

**UNITED STATES COURT OF APPEALS
DISTRICT OF COLUMBIA CIRCUIT**

The Irregulars, New Networks Institute,
Bruce A. Kushnick, Mark N. Cooper, Tom
Allibone, Kenneth Levy, Fred Goldstein,
and Charles W. Sherwood, Jr.,
Petitioners

Case No. 19-1085

Petition for Review of Order by the Federal
Communications Commission

v.

Federal Communications Commission and
United States of America,
Respondents

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

1. My name is Fred R. Goldstein. I am one of the named Petitioners in the above captioned proceeding.

2. The purpose of this Affidavit is to provide evidence of standing to pursue the matter. I will provide some of the basic facts particular to my individual circumstances, but also rely on the presentations contained in the Affidavits of Bruce A. Kushnick and Mark Cooper to explain why the basic facts I present below demonstrate that I have suffered (1) injury-in-fact (2) traceable to the Freeze Order (3) that could be redressed by an order from this Court holding unlawful, vacating, enjoining, and/or setting aside the Freeze Order and remanding the matter to the FCC for further consideration and action.

3. My address is PO Box 920362, Needham MA 02492. The Incumbent Local Exchange Carrier serving my residence and area is Verizon.

4. I currently receive the following communications services:

A. I receive telephone exchange and exchange access service from Comcast, using PacketCable.

B. I obtain broadband service from Comcast. This service is provided over hybrid fiber coaxial cable. Cable companies, like IXC and CMRS providers, extensively use ILEC-provided Business Data Services and sometimes higher capacity fiber based services for "backhaul" and for other purposes.

C. I obtain commercial mobile radio service (also known as "mobile wireless" or "cellular") from Verizon. As part of my service package I also receive commercial mobile data service for Internet access and other data services such as texting (SMS, MMS). My mobile wireless provider, like most others, often obtains dedicated transmission service over fiber or copper to support communications between the provider's towers and its core network, and pays the rates associated with that service to a LEC in the area. When I make or receive interMTA toll calls using my wireless service the general rules would appear to require that "Verizon the CMRS" be assessed access charges from my LEC (Verizon the ILEC).

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

D. Each of my communications service providers are required to pay into the federal Universal Service Fund, based on a percentage of the revenue they receive from me for assessable interstate communications services. They pass this amount through to me each month (along with all other service charges, fees, assessments and taxes) as part of my bill. The service charges and, potentially, some of the separately stated fees, assessments and taxes, are mandatory parts of the bill that I pay each month.

E. The FCC is charged with regulating the jurisdictionally interstate communications services I receive. The Commonwealth of Massachusetts regulates the jurisdictionally intrastate communications services I receive, although the state commission is statutorily pre-empted from price regulation over my CMRS service, even to the extent it is jurisdictionally intrastate.

5. My consulting practice has largely focused on two sets of clients. One features smaller competitive service providers around the country. I helped many small CLECs get their start in the decade following the Telecommunications Act of 1996. More recently I have largely worked with the Wireless ISP industry. These competitive providers are impacted when incumbent LECs enter markets at below-cost rates, subsidized by their state-utility affiliates via improper separations. The other set of clients has been state and local governments. In that role I have seen how local telephone network, made to seem unprofitable by improper allocations of cost, have been allowed to deteriorate. Especially in rural areas where competition does not exist, subscribers are left with no option except the local wireline ILEC service. The FCC's Freeze on separations has played a role in these and other industry problems which impact me and my clientele:

A. The Federal Communications Commission's principal justification for maintaining the Freeze appears to be that it reduces "burdensome" regulatory filing requirements on the part of Incumbent Local Exchange Carriers, and that it is not relevant to the bulk of subscribers, only to "a small percentage of Americans" who "receive their telecommunications services from providers subject to rate-of-return regulation." But those arguments are disingenuous. The impact of the Freeze extends well beyond those areas.

B. The first excuse, that the separations rules are burdensome, is only notable in context of the what the Commission then states in its Order: "In 1997, the Commission recognized the need to comprehensively reform the separations rules and referred separations reform to the Federal-State Joint Board on Jurisdictional Separations (Joint Board) for a recommended decision. More than twenty years later, the Joint Board has not reached agreement on comprehensive separations reform."

