order, the Wireline Competition Bureau (Bureau) finds that the Missouri Public Service Commission (Missouri PSC) met its obligation under section 276 of the Communications Act of 1934, as amended, (Act) and Commission orders implementing the statute when it rejected a request by the Midwest Independent Coin Payphone Association (MICPA) to require AT&T Missouri to issue refunds for certain payphone services.1 Because we decline to disturb the Missouri PSC's decision not to order refunds, we deny MICPA's Petition for Relief and for Declaratory Ruling.2 For the same reason, we also deny MICPA's Modified Request asking the Commission to "[r]ender a declaratory ruling on the effect of" that same Missouri PSC decision and rather than conduct a full rate review, just "[d]etermine whether refunds of overcharges would be ordered in this case."3

II. BACKGROUND

2. The MICPA Petition is an outgrowth of payphone compensation reform work undertaken by the Commission at the direction of Congress starting in 1996. More than two decades ago, Congress enacted section 276 of the Act to "promote competition among payphone service providers and promote the widespread deployment of payphone service to the benefit of the general public."4 According to the legislative history, Congress intended for the Commission to "terminat[e] the current system of payphone

1 Order Approving Tariff Revisions, Denying Applications to Intervene, Motions to Suspend, and Motion for Protective Order, and Denying as Moot Discovery Requests, Case No. TT-97-345 at 10 (1997) (Missouri PSC 1997 Order) (Attach. 2 of MICPA Petition).

2 The Midwest Independent Coin Payphone Association's Petition for Relief under the Commission's Payphone Orders and for Declaratory Ruling, WC Docket No. 13-319 (filed Dec. 26, 2013) (MICPA Petition or Petition). MICPA simultaneously filed a motion to hold the MICPA Petition in abeyance pending the outcome of litigation over the 2013 Payphone Order discussed herein. See also The Midwest Independent Coin Payphone Association's Petition for Relief under the Commission's Payphone Orders and for Declaratory Ruling; Midwest Independent Coin Payphone Association's Motion to Hold Petition in Abeyance, WC Docket No. 13-319 (filed Dec. 26, 2013). That motion is moot now that the 2013 Payphone Order litigation is complete. See supra para. 5.

3 See Letter from Mark W. Comley, Counsel to MICPA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 13-319, Attach. at 11 (filed Nov. 2, 2015) (MICPA Modified Request). We treat the MICPA Petition and the MICPA Modified Request as two separate requests, because they seek slightly different relief from the Commission.

4 47 U.S.C. § 276(b)(1).

regulation” and “eliminate all discrimination between [Bell operating company] BOC and independent payphones and all subsidies or cost recovery for BOC payphones.”⁵ In addition, section 276 requires the Commission to “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.”⁶

A. Legal Framework

3. Beginning in 1996, the Commission took a series of actions to effectuate the changes Congress directed to the payphone compensation system in section 276. In its *Initial Payphone Order*, the Commission recognized that the BOCs may have an incentive to charge their competitors unreasonably high prices for central office coin services, and adopted the new services test (NST), which applied a forward-looking cost methodology necessary “to ensure that central office coin services are priced reasonably.”⁷ The Commission preempted any inconsistent state requirements regarding pricing of payphone services.⁸ In the *Payphone Reconsideration Order*, the Commission modified the federal tariffing requirements and explained that it would “rely on the states to ensure that the basic payphone line is tariffed by the [BOCs] in accordance with the requirements of Section 276” as articulated by the Commission.⁹

4. *Subsequent Commission Payphone Orders.* In 2002, in the *Wisconsin Payphone Order*, the Commission confirmed that it would “initially” rely on state commissions to enforce the requirements of section 276.¹⁰ The Commission also preempted state rules that were “inconsistent with our nonstructural safeguards.”¹¹ And it provided “additional guidance” to state commissions on how to apply the NST.¹²

5. In the *2013 Payphone Order*, the Commission addressed the question of remedies, i.e.,

⁵ H.R. Rep. No. 104-204, at 88 (1995), as reprinted in 1996 U.S.C.C.A.N. 10, 54.

