BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Implementation of the Pay Telephone Reclassification and Compensation Provisions Of the Telecommunications Act of 1996	)	
The Southern Public Communication Association's Petition For A Declaratory Ruling Concerning Refund of Payphone Line Rate Charges	)	CC Docket No. 96-128

REPLY COMMENTS OF
EVERCOM SYSTEMS, INC.

Evercom Systems, Inc. ("Evercom"), in accordance with the Commission's Public Notice, DA 04-3653, released November 19, 2004, hereby files it reply comments in connection with the Petition For Declaratory Ruling ("Petition") filed by the Southern Public Communication Association ("SPCA").

I. BACKGROUND

1. Evercom provides inmate calling services at over 2000 county and municipal confinement facilities throughout the country, including many in Mississippi and other BellSouth states. Evercom also operates public pay telephones in many states, as an adjunct to its inmate calling operations. Evercom or its predecessors have been providing these services since as long ago as the early 1990s, long prior to the passage of Section 276 of the Communications Act.

2. In order to provide these services, in most locations Evercom gains access to the local network by subscribing to tariffed payphone access lines – lines subject to the pricing requirements

contained in the *Payphone Orders*.[1] Thus, Evercom has a direct interest in the outcome of the Petition since it is a beneficiary of the requirement for cost-based payphone access line rates.

3. Evercom focuses its brief Reply Comments on three specious arguments raised by the opponents of the Petition. The first relates to the authority explicitly retained by the FCC in connection with the state's delegated responsibilities for ensuring tariffed, FCC-compliant intrastate payphone access rates. The second relates to the *Payphone Orders* requirement that such FCC-compliant rates be in effect as a prerequisite for the RBOCs to receive dial-around compensation. The third relates to the doctrine of retroactive rate making.

II. THE COMMISSION HAS FULL AUTHORITY TO ACT ON THE PETITION

4. Opponents effectively claim that the FCC has not retained any role in connection with the state tariffing of intrastate payphone access rates. Disappointed PSPs are left solely to the state courts to seek redress when the requirements of Section 276 and the *Payphone Orders* are ignored or misapplied by state public service commissions like the Mississippi Public Service Commission.

5. There is nothing in either Section 276 or the *Payphone Orders* that supports this argument. Indeed, as the opponents who raise this argument blithely ignore, in the *Second Clarification Order* the FCC specifically stated that the "Commission retains jurisdiction under Section 276 to ensure that all

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[1] As used herein the term "*Payphone Orders*" shall mean *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecomm. Act of 1996*, CC Docket No. 96-128, *First Report and Order*, 11 FCC Rcd. 20541 (1996); *Order On Reconsideration*, 11 FCC Rcd. 21233 (1996), *aff'd in part and remanded in part sub nom., Ill. Public Telecomms. Ass'n v. FCC*, 117 F.3d 555 (D.C.Cir. 1997); *First Clarification Order*, 12 FCC Rcd. 20997 (Com. Car Bur. 1997); *Second Clarification Order*, 12 FCC Rcd. 21370 (Comm. Car. Bur. 1997); *Second Report and Order*, 13 FCC Rcd. 1778 (1997), *aff'd in part and remanded in part sub nom., MCI Telecomms. Corp v. FCC*, 143 F.3d 606 (D.C. Cir. 1998); *Third Report and Order on Reconsideration of the Second Report and Order*, 14 FCC Rcd. 2545 (1999), *aff'd, American Public Communications Council, Inc. v FCC*, 215 F.3d 51 (D.C. Cir. 2000); *In the Matter of Wisconsin Public Service Commission Order Directing Filings*, 15 FCC Rcd. 9978 (Com. Car. Bur. 2000) ("*Wisconsin I*"), *aff'd in part, Memorandum Opinion and Order*, 17 FCC Rcd. 2051 (2002) ("*Wisconsin II*"), *aff'd, New England Public Communications Council v. FCC*, 334 F.3d 69 (D.C. Cir. 2003)(unless individually referred to, hereinafter referred to collectively as the "*Payphone Orders*").

requirements of that statutory provision and the Payphone Reclassification Proceeding, including the intrastate tariffing of payphone services, have been met." [2] The opponents' argument would effective erase Section 276(c) from the Act. Further, the Commission is not deprived of this expressly-retained jurisdiction until the PSPs complete lengthy state court proceedings. There is nothing in the *Payphone Orders* that relegates PSPs, who believe that a state commission has erred in applying the FCC requirements relating to intrastate payphone access tariffs, solely or initially to the state court system before they may ask the FCC to act.

III. OPPONENTS IGNORE THE QUID PRO QUO STRUCK WITH THE FCC

6. Opponents also contend that all that they were required to do was to have intrastate tariffs that were "in effect" by the deadline and there was no need for them to be FCC-compliant in order for the RBOCs to collect dial-around compensation. The language of the *Second Clarification Order* totally invalidates such an argument. The FCC in granting the limited waiver specifically stated that it related to "the requirement that the LECS have filed intrastate payphone services tariffs...*that satisfy the new services test, and that effective intrastate payphone service tariffs comply with the 'new services test' for the purpose of allowing a LEC to be eligible to receive payphone compensation.*"[3]

7. The terms of the *quid pro quo* between the Commission and the RBOCs were crystal clear. For opponents to argue now that FCC-compliant tariffs were not part of that deal is revisionist history. The PSPs were clearly to be the principal third party beneficiaries of that *quid pro quo* and that is in part what the Commission intended. It certainly never intended for the opponents to obtain the benefit of that bargain while depriving their competitors of the explicit right to FCC compliant rates.

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[2] *Second Clarification Order*, at ¶ 19, n.60.

[3] *Id.*, at ¶18.

IV. GRANTING REFUNDS IS NOT RETROACTIVE RATEMAKING

8. The doctrine of retroactive ratemaking does not bar the relief requested by the SPCA. This is a convenient argument rolled out by the opponents which fails to consider the special circumstances surrounding the mandate of Section 276 and *Payphone Orders*. As effectively outlined by the Illinois Public Telecommunications Association in its Petition for Declaratory Ruling (with which this Petition has been consolidated), the rules against retroactive rate making do not bar the relief requested by the SPCA herein[4]. This is a red herring.

V. CONCLUSION

9. The Commission made clear that state commissions were to have the first shot at implementing the requirements of the *Payphone Orders* with respect to intrastate payphone access rates. However, the FCC explicitly retained jurisdiction to oversee state actions. The opponents' arguments to the contrary are totally without merit.

10. Further, there was a clear *quid pro quo* with the RBOCs. To prevent those requirements from being rendered meaningless by decisions like those in Illinois, Massachusetts and now Mississippi, the Commission must grant the relief requested by the consolidated Petitions. More specifically, the Commission should declare that in circumstances such as those reflected in the Petition, the PSPs are entitled to refunds for network services to the extent that the rate and charges were in excess of the cost-based rates required by the *Payphone Orders*. Otherwise, the RBOCs will have received the benefits of the *quid pro quo*, without having met one of the principal preconditions for receiving them.

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[4] *Illinois Public Telecommunications Association Petition for a Declaratory Ruling*, dated July 30, 2004, at pages 12-14.

Respectfully submitted,

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