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March 14, 2005

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, DC 20554

Re: CG Docket No. 04-244; CC Docket Nos. 98-170; RM-8783; ENF-95-20

Dear Ms. Dortch:

On July 16, 2004, the Commission released a *Notice of Proposed Rulemaking* in the above-referenced dockets.<sup>1</sup> Subsequently, several parties filed Comments and Reply Comments in which they made proposals that could only be adopted if (1) the Commission promulgated rules that are not within the proper scope of the *NPRM* and (2) the Commission issued regulations in areas that have previously been deregulated. The purpose of this letter is to provide BellSouth's position that the Commission must reject these proposals as legally untenable.

The general purpose of the *NPRM* was "to review the effectiveness of [the Commission's] rules governing pay-per-call services."<sup>2</sup> The *NPRM* first noted that the Commission has received widespread complaints concerning both pay-per-call ("PPC") services and toll-free numbers for more than a decade, and that it has implemented a number of rules to address the issues that pertain in these areas.<sup>3</sup> Nevertheless, "[i]n the first six months of 2004, the Commission received close to 5,000 complaints that referenced toll-free numbers."<sup>4</sup> The Commission also noted its concern that "as audiotext information services have migrated increasingly outside the pay-per-call

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<sup>1</sup> *Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-free Number Usage, et al.*, CG Docket No. 04-244, *et al.*, *Notice of Proposed Rulemaking and Memorandum Opinion and Order*, 19 FCC Rcd 13461 (2004) ("*NPRM*").

<sup>2</sup> *Id.* at 13462, ¶ 1.

<sup>3</sup> *Id.* at 13463-66, ¶¶ 4-9.

<sup>4</sup> *Id.* at 13466, ¶ 11.

setting, consumers . . . have lost some of [the] basic protections,” afforded by the existing rules.<sup>5</sup> Thus, the clearly articulated purpose of the *NPRM* was to explore the question of whether additional rules are needed to protect consumers.

Not surprisingly, the PPC providers that would be subject to these rules uniformly responded to the *NPRM* by claiming that no new rules are needed. More troubling to BellSouth, some of the PPC providers that filed Comments and Reply Comments went beyond the clear boundaries of the *NPRM* to argue (1) that the PPC industry is in dire financial circumstances; and (2) that the Commission should address this situation by imposing regulations that would shift to Local Exchange Carriers (“LECs”) a substantial portion of the cost of being a PPC provider. Of the parties that proposed in one way or another that the LECs be conscripted to the task of providing financial assistance to PPC providers, Pilgrim Telephone, Inc. (“Pilgrim”) clearly made the most draconian proposal. Specifically, Pilgrim proposed, in part, that the Commission do the following:

[1] Require LECs to bill for all 900 number calls at reasonable cost-based rates.

[2] Require LECs to sustain all charges for which there is a recorded verbal authorization, and prohibit them from issuing blanket recourses that exempt customers from paying for legitimate charges.<sup>6</sup>

Obviously, Pilgrim’s proposal has nothing to do with consumer protection, the proper subject of the *NPRM*. Pilgrim implicitly acknowledged as much when it asserted in its Reply Comments the following:

[M]any of the Commission’s proposals in the 2004 *NPRM* fall short of proposing steps necessary to rejuvenate the industry. Many of the Commission’s proposals, in fact, would be likely to accelerate the industry’s decline by imposing additional and unwarranted burdens and restrictions on the way that pay-per-call providers are permitted to deliver their services to consumers.<sup>7</sup>

Thus, Pilgrim scolds the Commission for issuing an *NPRM* that focuses on the protection of consumers rather than propping up the (according to Pilgrim) failing PPC industry. Pilgrim then ignores the scope of the *NPRM* and proceeds to argue for its self-serving proposals. Pilgrim’s attempt to argue within the context of this *NPRM* for rule changes that are clearly not contemplated by the *NPRM* must be rejected.

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<sup>5</sup> *Id.* at 13468, ¶ 15.

<sup>6</sup> Comments of Pilgrim Telephone Inc. at 19 (filed Nov. 15, 2004) (“Pilgrim Comments”).