⁶ 47 U.S.C. § 276(b)(1)(A).

⁷ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541 at 20614-15, para. 146 (1996) (*Initial Payphone Order*). The application of the NST was further clarified in the *Wisconsin Payphone Order*. *Wisconsin Pub. Serv. Comm’n; Order Directing Filings*, Memorandum Opinion and Order, 17 FCC Rcd 2051, 2065-2071, paras. 43-65 (2002) (*Wisconsin Payphone Order*). *Accord*, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, Order, 28 FCC Rcd 2615 (2013) (*2013 Payphone Order*) (declining to preempt state commission payphone decisions upon finding that the state commissions acted within the scope of the authority delegated to them by the Commission); *denying review in part, dismissing in part Illinois Public Telecomm. Ass’n v. F.C.C.*, 752 F.3d 1018 (D.C. Cir. 2014) (*Illinois Public Telecomm. Ass’n*); *cert. denied* 135 U.S. 1583 (2015).

⁸ *Initial Payphone Order*, 11 FCC Rcd at 20615, para. 147. *See also* 47 U.S.C. § 276(c).

⁹ *See generally Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, et al.*, Order on Reconsideration, 11 FCC Rcd 21233 at 21308-09, para. 163 (1996) (*Payphone Reconsideration Order*).

¹⁰ *Wisconsin Payphone Order*, 17 FCC Rcd at 2056, para. 15. The Commission explained that state commissions that are “unable” to review payphone tariffs “may ask incumbent LECs operating in their states to file such tariffs with the Commission.” *Id.*

¹¹ *Id.*

¹² *Id.* at 2065-2071, paras. 43-65. In the subsequent *2013 Payphone Order*, the Commission similarly noted that it “has retained oversight [of state implementation of section 276] to ensure that payphone access lines are NST-compliant, and more broadly, that the requirements of section 276 are followed.” *2013 Payphone Order*, 28 FCC Rcd at 2636, para. 42 & n.177.

whether several state commissions had erred in failing to provide refunds to payphone service providers.¹³ The Commission determined to “leave to the states the responsibility for deciding whether refunds are appropriate.”¹⁴ Thus, the *2013 Payphone Order* found that states “may, but are not required to,” order such refunds even where BOCs did not have NST-compliant rates in effect after the April 15, 1997 deadline.¹⁵ The Commission also explicitly reaffirmed the “dual regulatory structure” it had adopted to implement section 276(a), found that states “are well-positioned to resolve refund disputes arising from the tariffs they review,” and endorsed various states’ determinations to look to “applicable state and federal law and regulations” in determining whether to order refunds (including specifically state law filed rate and retroactive ratemaking doctrines).¹⁶ The Commission concluded that “section 276 . . . does not dictate whether refunds are due under any given set of circumstances,” and it denied requests to preempt state commission decisions on the applicability of refunds in state payphone proceedings in light of the foregoing regulatory scheme.¹⁷ The United States Court of Appeals for the District of Columbia Circuit upheld the Commission’s approach to state commission consideration of refund remedies under the *2013 Payphone Order*.¹⁸

B. State Procedural History

6. In 1997, the Missouri PSC issued an order rejecting a challenge by MICPA to AT&T Missouri’s payphone rate-related tariff revisions finding that AT&T’s tariff revisions “are in compliance with the FCC’s orders, and should therefore be approved as amended.”¹⁹ Since 1997, MICPA has filed multiple complaints and requests for investigation and hearing with the Missouri PSC regarding AT&T Missouri’s rates for payphone access lines and related services.²⁰ In response to a complaint filed by MICPA in 2002, the Missouri PSC granted AT&T Missouri’s motion to dismiss, holding its decision in 1997 to be a “determination on the merits that had long since been final.”²¹

7. After MICPA filed another complaint, the parties agreed to mediation.²² In 2011, MICPA requested that the proceeding be suspended, which it was until 2013.²³ At that point, the Missouri PSC dismissed MICPA’s request for relief. It did so on two separate grounds. First, it pointed to “changes in Missouri law” providing that once AT&T was classified as competitive the state commission “no longer has authority” to regulate its rates, “including [rates for] its payphone services.”²⁴ Second, it held that under Missouri law it was barred from changing rates put into effect by the 1997

¹³ *2013 Payphone Order*, 28 FCC Rcd at 2616-17, para. 1.