C. It is true that the existing Part 36 rules are dated and use terminology and categorization that date back to the analog copper network of the 20th century. But those are, literally, technicalities. Certainly a more modern, simpler set of separations rules could have been drafted over the past 22 years, and especially within the past 15 years. The problem is that over this period traffic patterns have shifted very far from pre-Freeze levels. It is clear that over the 22 years since 1997, essentially no effort has been made to update these rules to track relative jurisdictional use. The Freeze has been the Commission's substitute for reform. While the network has evolved dramatically, and

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

usage patterns have changed dramatically, the Freeze prevents any meaningful accounting of these changes from being performed.

D. A more important issue is the Freeze impacts far more than rural rate-of-return carriers. While only those carriers are subject to direct separated cost-based FCC regulation of their interstate access rates, the Freeze impacts how states view and thus regulate all Incumbent Local Exchange Carriers, including Price Cap Carriers. Jurisdictional separations, by definition, impact both state and federal jurisdictions, and states are required to use these same metrics to regulate within their intrastate jurisdiction.

E. Exactly how states use separated costs within their own jurisdiction varies from state to state. Retail regulation of ILEC rates has largely been relaxed, but even this varies between states. Some maintain price caps for some basic services, such as residential POTS. Some maintain quality-of-service regulation, such as a requirement that most repairs be performed within a certain time frame, or that routine installations be performed within a certain time. Others retain some form of traditional cost-of-service ratemaking or require reporting using separated costs as a means to ensure rates are reasonably priced.

F. The Commission's own Order notes in paragraph 18 that, "States also use separations results to determine the amount of intrastate universal service support and to calculate regulatory fees, and some states perform rate-of-return ratemaking using intrastate costs." Universal service funds exist within many states and are generally applicable to all carriers. Thus separations directly impacts the total charges paid by customers of competitive, as well as incumbent, carriers, even when retail rates are not regulated.

G. Because of the Freeze, the cost of POTS appears to be far higher than it really is. These services are unprofitable because their revenues have plummeted over the past 15 years, while the share of common expenses allocated to them have remained at frozen levels. Thus fewer and fewer lines are expected to cover the same expenses. Because these lines then appear to be unprofitable, ILECs reduce their investment, reduce their maintenance, and often request to discontinue these residual state-regulated services. They then offer unregulated, off-tariff substitutes, either directly or via CLEC affiliates. This back-door deregulation is facilitated by the false losses booked as a result of the Freeze.

H. The putative losses in copper-line POTS have also been used to justify discontinuance of copper-based services, both regulated and the unregulated DSL that piggybacks atop it. And when copper is discontinued, CLECs lose access to unbundled copper loops as well, especially those used for their own DSL-type services, including Ethernet over Copper, a more modern business service than the simple mass-market ADSL formerly promoted by the ILECs. This reduces the competitiveness of the market and in turn allows all remaining providers, typically the ILEC-cable duopoly, to raise their own prices. In the past I consulted for several CLECs using unbundled local loops. As the copper has been retired, or simply deteriorated beyond usability, they have lost

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

their investments and either pivoted to a different modality, such as wireless, or gone out of business.

I. Policies may also vary between states with regard to intrastate switched access rates. While the Commission has capped intrastate rates at parity with interstate rates, and largely reduced terminating switched access rates to zero or near-zero levels, originating access rates have not yet been reformed. These rates were originally intended to be paid by stand-alone long distance carriers who sold interexchange service to consumers via Equal Access. The IXC paid the LECs on both ends of the call, with the IXC paying the carrier whose customer originated the call as well as the carrier whose customer terminated the call. As local telephone plans began to bundle in long distance again, reverting to the pre-1984 norm, originating access was no longer primarily paid by interexchange carriers. Instead, it remained a punitive rate charged to competitive carriers who were deemed in some way to be providing an “interexchange” service on calls originated by ILEC customers.