<sup>7</sup> Reply Comments of Pilgrim Telephone, Inc. at i (filed Nov. 29, 2004).

Because Pilgrim's proposals are clearly outside of the scope of the *NPRM*, they cannot be adopted as a matter of law. In *Sprint Corp. v. FCC*,<sup>8</sup> the D.C. Circuit Court held that the Commission cannot promulgate a new rule without first issuing a Notice that includes the new rule. Although the *Sprint* case involved a lengthy procedural history, it can be boiled down to the following: the Commission issued a Notice of Proposed Rulemaking to propose a method for compensating payphone service providers for coinless calls. After adopting a compensation plan in a subsequent Order, the Commission modified the compensation plan in its *First Reconsideration Order*, which was entered in response to numerous Petitions for Reconsideration. Later, the Commission entered a *Second Order on Reconsideration*, which included yet another approach to compensation. Sprint appealed and argued that the Commission erred by failing to issue a new Notice of Proposed Rulemaking prior to promulgating the rule in the *Second Order on Reconsideration*.

The Court's analysis focused largely on whether the issuance of the rule set forth in the *Second Order on Reconsideration* constituted the creation of a new rule or merely a clarification of an existing rule. The Court determined that the Commission's decision entailed the former. Accordingly, the Court ruled that the Commission did, in fact, err by promulgating a new rule without meeting the notice requirements of the Administrative Procedure Act. Moreover, the Court rejected the Commission's contention that a new Notice was not required because the determination in the *Second Order on Reconsideration* was a "logical outgrowth" of the original rulemaking, which was properly noticed. Specifically, the Court stated the following:

"An agency may make changes in its proposed rule on the basis of comments without triggering a new round of comments, at least where the changes are a 'logical outgrowth' of the proposal and previous comments." [citation omitted]. In order for a final rule to be a "logical outgrowth" of a proposal, however, the agency first must have provided proper notice of the proposal. "The necessary predicate . . . is that the agency has alerted interested parties to the possibility of the agency's adopting a rule different than the one proposed." [citation omitted]<sup>9</sup>

Further, the rulemaking rejected by the Court in *Sprint* was more arguably a logical outgrowth of the Notice therein than is anything proposed in the instant proceeding by Pilgrim. In *Sprint*, the revised rule at least involved the same general subject matter as the original Notice: compensation of payphone service providers. By contrast, in our case the Commission has issued an *NPRM* that addresses the rules that apply to the pay-per-call industry for the express purpose of considering whether these rules are adequate to protect consumers. The radically different proposal of Pilgrim is not even remotely contemplated by the instant *NPRM*. Instead, Pilgrim has proposed

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<sup>8</sup> 315 F 3d 369 (D.C. Cir. 2003).

<sup>9</sup> *Id.* at 375-76.

action by the Commission that is entirely unrelated to the purpose of the *NPRM*, and that is clearly outside of its scope. Thus, the adoption of Pilgrim's proposal in this rulemaking is improper as a matter of law.

Moreover, even if Pilgrim's proposal were within the scope of the *NPRM*, it should, nevertheless, be rejected for an additional reason. As Verizon noted in its Reply Comments, billing and collection services have been deregulated for approximately eighteen years.<sup>10</sup> Given this, Pilgrim's contention is essentially that the Commission should impose a harsh set of regulatory requirements upon LECs in an area in which the Commission has already ruled (and in fact ruled long ago) that there is no need for any regulation. Verizon also notes the obvious unfairness in requiring LECs to provide to PPC providers billing services that have been deregulated, especially in light of the fact that many PPC providers offer services that some LEC subscribers would consider objectionable.<sup>11</sup> BellSouth concurs with Verizon's position on this point. Further, the decision by the Commission eighteen years ago to detariff billing and collection services presents a legal impediment to Pilgrim's proposal.