¹⁴ *Id.* at 2636, 2640, paras. 42 & n.178, 49.

¹⁵ *Id.* at 2639, para. 47.

¹⁶ *Id.* at 2635-36, paras. 41-42.

¹⁷ *Id.* at 2635, para. 41.

¹⁸ *See Illinois Public Telecomm. Ass’n.*

¹⁹ *Missouri PSC 1997 Order* at 10. Challenges were filed by MICPA and MCI. *See* MICPA Petition at 5-6.

²⁰ MICPA Petition at 5-16.

²¹ *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, 2013 WL 2902643 (Missouri PSC, July 5, 2013) (*Missouri PSC Dismissal Order*).

²² MICPA Petition at 10-11.

²³ *Id.* at 10-12.

²⁴ *Missouri PSC Dismissal Order* at 5.

tariff, as well as from engaging in retroactive ratemaking, and in any event “has no authority to order such refunds.”²⁵

C. The Petitions

8. In its Petition, MICPA argues that the Missouri PSC “failed to analyze” AT&T’s rates “against the requirements of the New Services Test,” dismissing its complaints “on grounds that the Missouri PSC lacked statutory authority, and thus jurisdiction, to reduce AT&T Missouri’s pay telephone rates and charges.”²⁶ MICPA further argues that because the Missouri PSC considers itself “unable to review payphone tariffs and render a compliance determination” the Commission should issue a declaratory ruling ordering AT&T Missouri to submit relevant payphone cost documentation and tariffs to the Commission for review in order for the Commission to determine whether the tariffs comply with section 276, the Commission’s rules and orders, and ultimately order AT&T to issue refunds to MICPA’s members.²⁷

9. The Commission sought comment on the MICPA Petition.²⁸ AT&T filed comments in opposition arguing that the Missouri PSC did determine that AT&T Missouri’s payphone rates were lawful under the filed rate doctrine and that to grant MICPA’s petition would require the Commission to engage in retroactive ratemaking.²⁹ AT&T also asserts that AT&T Missouri is no longer a payphone operator, and because it is now a competitive provider in Missouri, it is not subject to the Missouri PSC’s jurisdiction, section 276 or any decision in this case.³⁰

10. On November 2, 2015, MICPA filed an ex parte presentation modifying its requests in the Petition and to request that instead of conducting a full rate analysis, the Commission “[r]ender a declaratory ruling on the effect of” the *Missouri PSC 1997 Order* and “[d]etermine whether refunds of overcharges would be ordered in this case.”³¹

III. DISCUSSION

11. Based on the precedent set forth in the *2013 Payphone Order*, we find that the Missouri PSC met its obligation under section 276 and Commission orders implementing the statute when it reviewed MICPA’s refund request and concluded that it had no legal authority to grant refunds based on Missouri’s filed rate doctrine and the Missouri state law prohibition on retroactive ratemaking.³² As discussed above, in the *2013 Payphone Order*, the Commission explained that section 276 does not dictate refunds under any specific set of circumstances and emphasized that “[n]othing in section 276 requires that the Commission be the arbiter of specific refund disputes.”³³ Indeed, the *2013 Payphone*

²⁵ *Id.* at 5-9, citing MO. REV. STAT. § 392.245.5(6) (Supp. 2012). *State ex rel. St. Louis County Gas Co. v. Pub. Serv. Comm’n of Mo.*, 286 S.W. 84, 86 (Mo. 1926); *State ex rel. Util. Consumers’ Council of Missouri, Inc. v. Pub. Serv. Comm’n*, 585 S.W.2d 41, 58 (Mo. 1979).