J. States can and do allow ILECs to apply intrastate and sometimes interstate access charges these to non-local calls made within a state, where “local” is defined by the ILEC in its tariff or price book. VoIP providers are sometimes exempted and CMRS providers are always exempt from these, while stand-alone IXCs have largely disappeared. Certificated CLECs, however, are not exempt. Thus the primary impact of these rates is to create an impediment to what little CLEC competition still exists. If a Verizon customer in Boston calls a non-local CLEC number in Worcester, Verizon is both the originating and interexchange carrier, so no originating access applies (it would be paying itself), and the terminating access charge to the CLEC has been zeroed out by the same FCC reforms that make robocalling profitable. Originating access, however, does remain on the books, at levels that were not brought down by the past decade’s reforms.

K. Because many Interconnection Agreements contain clauses dating back to the dial-in modem era that explicitly classify all calls from ILEC lines to foreign-exchange (FX, also known as Virtual NXX) numbers as subject to intrastate originating access charges, CLECs are not able to provide intraLATA interexchange number portability. This is still the case even though the Commission has opened a Docket on nationwide number portability, a far more complex problem. IntraLATA portability by a CLEC, even between adjacent but not “local to each other” exchanges, is now constructively prohibited even though there are no technical impediments, based on the claim it creates FX service. Competitive carriers, such as cable companies, are thus loath to risk it.

L. This has personally affected me, as I recently moved between two adjacent rate centers which are “local” to each other in the relevant ILEC tariff. My home telephone number provided by Comcast could not be ported to my new location, even though they are served by the same head end, because Comcast, as well as its competitor RCN, implemented a ban on porting numbers across rate center boundaries. That ban is a direct result of the existence of those punitive intrastate originating access tariffs. Their rate level is in part justified by the putatively high costs of Verizon’s intrastate service, which is in turn maintained by the Freeze. Under the terms of Verizon’s standard interconnection agreement, even calls to wireline foreign exchange numbers within a

AFFIDAVIT OF FRED GOLDSTEIN IN SUPPORT OF STANDING

local calling area are subject to intrastate originating access. And as a result, I was only able to port the numbers to a mobile carrier, and from there to Google Voice, a VoIP service (deemed jurisdictionally interstate), which forwards the calls to "local" Comcast numbers. This preposterous complexity has preserved the numbers across rate center boundaries but because both sets of numbers, new and old rate centers, are still in service, it has doubled the "attack surface" for robocallers, and thus I receive at least twice as many robocalls as I would have otherwise. My outgoing calls also display the "local" numbers, not the ones I have had for many years and still wish to use.

M. Separations may also impact the way Universal Service Fund monies, at both the state and federal levels, are calculated, collected and disbursed. Federal USF is paid by providers of interstate telecommunications, who are assessed a fee equal to about 20% of their jurisdictional revenues. The provider then passes the fee through to consumers as a line item on the bill. I and every other consumer of interstate telecommunications therefore support the Connect America Fund, which subsidizes broadband service providers in unserved areas and pays providers that offer a discount to eligible low-income beneficiaries. Some states have their own USF, though Massachusetts does not. USF fees and the disbursements, especially to legacy rural ILEC recipients, are impacted by the distorted separations regime. The Freeze Order recognizes the link between separations and USF in paragraphs 18, 43 and 49.

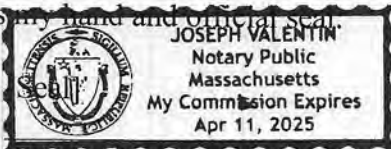
6. As explained above, the Freeze Order does inflict several concrete injuries in fact on me and all other consumers of intrastate and interstate communications services. If the Commission is required to revisit the issue because of a remand on review it will be forced to finally confront the serious harms inflicted by currently "frozen" jurisdictional allocations. The FCC and the states will be required to stop kicking this 22 year old can down the road several years, only to kick it again for an even longer period once the deadline approaches. The ultimate result will be allocation methods that more fairly represent relative use. This will benefit consumers, the carriers and the entire economy because it will lead to more rational regulatory treatment.

7. This concludes my Affidavit, but as noted above I am also relying on the Affidavits of Bruce A. Kushnick and Mark Cooper for a further explication on why I and the other petitioners have standing.



Fred R. Goldstein

SUBSCRIBED AND SWORN TO BEFORE ME this 17th day of May, 2019, to certify which witness



Notary Public in and for



Joseph Valentin