In the *Detariffing Order*, the Commission determined that detariffing was appropriate for two reasons. First, the Commission found that "billing and collection services provided by local exchange carriers are not subject to regulation under Title II of the Act."<sup>12</sup> The Commission reached this decision because billing and collection services are not telecommunications services, and even if they were, they are not common carrier services. Second, the Commission noted that it could still assert ancillary jurisdiction over billing and collections services, pursuant to Title I, if these services are incidental to telecommunication services (as defined in the pertinent statutes).<sup>13</sup> The Commission also noted, however, "that the existence of such ancillary jurisdiction does not justify exercising those powers."<sup>14</sup> Accordingly, the Commission stated the following:

The exercise of ancillary jurisdiction requires a record finding that such regulation would "be directed at protecting or promoting a statutory purpose." [citation omitted] We conclude that because there is sufficient competition to allow market forces to respond to the excessive rates or unreasonable billing and collection practices on the part of the exchange carriers, no statutory purpose would be served by continuing to regulate billing and collection service for an indefinite period.<sup>15</sup>

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<sup>10</sup> Reply Comments of Verizon at 6, (filed Nov. 29, 2004) ("Verizon Reply Comments") (citing *Detariffing of Billing and Collection Services*, CC Docket No. 85-88, *Report and Order*, 102 F.C.C. 2d 1150 (1986) ("*Detariffing Order*").

<sup>11</sup> *Id.* at 7.

<sup>12</sup> *Detariffing Order*, 102 F.C.C. 2d at 1169, ¶ 34.

<sup>13</sup> *Id.*, ¶ 35.

<sup>14</sup> *Id.*, ¶ 36.

<sup>15</sup> *Id.* at 1170, ¶ 37.

Accordingly, the Commission ordered the detariffing of billing and collection services after a brief transition period, which concluded on January 1, 1987.<sup>16</sup>

Pilgrim's argument that the Commission should compel LECs to bill and collect for PPC providers at regulated rates simply ignores the fact that the Commission could only take this action if it found that there is some current basis to revisit its earlier decision to deregulate and to reach a different conclusion. There is simply no such basis. Given the changes in the telecommunications industry since 1986, it is hard to believe that there could possibly be any justification for finding that billing and collection services that were deemed competitive eighteen years ago are no longer competitive. Thus, there is no basis for reassertion of regulation pursuant to Title I. It is even more difficult to believe that something has occurred since 1986 that could prompt the Commission now to determine that billing and collections services are telecommunications services, which also qualify as common carrier services. Thus, these services should remain deregulated.

More to the point, if Pilgrim wishes for the Commission to reregulate these services (and, again, reregulation would be a necessary prerequisite to the adoption of Pilgrim's proposal), then it is incumbent upon Pilgrim to provide a factual record to support such action by the Commission. Pilgrim has provided no facts to support such a decision, and neither has any other party that filed Comments in this proceeding. Pilgrim does nothing more in its Comments than note in passing that it disagrees with the conclusion that billing and collection services are competitive.<sup>17</sup> Pilgrim, however, provides no indication as to why it disagrees with this conclusion, and it certainly provides nothing that would support the reversal of a decision by the Commission that has stood for many years. Given the total absence of any factual record upon which the Commission could reverse its previous decision to deregulate billing and collection services, there is simply no legally tenable basis to do so.

Again, the proposal by Pilgrim amounts to nothing more than a facially inequitable and patently unfair request that LECs be required to bear the burden of costs generated by PPC providers in the course of their business. Even if Pilgrim's assertions regarding the dire circumstances of the PPC industry were accurate, it has provided no rationale as to why the LECs should be made to bear this burden. Further, Pilgrim's proposal is well outside of the efforts to insure consumer protection that define the scope of this rulemaking proceeding. Pilgrim's proposal cannot be adopted in this proceeding for this additional reason. Finally, even if Pilgrim's proposal could be adopted in this *NPRM* (and it cannot), it could only be adopted by the Commission if it were to reregulate billing and collection services, and there is no factual record to support this result. Accordingly, BellSouth submits that the Commission must reject the argument of

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<sup>16</sup> *Id.* at 1171-72, ¶ 39.

<sup>17</sup> Pilgrim Comments at 6, n. 8.

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Pilgrim that LECs should be made to bill and collect for PPC providers, that rates should be set for these services by the Commission, and that specific billing and collection practices should be forced upon the LECs.

Respectfully submitted,



J. Phillip Carver

cc: J. Keithley