²⁶ MICPA Petition at 1, 5.

²⁷ *Id.* at 1-2.

²⁸ *Comment Sought on Petition for Declaratory Ruling and Motion to Hold in Abeyance Filed by Midwest Independent Coin Payphone Association*, WC Docket No. 13-319, Public Notice, 29 FCC Rcd 118 (WCB 2014).

²⁹ AT&T Comments at 8.

³⁰ *Id.* at 9-10. AT&T ceased offering private pay telephone services in the state of Missouri in 2010. *Id.*, Attach. 1.

³¹ MICPA Modified Request (internal stylistic bullets removed).

³² *Missouri PSC Dismissal Order* at 8; see *2013 Payphone Order*, 28 FCC Rcd at 2634-35, paras. 40-41 (approving rejection of refunds for various state law reasons in Illinois, Mississippi, New York, Florida, and Ohio, including filed rate doctrine and prohibition on retroactive ratemaking).

³³ *2013 Payphone Order*, 28 FCC Rcd at 2635, para. 41 (finding that state decisions to deny refunds, including decisions based on a state’s prohibition on retroactive ratemaking and the filed rate doctrine, “are not inconsistent

(continued....)

Order made clear that “[r]efund determinations should be made by the various state commissions based on the specific facts of the case before them” and concluded that preemption is not appropriate when a state commission analyzes whether refunds are appropriate and makes a determination based on state law that such refunds are not warranted.³⁴ Such is the case here. Indeed, the Missouri PSC’s reasons for declining to issue refunds – the state law filed rate doctrine and bar against retroactive ratemaking – are consistent with those found acceptable by the Commission in the *2013 Payphone Order* and upheld by the D.C. Circuit.³⁵

12. Because we find no reason to disturb the Missouri PSC’s decision not to issue the refunds sought by MICPA, we need not reach the other issues raised by the MICPA Petition and the Modified Request. In particular, we decline to address MICPA’s arguments that the *Missouri PSC 1997 Order* is defective because the state commission did not provide an opinion on whether AT&T Missouri’s tariff revisions were NST-compliant.³⁶ Likewise we need not reach MICPA’s argument that the Missouri PSC improperly deprived MICPA of any opportunity to determine whether AT&T Missouri’s costs complied with the NST standard, by denying MICPA access to that cost documentation.³⁷ Without the opportunity for refunds, there is no remedy for these claims.

IV. ORDERING CLAUSES

13. ACCORDINGLY, IT IS ORDERED that, pursuant to the authority contained in sections 4(i), 201, 202, and 276 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 4(i), 201, 202, and 276, and sections 0.91, 0.291, 1.1 and 1.2 of the Commission’s rules, 47 CFR §§ 0.91, 0.291, 1.1 and 1.2, this Order IS ADOPTED.

14. IT IS FURTHER ORDERED that the Petition for Declaratory Ruling filed by the Midwest Independent Coin Payphone Association on December 26, 2013 and the Modified Request filed on November 2, 2015 ARE DENIED as set forth herein.

15. IT IS FURTHER ORDERED that the Motion to Hold in Abeyance filed by the Midwest Independent Coin Payphone Association on December 26, 2013 IS DISMISSED AS MOOT.

16. IT IS FURTHER ORDERED that pursuant to section 1.102(b)(1) of the Commission’s rules, 47 CFR § 1.102(b)(1), this Order SHALL BE EFFECTIVE upon release.

FEDERAL COMMUNICATIONS COMMISSION

Kris Anne Monteith
Chief
Wireline Competition Bureau

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with the Commission’s orders and regulations implementing of the Act” and, “[c]onsequently, preemption is not warranted.”).

³⁴ *2013 Payphone Order*, 28 FCC Rcd at 2640, para. 49; *see also id.* (“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.”).

³⁵ *Id.* at 2638, para. 46; *see also Illinois Public Telecomm. Ass’n.*

³⁶ MICPA Petition at 7; *see also* MICPA Reply Comments at 4-5.

³⁷ MICPA Petition at 6.

